

COMMENTS

CALLING THEIR SHOTS: MIFFED MINOR LEAGUERS, THE STEROID SCANDAL, AND EXAMINING THE USE OF SECTION 1 OF THE SHERMAN ACT TO HOLD MLB ACCOUNTABLE

*Jonathan D. Gillerman**

I. INTRODUCTION

In the seasons that followed Major League Baseball's¹ ("MLB") notorious 1994–95 players' strike,² professional baseball received a much needed injection of fan enthusiasm via a surge of homerun hitting that revived the sport³ and would forever define the period

* Albany Law School, J.D. 2010; Ithaca College, B.A., Journalism, 2007. Thank you to Shaina, my fiancé and best friend. Without her love and support this article would not have been possible. Thank you to Professor Evelyn Tenenbaum, for her guidance and input with this article and for helping to make me the legal writer I am today. Thank you to the Park Scholarship Program at Ithaca College, whose generosity has provided me with opportunities I otherwise would not have had. Finally, I would like to thank my parents, Mark and Lenora, for their unwavering love and support in all of my endeavors, and for creating a solid foundation that has allowed me to become a successful person and student.

¹ MLB is an organization that runs the highest level of professional baseball competition and oversees the operations of the thirty professional baseball clubs comprising the National League of Professional Baseball Clubs and the American League of Professional Baseball Clubs. See *United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1090 n.3 (9th Cir. 2008) (defining MLB); John K. Harris, Jr., *Fiduciary Duties of Professional Team Sports Franchise Owners*, 2 SETON HALL J. SPORT L. 255, 258–59 (1992); Major League Baseball, Team-by-Team Information, <http://mlb.mlb.com/team/> (last visited Nov. 16, 2009).

² The MLB strike of 1994–95 went into effect on August 12, 1994 and eliminated the remainder of the 1994 season. Mike Lopresti, *Baseball Strike of 1994–95 Timeline*, CINCINNATI ENQUIRER, Aug. 12, 2004, <http://reds.enquirer.com/2004/08/12/STRIKEBOX12-LOPRESTI.html>. This marked the first time in history that a professional sport's postseason had been cancelled because of a labor-related strike. *Id.*; see also HOWARD BRYANT, *JUICING THE GAME: DRUGS, POWER, AND THE FIGHT FOR THE SOUL OF MAJOR LEAGUE BASEBALL 1* (2005) ("[T]he 1994 player[s]' strike . . . wiped out the World Series"). The stoppage was attributed to the Major League Baseball Player's Association ("MLBPA") and MLB's owners' inability to agree to the terms of a new labor agreement. See generally Lopresti, *supra*.

³ Many fans remained disillusioned with professional baseball after the strike and the game's popularity suffered for it, noted by a 20% drop in attendance during the 1995 season, when play finally resumed. *Season Interrupted*, SPORTS ILLUSTRATED, Aug. 26, 2002, http://sportsillustrated.cnn.com/baseball/news/2002/08/25/1994_strike_victims_ap/; see also

as baseball's "homerun era."⁴ Such awe-inspiring performances captivated both fans and journalists⁵ alike, but the wonderment would prove fleeting; the collective naiveté shattered by the growing revelation that the majestic homerun boom they were experiencing was attributable to perhaps nothing more⁶ than the rise of performance-enhancing drug⁷ use in the game.

It wasn't long before federal investigators substantiated underlying suspicion⁸ with discoveries of links between major

Ron Scherer, *The 'Big Show' Is Cancelled as Baseball Strikes Out*, CHRISTIAN SCI. MONITOR, Sept. 16, 1994, at 1 ("A Gallup poll for USA Today and CNN, in early September [of 1994], found that 52 percent of the baseball fans polled did not miss the game or only missed it a little."). The 1998 homerun race between Mark McGwire and Sammy Sosa to eclipse Roger Maris's single season homerun record is credited with reviving fan interest in the game. See BRYANT, *supra* note 2, at 137–38.

⁴ Baseball's unofficial "homerun era" began following the 1994–95 strike and lasted approximately a decade, hitting a crescendo during the 1998 homerun race and fading slowly with the onset of stricter drug testing regulations amidst heightened awareness of performance-enhancing drug use in baseball. See Murray Chass, *Preview 03; Going, Going, Gone*, N.Y. TIMES, Mar. 30, 2003, at 8A. It has been described as a "decade[] in which home runs flew, records fell, attendance soared, and the public remained entertained but less believing of what it was watching" BRYANT, *supra* note 2, at 400; see Chass, *supra*, at 8A (describing how the power proliferation that transcended the "steroid era" changed the game). The homerun era has become synonymous with wide-spread steroid use, for which it has earned such nicknames as the "steroid era" and the "tainted era." BRYANT, *supra* note 2, at 400, 402; see also Dave van Dyck, *Hope Arrives with Baseball, America's Ultimate Survivor*, CHI. TRIB., Apr. 3, 2005, at 8 (describing steroid use as "the tarnish that has tainted [baseball's] decade-long golden era of home runs").

⁵ See BRYANT, *supra* note 2, at 324 (quoting *Newsday* journalist John Heyman, who summarized journalists' unwillingness to discuss performance-enhancing drug use during the early years of the homerun era: "We blew it . . . I don't remember writing any steroids stories in 1998. I just remember writing about a lot of home runs. . . . I guess none of us had the guts"); see also Jeff Pearlman, *Pee No Evil: Why Are Sportswriters Pretending Baseball's Steroid Era Is Over?*, SLATE, June 2, 2006, <http://www.slate.com/id/2142937> (noting that most fans and journalists were reluctant to question players' performances). But see Bob Nightengale, *Steroids Become an Issue; Baseball: Many Fear Performance-Enhancing Drug is Becoming Prevalent and Believe Something Must Be Done*, L.A. TIMES, July 15, 1995, at C1 (illustrating that the issue of steroid use was apparent as early as 1995, with estimates that between twenty and thirty percent of all players were already using at that time).

⁶ See generally Bob Klapisch et al., *The Theories Behind the Explosion*, ESPN.COM, May 15, 2000, <http://ad.abcnews.com/mlb/s/2000/0426/502514.html> (noting that many writers erroneously attributed the increase in homeruns to such factors as smaller stadiums, tighter wound baseballs, and inferior pitching).

⁷ The phrase "performance-enhancing drugs" generally refers to anabolic steroids, Tetrahydrogestrinone (an undetectable steroid known as "THG", also referred to as "the clear"), and human growth hormone ("HGH"). See Gregory D. Hanscom, Comment, *Baseball Juiced Up: Should the Increased Risk Associated with the Use of Performance-Enhancing Substances Create Tort Liability?*, 15 VILL. SPORTS & ENT. L.J. 367, 371 (2008) (identifying these substances). For purposes of this comment, the terms "steroids" and "performance-enhancing drugs" will be used interchangeably.

⁸ Though rumors had circulated since the late 1980s, the idea that steroids were playing a pivotal role in the sudden deluge of homeruns first garnered serious media attention following one journalist's discovery of the supplement androstenedione, a form of steroids, in

domestic steroid suppliers and MLB players.⁹ An alarmed Congress responded to the growing scandal, most notably in 2002, demanding that MLB and the Major League Baseball Players Association (“MLBPA”)¹⁰ implement stricter drug testing policies,¹¹ and again in 2005,¹² when the Committee on Government Reform subpoenaed¹³ several prominent ballplayers and MLB executives to testify¹⁴ about the use of performance-enhancing drugs in the game.¹⁵ By the time MLB finally¹⁶ commissioned an independent investigation¹⁷ to

MLB all-star Mark McGwire’s locker during the 1998 homerun race. See Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, at 34, available at http://sportsillustrated.cnn.com/si_online/flashbacks/2002/year_in_review/steroids/; see also Kate Galbraith, *Is Mark McGwire on Steroids?*, SLATE, Aug. 25, 1998, <http://www.slate.com/id/1001967> (discussing the controversy after McGwire admitted his use of the muscle-building supplement). But see Nightengale, *supra* note 5 (evidencing that the issue of steroid use was already prevalent in 1995). The McGwire androstenedione story, however, was quickly squashed; its merit was downplayed and disregarded and the writer who broke the story was vilified, both by the baseball establishment and even his fellow journalists. See BRYANT, *supra* note 2, at 140–41. As time progressed, though, more concrete allegations of steroid use emerged, thanks in part to a paramount shift in players’ willingness to discuss the formerly taboo subject with unprecedented candidness. See, e.g., JOSE CANSECO, JUICED: WILD TIMES, RAMPANT ‘ROIDS, SMASH HITS, AND HOW BASEBALL GOT BIG 1–10 (2005) (exposing the prevalence of steroid use in MLB through a narrative of the former MLB most valuable player’s (“MVP”) own prior use, as well as the use of other high-profile players); see also BRYANT, *supra* note 2, at 192–93, 195 (discussing how former MLB MVP Ken Caminiti’s admission of use and discussion of widespread use amongst players helped elevate steroid suspicion into presumptive guilt).

⁹ The Bay Area Laboratory Co-Operative (“BALCO”) was raided by the FBI on September 3, 2003. Bob Kimball & Beau Dure, *BALCO Investigation Timeline*, USATODAY.COM, Nov. 27, 2007, <http://www.usatoday.com/sports/balco-timeline.htm>. The organization was found to have produced and administered an extensive array of performance-enhancing drugs to professional athletes, including anabolic steroids, THG, and HGH. *Id.* Four professional players—Jason Giambi, Barry Bonds, Benito Santiago, and Gary Sheffield—were all linked to the organization. *Id.* All four testified about their involvement with BALCO before a federal grand jury. *Id.*

¹⁰ Established in 1966, “[t]he MLBPA is the collective bargaining representative for all current Major League Baseball players.” Major League Baseball Players Association, MLBPA Info: Frequently Asked Questions, <http://mlbplayers.mlb.com/pa/info/faq.jsp> (last visited Nov. 16, 2009).

¹¹ Major League Baseball, *Special Report: Drug Policy in Baseball, Event Timeline*, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited Nov. 16, 2009).

¹² *Id.*

¹³ *Id.* It is worth noting that Congress initially “invited” representatives of MLB to testify. *Id.* It was only after no one was willing to discuss the steroid issue that Congress was forced to use its subpoena power. *Id.*

¹⁴ Those subpoenaed to testify included MLB players Jose Canseco, Mark McGwire, Curt Schilling, Rafael Palmeiro, Frank Thomas, and Sammy Sosa, as well as MLB Commissioner Bud Selig, MLBPA Executive Director Donald Fehr, MLB Vice President of Baseball Operations Sandy Alderson, and San Diego Padres General Manager Kevin Towers. *Id.*

¹⁵ See Duff Wilson, *The Steroids Hearings: The Testimony; McGwire Offers no Denials at Steroid Hearings*, N.Y. TIMES, Mar. 18, 2005, at A1 (describing Mark McGwire’s, and others’, Congressional hearing testimony).

