

AVOIDING CONTRACTUAL LIABILITY TO BASEBALL
PLAYERS WHO HAVE USED PERFORMANCE ENHANCING
DRUGS: CAN WE KNOCK IT OUT OF THE PARK?

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INTRODUCTION

In 2007, Alex Rodriguez signed a \$275 million, ten-year contract with the New York Yankees, setting the record at the time for largest sports contract in history.¹ Since then, he has faced many allegations of performance enhancing drug (“PED”) use, one of which he confirmed through a public admission.² Regardless of these allegations and admissions, Rodriguez continues to reap the benefits of his record deal despite the fact that his performance has been rapidly declining in recent years.³ When Rodriguez initially received his massive payday, he was one of best players in the game, having previously won three American League Most Valuable Player awards.⁴ By most accounts, his PED usage contributed greatly to the many successes early on in his career.

Rodriguez is not alone in his transgressions. Baseball’s drug problem came into the light in the now infamous Mitchell Report,⁵

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¹ Associated Press, *Rodriguez Finalizes \$275M Deal with Yankees*, ESPN (Dec. 13, 2007, 2:21 PM), <http://sports.espn.go.com/mlb/news/story?id=3153171>.

² In his 2009 confession, Rodriguez admitted to using PEDs from 2001 to 2003 while playing for the Texas Rangers. Tyler Kepner, *Rodriguez, with an Apology, Says he Used Banned Drugs*, N.Y. TIMES, Feb. 10, 2009, at A1.

³ David Waldstein, *Between All and Nothing Lies Yanks’ New Reality: Trading Rodriguez an Unlikely Option*, N.Y. TIMES, Oct. 21, 2012, at SP5 (“Rodriguez . . . is coming off his worst season. He hit .272 with only 18 homers and 57 runs batted in during an injury-shortened year.”).

⁴ Associated Press, *A-Rod Wins Third MVP but Denied Unanimous Selection*, ESPN (Nov. 20, 2007, 7:28 AM), <http://sports.espn.go.com/mlb/news/story?id=3119020>. Rodriguez won his first MVP award with the Texas Rangers in 2003, his second with the Yankees in 2005, and his third with the Yankees in 2007. *Id.*

⁵ GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT

in which ex-senator and prosecutor George Mitchell was asked by Baseball Commissioner Bud Selig to examine the history and prevalence of PED use in the league.⁶ This independent report drew back the curtain on the drug culture in Major League Baseball (“MLB”), and quantified steroid use in baseball as widespread.⁷

Baseball is far from the only professional sport that has had to deal with the PED issue.⁸ Seven-time Tour de France winner Lance Armstrong now faces a lifetime-ban from cycling handed down by the United States Anti-Doping Agency, and has been stripped of all seven of his victories.⁹ He has recently drawn the ire of no less than the United States Department of Justice, which has expressed a desire to see Armstrong prosecuted for his lies about PED usage.¹⁰ In the National Football League (“NFL”), All-Pro linebackers Shawne Merriman and Brian Cushing have both faced suspensions for PED usage.¹¹ The National Basketball Association’s (“NBA”) Rashard Lewis demonstrated that PEDs had a place in basketball as well, even though basketball is a game where brute strength is not often thought of as a required attribute.¹²

As PEDs continue to make their presence felt throughout

INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL (2007) [hereinafter *Mitchell Report*], available at <http://files.mlb.com/mitchrpt.pdf>.

⁶ *Id.* at SR-1, SR-5.

⁷ *Id.* at 310 (“The use of steroids in Major League Baseball was widespread. The response by baseball was slow to develop and was initially ineffective. For many years, citing concerns for the privacy rights of the players, the Players Association opposed mandatory random drug testing of its members for steroids and other substances. But in 2002, the effort gained momentum after the clubs and the Players Association agreed to and adopted a mandatory random drug testing program. The current program has been effective in that detectable steroid use appears to have declined. However, that does not mean that players have stopped using performance enhancing substances. Many players have shifted to human growth hormone, which is not detectable in any currently available urine test.”).

⁸ See, e.g., Joshua H. Whitman, Note, *Winning At All Costs: Using Law & Economics to Determine the Proper Role of Government in Regulating the Use of Performance-Enhancing Drugs in Professional Sports*, 2008 U. ILL. L. REV. 459, 461 (“PEDs have become ubiquitous in professional sports.”).

⁹ Juliet Macur, *Say Goodbye to 7 Yellow Jerseys*, N.Y. TIMES, Oct. 23, 2012, at B13.

¹⁰ Pete Williams, *US Department of Justice Joins Lawsuit Against Lance Armstrong*, NBCNEWS.COM (Feb. 22, 2013, 11:58 AM), http://usnews.nbcnews.com/_news/2013/02/22/17057708-us-department-of-justice-joins-lawsuit-against-lance-armstrong?lite (“The government’s legal theory in joining the lawsuit is that when Armstrong agreed to race for the U.S. Postal Service team a decade ago in the Tour de France, he defrauded the government, violating its strict ban on illegal drugs, all the while claiming he did not use them.”).

¹¹ Dave Caldwell, *Father of Texans’ Cushing Stands Fast in Son’s Defense*, N.Y. TIMES, Nov. 21, 2010, at SP2; Michael S. Schmidt, *Merriman Is Expected to Drop His Appeal*, N.Y. TIMES, Oct. 31, 2006, at D5.

¹² Michael S. Schmidt, *Lewis Suspended 10 Games by N.B.A. for Doping Violation*, N.Y. TIMES, Aug. 7, 2009, at B10.

professional sports, owners and sponsors find themselves paying out large sums of money to athletes who have used the drugs to bolster their performances at the expense of their sport's reputation.¹³ In addition, after an athlete discontinues use of performance enhancers, sharp statistical declines appear to be the norm.¹⁴ Do teams have any hope of avoiding contractual liability to these "lemon" players, or are they stuck footing the bill?

This paper seeks to identify the availability and relative strengths and weaknesses of various legal safeguards that MLB teams and sponsors of players have at their disposal for avoiding contractual liability to athletes who have been discovered to have used PEDs. Part I will seek to answer the question of whether MLB is actually attempting to remove steroids from its game or is simply "going through the motions" to appease disgruntled onlookers. Part II will discuss a longstanding bastion of contract law, the morals clause, and its ineffectiveness under the governance of MLB's collective bargaining agreement ("CBA"). Part III will discuss the assertion of fraudulent misrepresentation to challenge the validity of the