¹⁶ This is not to suggest that MLB’s lack of vigilance should be attributable to ignorance. Much to the contrary, baseball was aware of the issue, as evidenced by, inter alia, random

assess its steroid problem, the highly anticipated findings confirmed what many already believed to be true: The decade once declared by baseball's Commissioner¹⁸ to have been its "greatest"¹⁹ was tainted by rampant steroid use²⁰ among its most celebrated athletes.²¹

With records and reputations sullied²² and the integrity of the game in shambles, the fallout from the Mitchell Report embroiled MLB in arguably its most prolific scandal ever.²³ Even now as baseball attempts to move beyond its tainted past, new details of steroid use continue to emerge, serving as a constant reminder of the era MLB would like to sooner forget.²⁴

drug tests it instituted in 2003 to determine if steroid use was prevalent enough that routine testing was necessary. Michael S. Schmidt, *Another Blow to an Epic Chase*, N.Y. TIMES, June 17, 2009, at B11. The results were kept secret, but have since been leaked, exposing several prominent players—including Alex Rodriguez, David Ortiz, and Manny Ramirez—to have been steroid users. *See infra* note 24.

¹⁷ At the request of MLB, in 2006, Senator George H. Mitchell began an independent investigation to determine the scope of performance-enhancing drug use by MLB players. GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL SR-5 (2007) [hereinafter MITCHELL REPORT], available at <http://Files.mlb.com/mitchrpt.pdf>. The investigation conclusively determined that these substances had been used extensively by many of the game's players over the past decade. *Id.* at SR-1. The findings, along with Senator Mitchell's recommendations, were made public on December 13, 2007. *Id.* at SR-1.

¹⁸ MLB's current Commissioner is Allan H. (Bud) Selig. Major League Baseball, MLB Executives, http://mlb.mlb.com/mlb/official_info/about_mlb/executives.jsp?bio=selig_bud (last visited Nov. 16, 2009). Commissioner Selig has served as MLB's chief policy and decision maker since being voted to the post by MLB's club owners in 1998. *See id.*

¹⁹ BRYANT, *supra* note 2, at 402.

²⁰ *See* MITCHELL REPORT, *supra* note 17, at SR-1 ("For more than a decade there has been widespread illegal use of anabolic steroids and other performance enhancing substances by players in Major League Baseball . . .").

²¹ *Id.* at SR-1, 167–74 (noting that among those said to have used were potential Hall of Famers, including Roger Clemens).

²² BRYANT, *supra* note 2, at 400 ("They've really damaged something . . . [T]hey've really tainted the one sport where statistics matter." (quoting author and historian David Halberstam)).

²³ *See, e.g.*, Bill Madden, *Bud's Neglect Can't Be Denied*, N.Y. DAILY NEWS, Feb. 17, 2005, at 74 ("[T]he steroids scandal threatens to go down as Selig's Watergate."). It will be interesting to observe where baseball historians eventually rank the steroid scandal in relation to such other notable baseball scandals as Pete Rose's decision to gamble on games he played in and, perhaps the most famous of all baseball scandals, when eight members of the 1919 Chicago Black Sox accepted bribes to throw (intentionally lose) the 1919 World Series.

²⁴ On February 7, 2009, a devastating blow was dealt to MLB when Alex Rodriguez, considered by many to be the greatest player in the game, as well as one of the few remaining "clean" superstars of the steroid era, was confirmed by *Sports Illustrated* to have tested positive for anabolic steroids in 2003. Selena Roberts & David Epstein, *Sources Tell SI Alex Rodriguez Tested Positive for Steroids in 2003*, SI.COM, Feb. 7, 2009, <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/07/alex-rodriguez-steroids/index.html?eref=T1> (last visited Nov. 16, 2010). Rodriguez is one of 104 MLB players to test positive for steroids during the 2003 survey testing. *Id.* Since then, MLB all stars Manny Ramirez and

When the dust finally settles, it seems clear that MLB, the MLBPA, and the growing list of “confirmed cheaters”²⁵ will be amongst the biggest losers of the steroid debacle. And yet, there is one segment of the baseball populace that lost long before the Mitchell Report made “steroid use in baseball”²⁶ a household name. I refer to the Minor League players who never made it to the professional level, simply because they played during an era of uninhibited steroid use.²⁷

For these players, their decision meant consciously falling behind the competition, and it may have ultimately cost them millions of dollars in professional contracts and endorsements.²⁸ Since the Mitchell Report’s publication, at least one former Minor League player has proposed organizing a class action lawsuit with the hopes of forcing MLB to adopt stricter drug testing rules.²⁹ Similarly, Rick Reilly, a columnist for *ESPN The Magazine*, has also suggested a class action suit for the Minor Leaguers, but has taken it a step further by proposing an actual cause of action against MLB under an antitrust law restraint of trade theory.³⁰ While Reilly’s

David Ortiz were also confirmed to have tested positive for steroids during the 2003 testing. Michael S. Schmidt, *Ortiz and Ramirez Said to Be on '03 Doping List*, N.Y. TIMES, July 30, 2009, at A1.

²⁵ This term refers to players who have been confirmed to have used performance-enhancing drugs. Using anabolic steroids and other performance-enhancing drugs was (and is still) considered cheating because these substances are taken “in violation of federal law and baseball policy.” See MITCHELL REPORT, *supra* note 17, at SR-1.

²⁶ *Id.* at SR-14.

²⁷ See Mike Celizic, *Minor Leaguers True Victims in Steroid Scandal*, NBCSPORTS.COM, <http://nbcsports.msnbc.com/id/22672104/> (last visited Nov. 16, 2010) (explaining how Minor Leaguers who refused to take steroids were severely disadvantaged); see also Michael O’Keeffe, *Ex-Minor Leaguer May Sue MLB*, N.Y. DAILY NEWS, Jan. 6, 2008, at 55 (“[T]he biggest losers of baseball’s steroid era weren’t the fans, they were minor leaguers who were cheated of their dreams because a rival for a major-league job got a boost from steroids.” (quoting Rich Hartmann, a former Minor League player attempting to organize a class-action lawsuit against MLB)); Rick Reilly, *A Lot of Guys in the Minors Got Hosed by Steroids. They Should Sue.*, ESPN THE MAGAZINE, Sep. 8, 2008, available at <http://sports.espn.go.com/espnmag/story?id=3554767> (raising the issue that prominent Minor Leaguers denied an opportunity to play in the majors due to rampant steroid use should sue MLB based on an antitrust law restraint of trade theory).

²⁸ See Verducci, *supra* note 8 (“If a young player were to ask me what to do . . . I’m not going to tell him [steroids are] bad. Look at all the money in the game: You have a chance to set your family up . . . So I can’t say, ‘Don’t do it,’ not when the guy next to you is as big as a house and he’s going to take your job and make the money.” (quoting the late MLB MVP Ken Caminiti)).

²⁹ As of the time of this writing, Rich Hartmann, a former Minor League player, was researching potential legal claims against MLB. Additionally, Hartmann is attempting to enlist former teammates to join him in a class action lawsuit, because he believes that minor league players who played between the years 1990–2005 and did not use steroids were cheated of their opportunity to play at the big league level. See O’Keeffe, *supra* note 27.

³⁰ See Reilly, *supra* note 27 (“I think minor league players . . . should file a class action,

aim is humor,³¹ the column nevertheless presents an interesting idea for potential litigation. Still, it may be one unlikely to effectuate an actual lawsuit because of the novelty of the claim, the costs associated with litigation, and the underlying legal hurdles it would encounter, most notably, MLB's prized exemption from federal antitrust laws.³² Navigating this exemption, as well as establishing the other elements of the proposed claim, would prove exceedingly more difficult than Reilly surmises in his column,³³ if it is even possible at all.³⁴ But the question remains: Could former non-steroid using Minor League players, who were competing at the highest level of Minor League Baseball and were denied an opportunity to play professional baseball because of competitive disadvantages caused by performance-enhancing drug use, successfully sue MLB and its club owners in an antitrust restraint of trade action, claiming that MLB's permissive allowance of steroid use during the homerun era constituted a conspiracy that unreasonably restrained trade in violation of section 1 of the Sherman Antitrust Act?

The purpose of this comment is to examine this question by discussing the elements and issues that would need to be proven, and the likelihood of the Minor Leaguers succeeding on the merits of this claim.

Part II of this comment will discuss the underlying factual predicate for the claim: that there is a positive correlation between steroid use and improved performance, and that MLB and its individual clubs knowingly allowed steroid use to continue during the homerun era. These two elements are necessary in order to demonstrate under the words of section 1 of the Sherman Act that a "conspiracy" existed,³⁵ and that this conspiracy unreasonably restrained trade.³⁶

restraint of trade lawsuit against Major League Baseball because they sat stewing in the minors while big leaguers were allowed to cheat."). For a discussion of antitrust law and the restraint of trade claim, see *infra* Part III.

³¹ Although Reilly's column briefly quotes William B. Gould IV, a preeminent labor law scholar and Professor Emeritus of Law at Stanford Law School, the article is clearly intended to be entertaining and does not provide a substantive discussion of the underlying legal issues. See Reilly, *supra* note 27 (noting, for example, Reilly's discussion of nonstatutory labor exemption considerations: "[t]hat's just so complicated it makes our head ache, but a good shark would gobble it right up").

³² See *infra* Part IV.

³³ Reilly is clearly optimistic about the suit's chances: "[even] Tori Spelling could win this case!" Reilly, *supra* note 27.

³⁴ See *infra* Part III.B.2.iv.

³⁵ 15 U.S.C. § 1 (2006); see also *infra* Part III.

³⁶ See *infra* Part III.

Part III will discuss the legal merits of the restraint of trade claim. Part III.A will begin with an overview of Antitrust Law and the tests used to prove a section 1 restraint of trade claim. Part III.B will analyze the issues that must be proven for the present claim to succeed. Part III will conclude that despite numerous obstacles towards making a prima facie claim, the claim is still viable.

Part IV will discuss additional legal hurdles that the Minor Leaguers must overcome to state their claim. These include issues posed by MLB's presumed exemption from the antitrust laws,³⁷ the Nonstatutory Labor Exemption, which immunizes employers and unions for agreements in restraint of trade which were bargained for in good faith by employers and union representatives,³⁸ and finally, the statute of limitations for a section 1 antitrust claim.³⁹ This Part will conclude that the Minor Leaguers have a good chance of overcoming these three hurdles as well.

The comment will conclude that despite baseball's near obvious culpability, this claim would be difficult to establish because of the lack of any concrete evidence to support the Minor Leaguers' claim, and the significant legal hurdles the plaintiffs must subsequently overcome even if a court were to accept their prima facie claim. Yet, despite the numerous obstacles, with the right plaintiffs and a lenient judge, the claim could succeed.

II. ESTABLISHING THE FACTUAL PREDICATE FOR THE ANTITRUST CLAIM

A. *Steroid Use and Improved Performance: The Proof Is in the Juice*

The first step towards proving that steroid use by Major Leaguers created an unreasonable restraint of trade is to demonstrate that there is a positive correlation between use and performance. Establishing this connection is about as close to a slam-dunk as it gets for the plaintiffs' claim.

The now infamous term "performance-enhancing drugs" is no misnomer. These substances have earned their namesake by providing players with a physical edge⁴⁰ that can dramatically⁴¹

³⁷ See *infra* Part IV.

³⁸ See *infra* Part IV.

³⁹ See *infra* Part IV.

⁴⁰ See Verducci, *supra* note 8 ("Anabolic steroids elevate the body's testosterone level, increasing muscle mass without changes in diet or activity . . ."). Steroids are also credited with alleviating chronic injuries. *Id.*; see also BRYANT, *supra* note 2, at 193 (noting that Ken

improve their on-the-field performance.⁴² Fantastic results have been realized by hitters and pitchers alike.⁴³ Indeed, it is their overwhelming effectiveness that created the culture of widespread use,⁴⁴ eventually transforming the game into a “[p]harmacological [t]radeshow.”⁴⁵ It was clear to players who did not use that they were placing themselves at a significant disadvantage as compared to their counterparts.⁴⁶ Thus, in any hypothetical suit, MLB would likely concede that a direct correlation exists between use and performance, rather than risk losing credibility arguing a point many now consider to be moot.⁴⁷

B. Putting Meat in the Seats—Baseball’s Permissive Stance on Steroids

The second factual element that must be proven is that MLB and its owners committed a conspiracy or agreement amongst themselves. This conspiracy requirement can be met, this comment argues, through evidence of MLB’s and the club teams’ permissive allowance of steroid use by players. While this element is not quite the “slam-dunk” the former was, there is still substantial evidence that proves such a conspiracy existed, if only in implicit form.

To illustrate, in his 2005 groundbreaking tell-all book *Juiced*, former MLB MVP and admitted steroid user Jose Canseco recounts how MLB allowed steroid-infused homerun hitters to resuscitate the game.⁴⁸ It was at this time, according to Canseco, when the

Caminiti “used steroids . . . because of how they made the injuries that had suppressed his production for so many years begin to disappear”).

⁴¹ See Verducci, *supra* note 8 (“[S]teroids can jump you a level or two. The average player can become a star, and the star player can become a superstar, and the superstar? . . . He can do things we’ve never seen before.” (quoting former MLB All-Star pitcher Kenny Rogers)).

⁴² See, e.g., *id.* (detailing how steroids helped Ken Caminiti hit more homeruns in one half of a season than he had had ever hit in any full season en route to winning the 1996 MLB MVP award).

⁴³ See, e.g., *id.* (“[Pitchers] in their late 30s, almost 40 . . . are throwing the ball 96 to 99 [miles per hour], and they never threw that hard before in their lives.” (quoting Kenny Rogers)).

⁴⁴ See *id.* (“‘At least half the guys [in the Major Leagues] are [on] steroids,’ [; v]irtually all of the 20 or so minor leaguers interviewed [for the story] described the use of steroids . . . as rampant in the minors” (quoting Ken Caminiti)); see also *supra* note 20.

⁴⁵ See Verducci, *supra* note 8.

⁴⁶ See generally *id.* (discussing the financial incentive to use and the immediate physical benefits steroids provide).

⁴⁷ See BRYANT, *supra* note 2, at 143 (discussing that the old conventional wisdom that bulking up could not help a player has been refuted).

⁴⁸ See CANSECO, *supra* note 8, at 199 (“McGwire and Sosa . . . generated so much excitement . . . that the cloud that had been hanging over baseball since the 1994 strike was finally lifted. People were as excited about baseball as they had ever been And why?

game was experiencing a renaissance thanks to the power surge, that baseball's leadership "made a tacit decision not only to tolerate steroid use, but actually to pretend it didn't exist among baseball players"⁴⁹ MLB players have long been known to keep their teammates' legal indiscretions under wraps.⁵⁰ It's just that this time around, the owners and league officials were in on it too.

Call it willful blindness or conscious ignorance, MLB exemplified an unmistakably "laissez-faire" approach towards steroid use during the homerun era.⁵¹ It is easy to understand why. The league had become more popular than ever before, and there wasn't anyone affiliated with the game who wanted to risk derailing the momentum.⁵²

At best, it seems MLB is guilty of turning a blind eye while players cheated their way into the record books.⁵³ At worst, they are guilty of protecting,⁵⁴ and in some instances, even promoting the use of performance-enhancing drugs.⁵⁵

Because the owners had been smart enough not to chase steroid use out of the game . . .").

⁴⁹ *Id.* at 200. "[O]wners had been smart enough not to chase steroid use out of the game, allowing guys like [Mark] McGwire to make the most of steroids The owners' attitude? As far as I could tell, *Go ahead and do it.*" *Id.* at 199.

⁵⁰ See BRYANT, *supra* note 2, at 192 (noting one of the baseball players' unwritten rules: "what happens in the clubhouse, stays in the clubhouse").

⁵¹ See, e.g., CANSECO, *supra* note 8, at 201; MITCHELL REPORT, *supra* note 17, at 86–103 (discussing several incidents in which MLB exhibited a "less than vigorous response" upon learning that players had been caught with steroids); T.J. Quinn, *'ROID Probe Digs Beyond Barry, Looks into Mac, Canseco*, N.Y. DAILY NEWS, Apr. 27, 2006, at 76 (noting that former FBI agent Greg Stejskal "told MLB security chief Kevin Hallinan in 1994 that players had been implicated as steroid users, and that MLB did nothing about it").

⁵² See BRYANT, *supra* note 2 at 170–71 ("We talk about the brilliance of these businessmen who own these clubs But we're supposed to believe they're so stupid and naïve that they don't see the dramatic change in their ballplayers [The owners] are very bright men. They know what's going on, and they choose to turn their heads the other way because it helps them make a lot of money." (quoting Charles Yesalis, an expert on steroids in sports)).

⁵³ See *Baseball: Roundup; Padres' Towers Says He Knew Caminiti Was Using Steroids*, N.Y. TIMES, Mar. 1, 2005, at D2 ("The truth is, we're in a competitive business, and these guys were putting up big numbers and helping your ball club win games You tended to turn your head on things I hate to be the one voice for the other 29 G.M.'s, but I'd have to imagine that all of them, at one point or other, had reason to think that a player on their ball club was probably using, based on body changes and things that happened over the winter. I think we all knew it, but we didn't say anything about it." (quoting Kevin Towers, former General Manager of the San Diego Padres)); see also Verducci, *supra* note 8 (discussing how the Minor League drug testing system imposed no fines on violators).

⁵⁴ See BRYANT, *supra* note 2, at 396–98. According to Bryant, Commissioner Selig was so irate about the discussion of steroid use in the game that he instituted a gag order on all baseball officials, imposing a mandatory fine of \$10,000 on anyone who discussed steroids with the media. *Id.*

⁵⁵ See *id.* at 396 (discussing how Congress now believes that Commissioner Selig "actively sought to secretly undermine his own drug policy"); see also Verducci, *supra* note 8 (noting how one Minor Leaguer told *Sports Illustrated* that his manager recommended that he use steroids).

In the Mitchell Report, Senator Mitchell defends MLB's inaction by noting that after the work stoppage of 1994, pressing bargaining issues persisted, and this is why "the use of steroids and other illegal performance enhancing substances in professional baseball received a lower priority than economic matters."⁵⁶ The Senator's assessment seems most generous though, considering that any attempts by MLB to curtail steroid use have come only on the heels of pressure from Congress, the FBI, and the media.⁵⁷

In sum, it is not known whether there were ever secret meetings or memos where owners and league officials *expressly* agreed amongst themselves to allow steroid use to continue for the good of the game. But, in light of what *is* known, it seems clear that a tacit agreement crystallized over time, embodied by a collective silence and general reluctance to disturb the steroid-enhanced status quo. Steroid use in baseball may have indeed been a fortuitous accident, but it was one the league was happy to suffer for the better part of a decade.

MLB could attempt to deny this point by either rehashing its long maintained—yet much maligned—defense of ignorance,⁵⁸ or, in the alternative, by arguing that MLB actively attempted to squash steroid use, but was simply unsuccessful.⁵⁹ Neither defense is likely viable due to the efforts of Senator Mitchell and numerous journalists who have unearthed countless examples where MLB and its owners were willing to look the other way.⁶⁰

Thus, it is very likely that this element would also be satisfied, and because the underlying factual predicate for the claim would likely be met, plaintiffs would have the requisite foundation to support their antitrust claim. Further analysis of the legal merits is therefore warranted.

⁵⁶ MITCHELL REPORT, *supra* note 17, at 87.

⁵⁷ *See supra* Part I.

⁵⁸ *See supra* note 52 and accompanying text. This claim is now particularly dubious considering the news that MLB knew that at least one hundred players—including some of the game's biggest stars—had tested positive for steroids during random sample testing in 2003. *See* Schmidt, *supra* note 24.

⁵⁹ *See supra* note 16 and accompanying text.

⁶⁰ *See supra* notes 47–52 and accompanying text.

III. THE MINOR LEAGUE PLAYERS' CLAIM

A. *Section 1 of the Sherman Antitrust Act and the Restraint of Trade Claim*

Faced with the pernicious threat of increasingly powerful trusts and monopolies,⁶¹ in 1890, Congress enacted the Sherman Antitrust Act⁶² (“Sherman Act”) to protect free market competition and prevent illegal restraints of trade.⁶³ The Act was promulgated pursuant to Congress’ power to regulate interstate commerce.⁶⁴

The restraint of trade claim that is the focus of this comment arises from section 1 of the Sherman Act, which states in pertinent part, “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”⁶⁵ Besides the criminal penalties set forth in this section,⁶⁶ 15 U.S.C. § 15(a) entitles plaintiffs to civil recovery for three times the amount of damages suffered, including the cost of the suit and reasonable attorney’s fees.⁶⁷

Federal courts apply one of two different tests to determine if a restraint violates section 1. They are the “*per se*” invalidity test and the “[R]ule of [R]eason” test.⁶⁸ Under either *per se* or the Rule of Reason, plaintiffs must prove three elements to prevail on the section 1 claim. They are: “(1) the existence of a contract, combination, or conspiracy among two or more separate entities that (2) unreasonably restrains trade and (3) affects interstate or

⁶¹ United States v. Se. Underwriters Ass’n, 322 U.S. 533, 553 (1944) (“‘Trusts’ and ‘monopolies’ were the terror of the period.” (citation omitted)).

⁶² 15 U.S.C. §§ 1–7 (2000 & Supp. 2004).

⁶³ See 15 U.S.C. §§ 1–2; see also *South-Eastern Underwriters Ass’n*, 322 U.S. at 553 (“A general application of the Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth.”).

⁶⁴ U.S. CONST. art. 1, § 8, cl. 3.

⁶⁵ 15 U.S.C. § 1.

⁶⁶ Section 1 states:

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

⁶⁷ See 15 U.S.C. § 15(a) (2006).

⁶⁸ See generally Lacie L. Kaiser, Comment, *Revisiting the Impact of the Curt Flood Act of 1998 on the Bargaining Relationship Between Players and Management in Major League Baseball*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 230, 233–34 (2004) (discussing the *per se* and Rule of Reason tests).

foreign commerce.”⁶⁹

As the Supreme Court noted in *Broadcast Music, Inc., v. Columbia Broadcasting System, Inc.*,⁷⁰ the *per se* test is reserved for agreements and restraints that are “plainly anticompetitive,’ and so often ‘lack . . . any redeeming virtue,’ that they are conclusively presumed illegal”⁷¹ Therefore, courts will not apply the *per se* test unless they can determine, absent any factual investigation,⁷² that the restraint has a “pernicious effect on competition.”⁷³ When it is applicable, though, the *per se* rule is a useful tool that allows the court to bypass the often “complicated and prolonged economic investigation” that generally accompanies antitrust litigation.⁷⁴ By maximizing efficiency and expediency, the *per se* test has been lauded by the Supreme Court as “a valid and useful tool of antitrust policy and enforcement.”⁷⁵

Conversely, the Rule of Reason analysis is applied in situations “where the economic impact of the challenged practice is not obvious.”⁷⁶ Because not all restraints of trade are necessarily invalid,⁷⁷ the Rule of Reason sets out to determine if the restraint at issue does in fact unreasonably restrain trade.⁷⁸ In determining whether a restraint is unreasonable, courts consider either: (1) “the nature or character of the contracts, or (2) [the] surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices.”⁷⁹ Under either

⁶⁹ *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1033 (9th Cir. 2005). The elements required to prove that a restraint is unreasonable are ultimately the same under both the *per se* and Rule of Reason tests, but because the *per se* test is only applied where the restraint at issue is already known to be blatantly anticompetitive, no further analysis under *per se* is required. *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1154–55 (9th Cir. 2003); *see also* *Kaiser*, *supra* note 68, at 233–34.

⁷⁰ 441 U.S. 1, 8 (1979).

⁷¹ *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

⁷² *Broad. Music, Inc.*, 441 U.S. at 9 (“It is only after considerable experience with certain business relationships that courts classify them as *per se* violations” (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 607–08 (1972))).

⁷³ *N. Pac. Ry. Co.*, 356 U.S. at 5.

⁷⁴ *Broad. Music, Inc.*, 441 U.S. at 8 n.11 (quoting *N. Pac. Ry. Co.*, 356 U.S. at 5).

⁷⁵ *Id.* at 8.

⁷⁶ *Jack Russell Terrier Network*, 407 F.3d at 1033 n.13 (quoting *Dimidowich v. Bell Howell*, 803 F.2d 1473, 1480 (9th Cir. 1986)).

⁷⁷ *See infra* note 144 (discussing which types of restraints are prohibited).

⁷⁸ *N. Pac. Ry. Co.*, 356 U.S. at 4–5; *Jack Russell Terrier Network*, 407 F.3d at 1033 n.13 (citing *Paladin Assocs.*, 328 F.3d at 1156).

⁷⁹ *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 103 (1984) (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 690); *see also* Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 79 (2003) (“First, a plaintiff must establish a

(1) or (2), the ultimate inquiry is the restraint's effect on "competitive conditions."⁸⁰

Once plaintiffs' prima facie claim has been established, the burden shifts to the defendant to prove that the harm demonstrated in plaintiffs' claim is outweighed by the "procompetitive" effects produced by the agreement.⁸¹ Even upon such a showing by the defendant, plaintiffs may still prove the restraint is unreasonable by demonstrating that the same effects could have been achieved via a "less restrictive alternative."⁸²

The distinction between the *per se* test and the Rule of Reason is ultimately inconsequential.⁸³ Regardless of which test the court uses, the focus of a section 1 claim is always the restraint and its impact on interstate competition.⁸⁴

B. Analysis of the Player's Suit Under Section 1

Consideration on the merits of the section 1 claim proposed begins with the elements discussed in Part II, *supra*. Under either *per se* or the Rule of Reason framework, the finder of fact must first conclude that: (1) MLB and its owners allowed illegal steroid use to occur and (2) there is a positive correlation between steroid use and improved athletic performance. These elements form the factual predicate for determining that, by allowing players to use illegal performance enhancers, MLB prevented some minor leaguers from obtaining lucrative professional baseball contracts; or, put another way, MLB restricted interstate competition by creating significant anticompetitive effects.⁸⁵ Without these underlying elements, a plaintiff cannot prove the section 1 claim, and the suit would likely be dismissed on a motion for summary judgment,⁸⁶ if not

prima facie case by showing that the restraint produces tangible anticompetitive harm, a showing that usually consists of proof of 'actual detrimental effects' such as increased price or reduced output.").

⁸⁰ *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 103 (quoting *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 690).

⁸¹ Meese, *supra* note 79, at 79.

⁸² *Id.* at 79–80.

⁸³ See *Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 104 n.26 ("[T]here is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.").

⁸⁴ *Id.* at 104.

⁸⁵ See *supra* Part II.B; see also *infra* Part III (discussing the restraint's effect on interstate commerce).

⁸⁶ FED. R. CIV. P. 56 (outlining the procedure and standard for summary judgment). This statement, of course, assumes that the claim is legally sufficient to proceed to this stage in

beforehand on a motion to dismiss.⁸⁷ Considering the plethora of evidence that is available to prove these elements,⁸⁸ though, it would seem highly unlikely that a court would dismiss this claim or preclude it from going to trial based upon apparent deficiencies in either (1) or (2) stated above. Thus, because it can be assumed (as discussed, *infra*) that the factual predicate for the case could be established, further analysis is warranted.

1. Assessment Under the *Per Se* Test

In this litigation, the plaintiffs would logically begin by attempting to argue that the *per se* test should be employed. The argument offered would be that MLB knowingly restricted the opportunity of non-steroid using players by allowing performance-enhancing drug use, and this action is so “plainly anticompetitive”⁸⁹ and void of any “redeeming virtue”⁹⁰ that it constitutes a *per se* violation of section 1.

The court, however, would likely not find this argument persuasive. This is because, regardless of how pernicious one perceives MLB’s conduct to have been, the concerted act of allowing steroid proliferation is not tantamount to *per se* invalid restraints that have “no purpose except stifling . . . competition.”⁹¹ Rather, accepting what would be the players’ allegations as true,⁹² MLB’s primary purpose for permitting performance-enhancing drug use was to generate and maintain fan interest in the game.⁹³ Their⁹⁴ actions created the restraining effect of preventing some minor league players from competing in the pros. Yet, these actions were not purposefully aimed at stifling competition like other *per se*

the litigation.

⁸⁷ FED. R. CIV. P. 12(b)(6) (outlining the motion to dismiss for “failure to state a claim upon which relief can be granted”). Under this motion, a court must “accept all allegations in the complaint as true and draw all inferences in the light most favorable to the non-moving party[].” *Gorham-Dimaggio v. Countrywide Home Loans, Inc.*, 592 F. Supp. 2d 283, 288 (N.D.N.Y. 2008) (quoting *Ruggles v. Wellpoint Inc.*, 253 F.R.D. 61, 65 (N.D.N.Y. 2008)).

⁸⁸ Support for these elements discussed in Part II, *supra*, is admittedly but a small sample of the evidence that could be amassed to support these propositions.

⁸⁹ *Broad. Music, Inc.*, 441 U.S. at 8 (quoting *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 692).

⁹⁰ *N. Pac. Ry. Co.*, 356 U.S. at 5.

⁹¹ *Broad. Music, Inc.*, 441 U.S. at 20 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

⁹² A court is obligated to accept the allegations contained on the face of the complaint as true when considering a 12(b)(6) motion to dismiss. *See supra* note 88.

⁹³ *See supra* Part II.B.

⁹⁴ “Their” refers to MLB and the individual ball clubs that comprise the Major Leagues.

restraints, like “price fixing”⁹⁵ or “tying agreements.”⁹⁶ Here, baseball’s motives were to provide a more exciting product, and the restraining effect that resulted was incidental. The restraint was not implemented to eliminate competition from non-using Minor Leaguers, nor did it. It was still possible for “clean” ballplayers to reach the big leagues and achieve the same success as steroid users. It was just much more difficult for them to do so. For these reasons, this restraint would not be considered *per se* invalid by the court, and the claim would need to be assessed under the Rule of Reason framework to determine its validity.

2. Assessment Under the Rule of Reason Framework

To succeed under the Rule’s framework, plaintiffs must first establish the *prima facie* elements of the section 1 claim.⁹⁷ The first requirement is to prove “the existence of a contract, combination, or conspiracy among two or more separate entities.”⁹⁸ Antitrust claims, by definition, must involve the concerted action of more than one entity.⁹⁹ The argument then for the plaintiffs would be, as discussed in Part II, that MLB and the owners¹⁰⁰ of individual baseball clubs implicitly conspired¹⁰¹ to allow performance-enhancing drug use to continue unabated.¹⁰²

i. Assessment of the First Element and the Potential Use of the Single Entity Defense by MLB and the Club Owners

To counter the first requirement that there be concerted activity, MLB would likely argue that its business interests and those of its affiliate¹⁰³ ball clubs, are so identical that they must be “viewed as a

⁹⁵ *N. Pac. Ry. Co.*, 356 U.S. at 5 (citation omitted).

⁹⁶ *Id.* (citation omitted). Tying agreements are “agreement[s] by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.” *Id.* The Supreme Court has noted that these agreements “serve hardly any purpose beyond the suppression of competition.” *Id.* at 6 (quoting *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305–06 (1911)).

⁹⁷ *Jack Russell Terrier Network*, 407 F.3d at 1033; *see supra* Part III.A.

⁹⁸ *Jack Russell Terrier Network*, 407 F.3d at 1033; *see supra* Part III.A.

⁹⁹ 15 U.S.C. § 1 (2006).

¹⁰⁰ This comment suggests that the conspiracy occurred between MLB and the owners, although an argument could be made that MLB conspired with the MLBPA.

¹⁰¹ The “unofficial agreement” refers to the “code of silence” discussed *supra* Part II.B.

¹⁰² *See supra* Part II.

¹⁰³ Major League baseball clubs are wholly owned and operated, making them each affiliates and not subsidiaries of Major League Baseball.

single economic unit”¹⁰⁴ and not as two separate entities capable of conspiring. This is referred to in antitrust litigation as the “single-entity” defense.¹⁰⁵ The court’s acceptance of the defense would preclude any finding of concerted activity and nullify plaintiffs’ cause of action.

To determine if two closely related organizations should be deemed a single entity, the court focuses on the degree of separation between them.¹⁰⁶ Factors the court may examine in making this determination include “whether [the organizations] ha[ve] separate control of [their] day-to-day operations, separate officers, [and] separate corporate headquarters.”¹⁰⁷ Courts though, are not limited to these factors. Ultimately, the scope of the single-entity inquiry depends upon the “unique . . . facts of each case,”¹⁰⁸ and courts will evaluate the sum business practices of a corporation before “determin[ing] whether [the] separately incorporated entity is capable of conspiring under section 1.”¹⁰⁹

Courts that have reached this issue have generally determined that professional sports teams and leagues are separate entities *capable* of conspiring.¹¹⁰ But this general rule remains subject to the proposition that single-entity determinations depend upon the unique factual circumstances of each case.¹¹¹ Professional sports leagues may appear more or less like single entities depending upon “which facet of the business [the court] examines.”¹¹² For example, in *Brown v. Pro Football, Inc.*,¹¹³ the Court examined, in dicta, the

¹⁰⁴ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 772 n.18 (1984).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Jack Russell Terrier Network*, 407 F.3d at 1034 (citation omitted).

¹⁰⁹ *Id.* (quoting *Copperweld Corp.*, 467 U.S. at 773 n.21).

¹¹⁰ *See Nat’l Hockey League Players Ass’n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 469 (6th Cir. 2005) (“Other courts considering the actions of professional sports leagues have found the leagues to be joint ventures whose members act in concert (i.e., *agree*) to promulgate league rules, rather than one solitary acting unit.” (citing *N. Am. Soccer League v. Nat’l Football League*, 670 F.2d 1249, 1257 (2d Cir. 1982))); *see Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 56 (1st Cir. 2002) (discussing *Copperweld Corp.*). *But see infra* note 112 and accompanying text.

¹¹¹ *See Chicago Prof’l Sports Ltd. P’ship v. Nat’l Basketball Ass’n*, 95 F.3d 593, 599–600 (7th Cir. 1996).

¹¹² *Id.* at 599 (“From the perspective of fans and advertisers . . . ‘NBA Basketball’ is one product from a single source even though the Chicago Bulls and Seattle Supersonics are highly distinguishable But from the perspective of college basketball players who seek to sell their skills, the teams are distinct, and because the human capital of players is not readily transferable to other sports . . . the league looks more like a group of firms acting as a monopsony.”).

¹¹³ 518 U.S. 231 (1996).

National Football League (“NFL”) from the vantage point of a league bargaining representative, and subsequently classified the league and its teams as a single entity.¹¹⁴ In arriving at this determination, the Court focused on the degree of cooperation that was required from individual football teams for the NFL to have successful labor negotiations.¹¹⁵ The Court noted that because of this immense cooperation, it could not characterize these teams as “completely independent economic competitors”¹¹⁶ because the NFL, through negotiations on behalf of the league with the players’ union, had taken on the role of acting like a “single bargaining employer.”¹¹⁷

Conversely, in *National Hockey League Players Association v. Plymouth Whalers Hockey Club*,¹¹⁸ the Sixth Circuit held that member clubs of the Ontario Hockey League (“OHL”) and the OHL itself could not be characterized as a “single economic entity.”¹¹⁹ The court explained that when teams adopt the eligibility rules of a league, they do not become part of the league as a singular economic unit,¹²⁰ but rather, they retain their economic independence as “multiple actors who act in concert.”¹²¹ Similarly, in *Los Angeles Memorial Coliseum Commission v. National Football League*,¹²² the Ninth Circuit rejected the NFL’s single entity defense, accepting instead plaintiff’s contention that the NFL is comprised of “28 separate legal entities which act independently,”¹²³ who are therefore capable of conspiring.

The court provided three justifications for its decision in *Los Angeles Memorial Coliseum*.¹²⁴ First, it discussed that any ruling which held that the NFL and individual teams were incapable of conspiring would cast doubt on prior decisions¹²⁵ that imposed antitrust liability on the league, and also have the effect of shielding the NFL from future antitrust liability by way of the single-entity

¹¹⁴ *Id.* at 248–49.

¹¹⁵ *See id.* at 248.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 248–49.

¹¹⁸ 419 F.3d 462 (6th Cir. 2005).

¹¹⁹ *Id.* at 470 (citation omitted).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 726 F.2d 1381 (9th Cir. 1984).

¹²³ *Id.* at 1387.

¹²⁴ *Id.* at 1387–88 (noting agreement with the three justifications provided by the district court).

¹²⁵ *Id.* at 1388 (citation omitted).

defense.¹²⁶ Second, it noted its approval of the district court's determination that having shared or similar business interests did not prevent organizations from conspiring, as "other organizations have been found to violate section 1 though their product was 'just as unitary . . . and require[d] the same kind of cooperation.'"¹²⁷ Third, it noted that having common goals does not mean you are a single entity.¹²⁸ In light of these factors, the court held that the individual teams comprising the NFL were "sufficiently independent and competitive with one another to warrant rule of reason scrutiny under section 1 of the Sherman Act."¹²⁹

These cases illustrate that there is no blanket rule regarding professional sports leagues and whether they may be classified as single entities. Yet, notwithstanding the Seventh Circuit's holding in *Chicago Pro Sports v. National Basketball Association*¹³⁰ and the Supreme Court's discussion in dicta in *Brown*,¹³¹ it seems more likely than not that a single-entity defense from MLB would fail in our hypothetical case.

To begin, MLB's Constitution contains similar provisions to that which the Ninth Circuit relied upon in *Los Angeles Memorial Coliseum* in determining that the NFL was not a single entity.¹³² The first provision, contained in article I, sets forth that the Major League Constitution "constitutes an agreement among the Major League Baseball Clubs . . ." ¹³³ The second, contained in article II,

¹²⁶ *Id.*; see, e.g., *N. Am. Soccer League*, 670 F.2d at 1257–58.

¹²⁷ *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1388 (quoting *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 519 F. Supp. 581, 583 (C.D. Cal. 1981)).

¹²⁸ *Id.* at 1389–90 ("The member clubs are all independently owned. . . . Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other 'single entities.' In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and . . . there is also competition for fan support, local television and local radio revenues, and media space. These attributes operate to make each team an entity in large part distinct from the NFL.").

¹²⁹ *Id.* at 1389.

¹³⁰ 961 F.2d 667, 676 (7th Cir. 1992).

¹³¹ 518 U.S. at 250. It is important to note that the single-entity discussion in *Brown* was discussed in dicta by the Court, and is therefore not binding precedent that circuit courts must follow.

¹³² *L.A. Mem'l Coliseum Comm'n*, 726 F.2d at 1389 ("Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution, which is to 'promote and foster the primary business of League members.'").

¹³³ MAJOR LEAGUE CONST., art. I, available at <http://www.bizofbaseball.com/docs/MLCconstitutionJune2005Update.pdf>.

states that individual clubs are “members” of MLB.¹³⁴ These provisions may be fairly construed to imply that clubs maintain their identity as independent organizations operating under a unified league.¹³⁵ Their status as members merely connotes that they have agreed to abide by certain rules and regulations promulgated for the benefit of all MLB clubs.

Furthermore, though it is true, as the Supreme Court has noted,¹³⁶ that “substance, not form, should determine whether a separately incorporated entity is capable of conspiring under section 1,”¹³⁷ there is scant evidence to suggest that MLB acted as a single economic unit. To the contrary, baseball clubs are constantly competing against one another, whether for broadcast revenue and free agent players¹³⁸ or other economic interests. Even if a court were to follow the approach discussed in *Brown*,¹³⁹ just because MLB clubs cooperate on matters intimately affecting their economic interests, this should not automatically render them one single economic entity.¹⁴⁰ Therefore, it stands to reason that a court tasked with examining the business of baseball would be more likely to find MLB akin to “multiple actors [acting] in concert”¹⁴¹ than a “single economic unit.”¹⁴² For the sake of argument then, it can be assumed this element would be met; that the individual club owners of MLB, as amongst themselves, as well as in conjunction with MLB and its league officers, were capable of conspiring with one another. Thus, consideration should be given to the remaining elements of plaintiffs’ prima facie claim.¹⁴³

¹³⁴ *Id.* art. II, § 1.

¹³⁵ *See id.* art. I, II, § 1.

¹³⁶ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773 n.21 (1984).

¹³⁷ *Id.*

¹³⁸ A prime example that inter-team competition exists from a legitimate economic standpoint, and not just “on the field,” is the overwhelming discrepancy in team spending on free-agent players creating significant competitive advantages. Professional baseball is the only major professional sports league in the United States not to have a mandatory cap on players’ salaries. Paul D. Staudohar, *Salary Caps in Professional Team Sports, COMPENSATION & WORKING CONDITIONS* 3, 3, 8–9 (1998), available at <http://www.bls.gov/opub/cwc/archive/spring1998art1.pdf>.

¹³⁹ *See supra* notes 131–36 and accompanying text.

¹⁴⁰ Moreover, under the “facet” approach discussed in *Brown*, a court would be loath to say that the “degree of cooperation” exhibited by teams in allowing steroid use rendered them a single entity. *See Brown*, 518 U.S. at 248 n.8 (citation omitted).

¹⁴¹ *See supra* notes 122, 131–36 and accompanying text.

¹⁴² *See supra* notes 105, 131–36 and accompanying text.

¹⁴³ If however, a court accepted MLB’s single-entity defense, plaintiffs’ claim would be dismissed as a matter of law. *See Chicago Prof’l Sports Ltd. P’ship*, 95 F.3d at 603 (stating that if a sports league was considered a single entity, it would only be subject to scrutiny under section 2 of the Sherman Act and not under section 1); *see also* James T. McKeown,

ii. The Unspoken Agreement Constituted an Unreasonable Restraint on Commerce

The second prima facie element plaintiffs must prove is that the restraint at issue is an unreasonable restraint.¹⁴⁴ Unreasonable restraints are those agreements and combinations that either “had, or [are] likely to have, an adverse effect on [interstate] competition.”¹⁴⁵ Moreover, the effects of such restraints can be neither remote nor isolated, and must have produced, or be likely to produce, significant anticompetitive effects.¹⁴⁶

Proving that a restraint is unreasonable, as discussed supra, generally requires proof of “actual detrimental effects,’ such as increased price or reduced output.”¹⁴⁷ It is this requirement—that plaintiffs be able to demonstrate the actual, tangible anticompetitive effects of the restraint—wherein the first major obstacle¹⁴⁸ in proving this claim lies.

First, any losses alleged by the Minor League players would be purely speculative. While their claim is premised on the supposition that such players *would* or *could* have made it to the big

2008 *Antitrust Developments in Professional Sports: To the Single Entity and Beyond*, 19 MARQ. SPORTS L. REV. 363, 366 (2009) (stating that if the NFL was a single entity, it would be immune from section 1 suit).

¹⁴⁴ The rule that only “undue” restraints of trade and commerce violate section 1 was decided in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59–60 (1911). Before this decision, there were no distinctions made amongst benign, reasonable, and undue restraints because the plain language of the statute expressly imposed liability for “[e]very contract, combination . . . or conspiracy, in restraint of trade.” 15 U.S.C. § 1 (emphasis added). In *Standard Oil Co.*, the Court reinterpreted the statute from a functionalist viewpoint to prohibit only those restraints that unduly or unreasonably restrain interstate commerce. *Standard Oil Co.*, 221 U.S. at 63–64. The Court’s interpretation was criticized by Justice Harlan, who accused the Court—and correctly so—of reading a new word into the statute (“unreasonable”), and thereby subverting the separation of powers through an act of “judicial legislation.” *Id.* at 88–89 (Harlan, J. dissenting). Nevertheless, the Court reasoned that if section 1 were not limited to only unreasonable restraints, then it would have the effect of “destr[oying] . . . all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce.” *Id.* at 63. The Rule of Reason test is therefore used to distinguish reasonable restraints from unreasonable restraints.

¹⁴⁵ JAMES E. HARTLEY ET AL., AM. BAR ASS’N SECTION OF ANTITRUST L., THE RULE OF REASON, 104 (1999) (citation omitted).

¹⁴⁶ *Topco Assocs.*, 405 U.S. at 606 (“Congress did not intend to prohibit all . . . contracts that might in some insignificant degree or attenuated sense restrain trade or competition.”).

¹⁴⁷ See Meese, *supra* note 79, at 79. Anticompetitive effects may also be proven indirectly “by proving that the defendant possessed the requisite market power within a defined market.” *Law v. Nat’l Collegiate Athletic Ass’n*, 134 F.3d 1010, 1019 (10th Cir. 1998).

¹⁴⁸ Of course, proving that a non-verbal, “turn a blind-eye” approach constituted a conspiracy or agreement in restraint of trade is an obstacle in its own right, the presence of actual corroborative evidence makes it less suspect than the current claim at issue.

leagues,¹⁴⁹ it ignores equally pragmatic alternatives that would have prevented this occurrence, including the likelihood of injury, and the fact that all things being equal, these players may not have been good enough to play at the Major League level. Just because players used steroids to enhance their abilities does not eliminate the possibility that they were already better athletes than those players who did not reach the professional level.

Moreover, as in any professional sport, the prospect of a professional career is uncertain. Players with great promise may fail to live up to their billing, and less talented players may surprise even the shrewdest talent evaluators and enjoy long and lucrative careers. Thus, even if a player had demonstrated his ability to play professional baseball, there is no guarantee that he would have been promoted to the big leagues. The lack of any genuine, concrete evidence that could be offered to support this claim makes it admittedly dubious.

Second, Minor Leaguers would be hard-pressed to produce any tangible financial accounts of what they were prevented from earning because of the prevalent use of steroids. This information, or something related, would be necessary to meet the actual damages requirement for a restraint to be deemed unreasonable.¹⁵⁰ Plaintiffs may attempt to prove definable economic loss by noting the lucrative contracts of steroid-using players of the era, but this only suggests that players benefited financially from steroids and does not demonstrate that “clean” Minor League players would have been compensated in like amount but for the prevalent use of steroids.

Third, any Minor Leaguer attempting to establish the unreasonableness of this restraint would have to prove that they did not use steroids or performance-enhancing drugs. This would be extremely difficult to establish because injected steroids only remain detectable in the human body for 3–4 months, while orally administered steroids remain detectable for a mere 1–4 weeks.¹⁵¹ A trial within a trial would therefore be required, as any prospective plaintiff would first need to prove that he never used steroids or performance-enhancing drugs before proceeding with the claim. Without any means of providing genuine proof, a jury finding for

¹⁴⁹ “Big leagues” is a synonym for Major League Baseball.

¹⁵⁰ See Meese, *supra* note 79, at 79.

¹⁵¹ Anabolic Steroids: The Road to the Gold or the Road to the Grave, <http://www.youcanbenefit.com/ster.html> (last visited Nov. 16, 2009); see also Herbert A. Haupt, *Anabolic Steroids and Growth Hormone*, 21 AM. J. SPORTS MED. 468, 469 (1993).

plaintiffs would have to be persuaded by the testimony of plaintiffs and other eyewitnesses that they never took performance enhancing drugs. This evidentiary issue would likely thwart the possibility of the suggested¹⁵² class action suit because it would be nearly impossible to perform the required inquiry for every member of the class. Additionally, because there is no objective way to determine who used and for how long, to effectuate plaintiffs' (or plaintiff's) claim, a court would have to assume that (1) any use of performance-enhancing drugs—however minimal—eliminates a potential plaintiff, and (2) any use by players—however minimal—is enough to create an unreasonable restraint against players who did not use. These potential shortcomings further suggest that a court could find plaintiffs' claim too speculative.

Undoubtedly, these issues present significant, if not insurmountable, causal challenges towards establishing the unreasonableness of the restraint in question. But, if plaintiffs were able to demonstrate the anticompetitive effects in some actual way, they could theoretically prove that the restraint is unreasonable. This would require a somewhat activist court or sympathetic jury that was willing to accept, based on eyewitness and expert testimony, that: (1) the Minor Leaguer has never used steroids or performance-enhancing drugs; (2) at the time he was playing, the player was legitimate MLB talent; and (3) in the expert opinion of talent evaluators and other MLB and Minor League personnel, the player would have played professional baseball but for the inundation of performance-enhancing drug use by other players.

Even if these challenges could be overcome, the plaintiffs must still prove the restraint caused substantial effects to a definable market for the restraint to be unreasonable.¹⁵³ While some cases have obviated the need to define the relevant market by applying a "quick look" rule,¹⁵⁴ the rule is only applied in *per se* situations where the obvious invalidity of the restraint eliminates the need for market analysis.¹⁵⁵ Because this is not a *per se* restraint, the "quick

¹⁵² See, e.g., Reilly, *supra* note 27 (suggesting that Minor Leaguers should sue MLB based on an antitrust law restraint of trade theory).

¹⁵³ *Law*, 134 F.3d at 1016.

¹⁵⁴ See, e.g., *id.* at 1020 ("No 'proof of market power' is required where the very purpose and effect of a horizontal agreement is to fix prices . . . the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a 'quick look' rule of reason." (citations omitted)).

¹⁵⁵ The "quick look" approach to relevant market power is applied in situations where the *per se* test is used because "no elaborate industry analysis is required to demonstrate the

look” rule is inapplicable and the relevant market must be defined. How it is defined and who it is said to include are extremely important and, often, outcome determinative.¹⁵⁶

In the present case, the plaintiffs should seek to define the relevant market as narrowly as possible to demonstrate the greatest magnitude of the restraint’s harm. This would include defining the market as “the market for all non-performance-enhancing drug-using AAA class¹⁵⁷ Minor League players who are considered bona fide professional prospects.” This definition supports the Minor Leaguers’ position by limiting the scope of the relevant market to include only those players affected by the restraint.

MLB would argue, conversely, that the relevant market should be defined as “the entire market for baseball players” and seek to incorporate all minor league and high school players within this classification. This would drastically reduce the anticompetitive effects of the restraint by broadening the scope to include thousands of ballplayers who had relatively minute chances of making it to the big leagues. If the court were to adopt this definition, they would likely find that the anticompetitive effects impact but a small percentage of the total market, leading them to conclude the restraint is not unreasonable. If the court accepts the Minor Leaguers’ definition, however, the applicable percentage of effected persons becomes much greater.¹⁵⁸ Ultimately, how the market is defined would depend upon the factual findings of the court. This

anticompetitive character of such an agreement.” *Id.* (quoting *Nat’l Soc’y of Prof’l Engineers*, 435 U.S. at 692). Because the *per se* test could not be employed here, the “quick look” rule is not applicable to the Minor Leaguers’ claim.

¹⁵⁶ See *Law*, 134 F.3d at 1019–20. In this case, assistant college basketball coaches challenged an NCAA rule that limited the amount of compensation coaches could receive. *Id.* The NCAA argued that the restraint imposed was not an unreasonable restraint, and supported its position by attempting to define the relevant market for its product (basketball) as “the entire market for men’s basketball coaching services,” of which it argued men’s college basketball coaches comprised only 8% of this market. *Id.* The court was able to avoid the issue altogether. Nevertheless, the case demonstrates just how crucial defining the market can be to the outcome of restraint of trade case.

¹⁵⁷ AAA is the highest class of Minor League Baseball before Major League Baseball. The Official Website of Triple-A Baseball, <http://www.triple-abaseball.com/Players.jsp> (last visited Nov. 16, 2009). Most baseball players play in “Triple A” before being called up to the professional level. *Id.* As such, Triple A ball is generally considered the final hurdle before reaching the major leagues. *Id.*

¹⁵⁸ For the sake of argument, assume there are fifteen minor leaguers who establish they did not use steroids, and there is significant agreement among expert witnesses—potentially coaches and scouts—that they would have reached the pros but for Minor and Major League Players’ use of steroids. If the court determines that these fifteen existed among a relative market of fifty Major League-ready players, this would demonstrate that the restraint greatly affected the relative market (37.5%), and with such a substantial percentage of effected persons, they would be more likely to hold that the restraint was an unreasonable restraint.

author expects the court would define the market somewhere in between; limiting the market so as not to include all Minor League players, while not narrowing the scope to include just bona fide MLB prospects. Ultimately though, if not enough former Minor Leaguers can demonstrate that they (1) did not use steroids and (2) could have played in the Major Leagues, then it will not matter how broadly the market is defined.

iii. Summary of Proving the Unreasonableness of the Restraint

This element would be exceedingly difficult for plaintiffs to prove. First, a court would have to accept that one individual would have made it to the pros but for steroid's prevalent use. Second, the court would have to conclusively determine who did and did not use steroids. This is probably the most challenging aspect of the claim. Then, even assuming this was demonstrable, the court would also have to accept a narrow definition for the relevant market to find the restraint sufficiently unreasonable.

While not impossible, this element does not weigh favorably for the plaintiffs. In keeping with the general spirit of this comment, though, because this element *could* be met, the analysis will continue.

iv. The Restraint's Affect on Interstate Commerce

The third prima facie element plaintiff must prove is that the unreasonable restraint "affect[ed] interstate commerce."¹⁵⁹ Assuming arguendo that the plaintiffs can establish the unreasonableness of the restraint, this element should not pose a problem. Recent Supreme Court jurisprudence has given the Commerce Clause¹⁶⁰ an exceptionally broad interpretation.¹⁶¹ Moreover, the Supreme Court has eradicated any ambiguity on the issue, having previously held that "[p]rofessional baseball is a business and it is engaged in interstate commerce."¹⁶² Therefore, the court will find the restraint affected interstate commerce.

¹⁵⁹ *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (citation omitted).

¹⁶⁰ *See supra* note 65.

¹⁶¹ *Gonzales*, 545 U.S. at 50 (O'Connor, J., dissenting) (noting that even "windowsill gardening" is interstate commerce).

¹⁶² *Flood v. Kuhn*, 407 U.S. 258, 282 (1972).

v. Conclusion Under the Rule of Reason Framework

As discussed *supra*, the Minor Leaguers have significant challenges to overcome in proving these elements and succeeding in this claim.¹⁶³ Even assuming *arguendo* that they met their initial burden and established the elements of the prima facie claim, MLB would still have an opportunity to rebut this showing by offering evidence of the restraint's procompetitive benefits.¹⁶⁴ Naturally, MLB would be loath to put itself in the precarious position of arguing that steroid use had a positive competitive effect on the game. Therefore, any rebuttal is unlikely.

In concluding this section, one should take away the impression that while the merits of the claim are undeniably dubious, they are not an outright impossibility either. Yet, even if these elements could be met, (which this author contends is still a possibility), additional legal hurdles remain. Plaintiffs would still have to circumvent MLB's presumed exemption from antitrust laws, the non-statutory labor exemption, and the relevant statute of limitations.

IV. SCALING THE WALL: THE ANTITRUST EXEMPTION, THE
NONSTATUTORY LABOR EXEMPTION, AND THE STATUTE OF
LIMITATIONS

A. *MLB's Antitrust Exemption*

1. Historical Background

MLB has enjoyed a judicially-created exemption from federal antitrust regulation since the landmark Supreme Court case of *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.¹⁶⁵ In that case, Chief Justice Oliver Wendell Holmes infamously held that the business of baseball is in providing "exhibitions of base ball [sic], which are purely state affairs" and not subjects of interstate commerce.¹⁶⁶ The oft criticized opinion¹⁶⁷ is considered to be one of Holmes's worst,¹⁶⁸ yet

¹⁶³ See *supra* Part III.B.2(i)-(iv).

¹⁶⁴ See *supra* note 82.

¹⁶⁵ 259 U.S. 200 (1922).

¹⁶⁶ *Id.* at 208-09.

¹⁶⁷ The Supreme Court would correct the error fifty years later in *Flood v. Kuhn*, stating definitively that professional baseball is interstate commerce. *Flood*, 407 U.S. at 282. In retrospect, the decision by the Court not to classify professional baseball (already a

nevertheless established the precedent that would allow baseball to operate for most of the twentieth century immune from antitrust liability.¹⁶⁹

Thirty years later, baseball's exemption status was further bolstered by the Supreme Court's decision in *Toolson v. New York Yankees, Inc.*¹⁷⁰ In *Toolson*, the Court rejected a section 1 Antitrust claim challenging the validity of a free-agency restriction clause¹⁷¹ that was standard in every MLB player's contract.¹⁷² The Court cited *stare decisis* as the rationale for upholding the validity of the clause despite its obvious restraining effect.¹⁷³ In a one paragraph decision, *Toolson* made it explicitly clear that any change to MLB's exemption status would have to come through legislative enactment.¹⁷⁴

In 1972, when the Supreme Court next considered the issue in *Flood v. Kuhn*,¹⁷⁵ baseball's antitrust exemption remained intact. The Court in *Flood* viewed the immense passage of time¹⁷⁶ in which no changes had occurred to represent more "than mere

burgeoning industry in 1922) as commerce amongst the states is perhaps not as illogical as it appears if one considers the era of constitutional jurisprudence in which the decision was rendered. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES, §3.3.3 (3d ed. 2002) (noting that between the late 19th century and until 1937, the Supreme Court narrowly defined what constituted commerce).

¹⁶⁸ See Mitchell Nathanson, *The Irrelevance of Baseball's Antitrust Exemption: A Historical Review*, 58 RUTGERS L. REV. 1, 2 n.3 (2005) (noting, inter alia, that the Second Circuit "freely acknowledge[s] . . . that [the] *Federal Baseball* [decision] was not one of Mr. Justice Holmes' happiest days" (quoting *Salerno v. Am. League of Prof'l Baseball Clubs*, 429 F.2d 1003, 1005 (2d Cir. 1970))).

¹⁶⁹ *Id.* at 2.

¹⁷⁰ 346 U.S. 356, 357 (1953).

¹⁷¹ *Id.* "The reserve clause is popularly believed to be some provision in the player contract which gives to the club in organized baseball which first signs a player a continuing and exclusive right to his services." *Id.* at 362 n.10 (Burton, J., dissenting) (quoting H.R. REP. NO. 2002, 82d Cong., 2d Sess. 111).

¹⁷² *Id.* at 362.

¹⁷³ *Id.* at 357. The precedent relied on by the *Toolson* court was *Federal Baseball Club of Baltimore, Inc.*, which similarly dealt with a section 1 challenge to MLB's reserve clause. *Fed. Baseball Club of Balt., Inc.*, 259 U.S. at 207.

¹⁷⁴ The business [of professional baseball] has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.

Toolson, 346 U.S. at 357.

¹⁷⁵ 407 U.S. at 259.

¹⁷⁶ 407 U.S. at 259. This case, like *Toolson* and *Federal Baseball Club of Baltimore, Inc.*, dealt with a player challenging the reserve clause contained in MLB player contracts that restricted player rights to free agency. *Id.* Ironically, when baseball's infamous reserve clause was eventually defeated, it was not on antitrust grounds, but rather, on basic contract law principles. See Nathanson, *supra* note 168, at 3.

congressional silence and passivity”;¹⁷⁷ interpreting it instead to symbolize congressional recognition “of baseball’s unique characteristics and needs”¹⁷⁸ that require antitrust immunity.

In sum, the Supreme Court in *Flood* completed the metamorphosis of baseball’s prized antitrust exemption.¹⁷⁹ What had begun humbly as an aberration marked by congressional inaction¹⁸⁰ had by 1972 transformed into an express judicial mandate of Congress’s “recognition and acceptance of baseball’s unique characteristics and needs.”¹⁸¹

2. The Current State of the Antitrust Exemption

In this hypothetical suit, MLB would likely argue that its exemption shields it from all antitrust liability. Whether or not the exemption would apply here, though, remains unclear. The scope of MLB’s exemption has been clouded by post-*Flood* judicial interpretation¹⁸² and recent legislation.¹⁸³

As a general rule, there are two principle areas where courts agree that the antitrust exemption applies.¹⁸⁴ They are issues

¹⁷⁷ *Flood*, 407 U.S. at 283.

¹⁷⁸ *Id.* at 282.

The Court has emphasized that since 1922 baseball, with full and continuing congressional awareness, has been allowed to develop and to expand unhindered by federal legislative action. Remedial legislation has been introduced repeatedly in Congress but none has ever been enacted. The Court . . . has concluded that Congress . . . has had no intention to subject baseball’s reserve system to the reach of the antitrust statutes.

Id. at 283.

¹⁷⁹ MLB is the only professional sport that is exempt from federal antitrust laws. See *Flood*, 407 U.S. at 282 (“With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly. *Federal Baseball [Club of Baltimore, Inc.]* and *Toolson* have become an aberration confined to baseball.”); see also Nathanson, *supra* note 168, at 2 (noting that other sports do not share the same antitrust immunity).

¹⁸⁰ The court in *Flood* noted that “[r]emedial legislation” had been introduced repeatedly by Congress to remove baseball’s antitrust exemption, but that none was ever enacted. 407 U.S. at 283. The Court viewed the passage of time in which baseball grew and developed “with full and continuing congressional awareness . . . unhindered by federal legislative action,” not as Congressional silence, but as Congressional approval of the antitrust exemption. *Id.*

¹⁸¹ *Id.* at 282.

¹⁸² See *supra* notes 176–82 and accompanying text.

¹⁸³ *PLUS: BASEBALL; Antitrust Exemption Is Partly Revoked*, N.Y. TIMES, Oct. 28, 1998, at D7.

¹⁸⁴ See *Piazza v. Major League Baseball*, 831 F. Supp. 420, 440 (E.D. Pa. 1993) (“There seems to be agreement among these courts and others that, defined in this way, the exempted market includes (1) the reserve system and (2) matters of league structure.” (citing *Profl Baseball Schs. & Clubs, Inc. v. Kuhn*, 693 F.2d 1085, 1085–86 (11th Cir. 1982)); *Postema v. Nat’l League of Profl Baseball Clubs*, 799 F. Supp. 1475, 1489 (S.D.N.Y. 1992); *Henderson*

involving MLB's reserve clause¹⁸⁵ and issues pertaining to league structure and organization.¹⁸⁶ In *Flood*, the Court explained that baseball's "unique characteristics and needs" required some concerted activity for the game to remain viable.¹⁸⁷ Thus, when determining if a particular act is within the scope of baseball's antitrust exemption, courts revisit this language to adjudge whether the concerted conduct at issue is one central to baseball's "unique characteristics and needs."¹⁸⁸ Without any direction from the Supreme Court as to how broadly or narrowly the "unique characteristics and needs" language should be construed, this inquiry has been left to the unfettered discretion of the lower courts.¹⁸⁹ As one might expect, their decisions have been inconsistent, creating significant ambiguity in this area of law.¹⁹⁰

To illustrate the disjunction, some courts have interpreted *Flood's* "unique characteristics and needs" language broadly, expanding it to encompass everything within the "business of baseball."¹⁹¹ For example, the Seventh Circuit has held that the "business of baseball" means *all* facets of the game and excludes only those situations where there is merely an "attenuated relation" between the act in question and the "business of baseball."¹⁹² A similarly

Broad. Corp. v. Houston Sports Ass'n, 541 F. Supp. 263, 269 (S.D. Tex. 1982); *State v. Milwaukee Braves, Inc.*, 144 N.W.2d 1, 15 (Wis. 1966); *see also Flood*, 407 U.S. at 272-73 (quoting H.R. REP. NO. 2002, at 229 (1952) (noting the importance of the reserve system to the viability of MLB)).

¹⁸⁵ The precedent for upholding the reserve system under the antitrust exemption was the direct line of *Federal Baseball Club of Baltimore, Inc.*, *Toolson*, and *Flood*. *See supra* Part IV.A.1. As discussed above, the reserve clause was finally defeated based on contract law principles. *See supra* note 177.

¹⁸⁶ *Postema*, 799 F. Supp. at 1488 ("We venture to guess that this exemption does not cover every type of business activity to which a baseball club or league might be a party . . . but it does seem clear that the exemption at least covers the agreements and rules which provide for the structure of the organization and the decisions which are necessary steps in maintaining it." (quoting *Milwaukee Braves, Inc.*, 144 N.W.2d at 15)).

¹⁸⁷ *Flood*, 407 U.S. at 272-73, 282 (quoting H.R. REP. NO. 2002, at 229 (1952)) (discussing the issue and noting the importance of the reserve system to the viability of MLB).

¹⁸⁸ *See, e.g., Piazza*, 831 F. Supp. at 440 (explaining how courts have used the "unique characteristics and needs" language from *Flood* to determine what is within the scope of the antitrust exemption).

¹⁸⁹ *See infra* notes 192-201 and accompanying text.

¹⁹⁰ *See infra* notes 192-205 and accompanying text.

¹⁹¹ *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 541 (7th Cir. 1978).

¹⁹² *Id.* at 541 n. 51 (citation omitted). Areas where the court has found that the relationship was too attenuated and not central to the business of baseball include, inter alia, agreements with cable television companies, trading card manufacturers, and concessionaires. *Postema*, 799 F. Supp. at 1489 (citing *Fleer Corp. v. Topps Chewing Gum, Inc.*, 658 F.2d 139, 153 (3d Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982) (baseball card manufacturer), *Nishimura v. Dolan*, 599 F. Supp. 484, 500 (E.D.N.Y. 1984) (cable company), *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 365 F. Supp. 235, 254 (N.D. Cal.

robust interpretation was employed by the Eleventh Circuit to uphold an exemption in *Major League Baseball v. Crist*.¹⁹³ In that case, the court held that the decision to contract a team, i.e., to withdraw and relocate an existing MLB franchise, was squarely within the “business of baseball,” and protected under the exemption.¹⁹⁴

Other courts have not applied the exemption as liberally. In *Postema v. National League of Professional Baseball Clubs, Inc.*, the Southern District of New York held that agreements between professional baseball and umpires were not exempted.¹⁹⁵ The court explained that “[u]nlike the league structure or the reserve system, baseball’s relations with non-players are not a unique characteristic or need of” professional baseball and are not “essential” to the game’s continued success.¹⁹⁶ In reaching this decision, *Postema* declined to follow precedent from the Second Circuit in *Salerno v. American League of Professional Baseball Clubs*, which previously held that employment relations with umpires *are* included under baseball’s antitrust exemption.¹⁹⁷ *Postema* explained that the Second Circuit opinion was decided before the Supreme Court had limited the scope of the exemption in *Flood* to only those “unique characteristics [or] needs” of professional baseball.¹⁹⁸ In the *Postema* court’s view, *Salerno* would not have found this activity exempted had it been decided after *Flood*.¹⁹⁹

The verity of this position, however, is uncertain. Despite adopting a similarly narrow view of the exemption, the Southern District of Texas suggests that agreements with umpires may still be exempt following *Flood*. In *Henderson Broadcasting Corp. v. Houston Sports Ass’n*, a case involving an antitrust claim against MLB over broadcast rights that was decided ten years before *Postema*—and ten years after *Flood*—the court held that broadcasting rights were not subject to the exemption because they

1972), *rev’d on other grounds*, 512 F.2d 1264 (9th Cir. 1975) (concessionaire)).

¹⁹³ 331 F.3d 1177 (11th Cir. 2003).

¹⁹⁴ *Id.* at 1189. *But see Piazza*, 831 F. Supp. at 440 (noting that the decision to include contraction within the exemption could not be determined as a matter of law without factual inquiry into background).

¹⁹⁵ 799 F. Supp. at 1489.

¹⁹⁶ *Id.*

¹⁹⁷ *Salerno*, 429 F.2d at 1004–05; *Postema*, 799 F. Supp. at 1489 n.11 (“[B]roadcasting is not central enough to baseball to be encompassed in the baseball exemption.’ . . . [It] ‘is not a part of the sport in the way in which players, umpires, and the league structure and the reserve system are.’”) (quoting *Henderson Broad. Corp.*, 541 F. Supp. at 265, 269).

¹⁹⁸ *Postema*, 799 F. Supp. at 1489 (quoting *Flood*, 407 U.S. at 282).

¹⁹⁹ *Id.*

are “not central enough to baseball . . . in the way in which players, *umpires*, the league structure and the reserve system are.”²⁰⁰ Thus, *Henderson* contradicts the rationale offered in *Postema*, by suggesting that, even after *Flood*, agreements with umpires are a central aspect of the game covered by the exemption.

The *Postema* and *Henderson* decisions are very much illustrative of the law in this area. Both decisions construe *Flood* as limiting the scope of the exemption, yet ultimately disagree as to what should be included within it. Indeed, beyond the issue of the reserve clause and matters of league structure, there is little consensus among federal courts as to what constitutes exempt activity.

Little has changed in this regard even with the 1998 passage of the Curt Flood Act.²⁰¹ The Act expressly eliminated the exemption for issues “directly relating to or affecting employment of major league baseball players to play baseball at the major league level,”²⁰² but neglected to mention what is still subject to the exemption. The fact that Congress saw fit to instruct courts not to “rely on the enactment”²⁰³ to grant standing to sue MLB on other antitrust grounds does suggest that the exemption encompasses other forms of concerted action. As the cases illustrate, what these forms are remains a matter of judicial interpretation.

3. Application to the Present Case

In the present case, MLB could present a strong argument that the ability to set rules and regulations for its players—here, drug testing policies and procedures—would fall within the scope of the unanimously accepted league structure exemption. This is because, as the argument would go, uniform decision-making authority for player issues comprises a “unique characteristic[] and need[]” of professional baseball.²⁰⁴

Plaintiffs’ best opportunity for preserving the claim, then, would be to counter by characterizing the concerted activity as narrowly as possible in an effort to steer it away from being simply a matter of

²⁰⁰ *Henderson Broad. Corp.*, 541 F. Supp. at 265, 269 (emphasis added).

²⁰¹ 15 U.S.C. § 26b (2006).

²⁰² § 26b(a). It is worth noting that the Act made clear that it does not provide Minor Leaguers with standing to sue MLB on the same grounds. § 26b(c).

²⁰³ § 26b(b) (“No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements . . .”).

²⁰⁴ *Postema*, 799 F. Supp. at 1489 (quoting *Flood*, 407 U.S. at 282).

“league structure,” and instead, an issue the court could more freely determine is beyond the reach of the exemption. Thus, by arguing that MLB’s action was “the conscious allowance of illicit drug use,” rather than simply the “establishment of lax rules governing player conduct,” plaintiffs could persuade the court that either as a matter of law, i.e., that this conduct is not central to baseball’s unique characteristics and needs, or as a matter of public policy, i.e., that MLB should not be allowed to circumvent federal and state drug laws under the guise of its exemption, that the court should not find this activity exempt from antitrust scrutiny.

Obviously, if the court accepted MLB’s argument, the claim would fail as a matter of law. If the court accepted plaintiffs’ argument, there would be little else in the way of establishing a successful claim (assuming the other issues have been established). The Nonstatutory Labor Exemption,²⁰⁵ thought to preclude professional athletes from pursuing antitrust actions against their respective leagues regardless of the Curt Flood Act’s auspicious language,²⁰⁶ would not be applicable here. This is because Minor League players, with but some exceptions,²⁰⁷ are not represented by the MLBPA,²⁰⁸ and therefore, any agreements bargained for between MLB and the MLBPA do not extend to Minor Leaguers.²⁰⁹ Thus, MLB would find no safe harbor under this exemption.

Furthermore, regarding the likely affirmative defense that any such claim would be time-barred,²¹⁰ there is clear precedent in antitrust jurisprudence that a court may toll the statute of

²⁰⁵ *Brown*, 518 U.S. at 249–50 (discussing the Nonstatutory Labor Exemption with respect to sports leagues).

²⁰⁶ See Nathanson, *supra* note 168, at 6–7.

²⁰⁷ See Verducci, *supra* note 8 (noting that Minor Leaguers on a Major League team’s active forty-man roster are theoretically Major Leaguers, and are thus subject to the CBA). Therefore, it is important to note that any Minor League player who was on a forty-man roster would be precluded from participating in this lawsuit. This could cause a problem for some would-be plaintiffs, as there is likely a high correlation between Minor Leaguers who would be able to demonstrate that they would have made it to the professional level, and Minor Leaguers who were prominent enough to have been designated a spot on the active forty-man roster.

²⁰⁸ See MITCHELL REPORT, *supra* note 17, at 88 (noting this point). *But see* Verducci, *supra* note 8 (noting that Minor Leaguers on a Major League team’s active forty-man roster are theoretically Major Leaguers, and are thus subject to the CBA).

²⁰⁹ *Brown*, 518 U.S. at 259 (Stevens, J., dissenting).

²¹⁰ See 15 U.S.C. § 15b (“Any action to enforce any cause of action under section 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued.”). While this comment has focused on federal law, a cause of action under state law may provide a lengthier statute of limitations. See, e.g., N.Y. C.P.L.R. § 213(1) (McKinney 2003) (providing a six year statute of limitations).

limitations until damages become “ascertainable.”²¹¹ In the present case, because the full extent of MLB’s concerted activity has arguably first been verified with the 2007 release of the Mitchell Report, it is likely that a court may find this to be the date of accrual for the cause of action. Of course, if the court were to conclude that the action is in fact time-barred, this claim would fail to even make it out of the box.

V. CONCLUSION

This comment has sought to provide a roadmap for potential litigation Minor Leaguers may pursue against MLB. Though clearly written from the perspective of the plaintiffs, it has been my attempt to highlight the strengths and weaknesses present on both sides, critically assessing the issues and viability of the suit at each stage. Taken as a whole, it is easy to demonstrate MLB’s culpability during the steroid era, but proving the elements of the *prima facie* claim proposed remains a much more difficult proposition.

To briefly reiterate, plaintiffs need several things to go their way for the claim to be viable. These include: (1) establishing the factual predicate for their claim—that steroids improve performance and MLB permitted this use to continue unabated; (2) establishing that MLB and the individual ball clubs are not a single entity incapable of conspiring; (3) overcoming a bevy of causal issues regarding potential loss of opportunity and steroid use (admittedly the Achilles’ heel of the claim); (4) defining the relevant market in a way that the restraint imposed constitutes an unreasonable restraint; (5) characterizing the concerted activity as one that does not fall within the antitrust exemption; (6) finding Minor Leaguers who satisfy the causal issues but were not on a forty-man roster, which would otherwise allow for the invocation of the Non-statutory Labor Exemption by MLB; and finally, (7) convincing the court that the statute of limitations for a section 1 claim should be tolled.

As one might surmise, this is no small task for the plaintiffs. And remember, too, that even if the statute of limitations is tolled, it

²¹¹ ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 858 (6th ed. 2007); *see also* *New York v. Hendrickson Bros., Inc.*, 840 F.2d 1065, 1083 (2d Cir. 1988) (noting that a plaintiff may toll the statute of limitations under the equitable doctrine of “fraudulent concealment” if they prove: “(1) that the defendant concealed from him the existence of his cause of action, (2) that he remained in ignorance of that cause of action until some point within four years of the commencement of his action, and (3) that his continuing ignorance was not attributable to lack of diligence on his part”).

2010]

Calling Their Shots

573

won't be for long. Additionally, given the somewhat strong possibility that this claim could fail, it would be difficult to find plaintiffs' counsel willing to accept this case. The prospect of a handsome settlement coupled with the publicity it would generate, however, would likely attract competent counsel.

Thus, for all its obstacles and nuances, this lawsuit could very well be viable. Given the right ingredients, namely, a choice class of plaintiffs, expert witnesses, and a lenient—or better yet—activist judge, this hypothetical claim could turn into a real legal victory for Minor Leaguers denied their shot because of steroids.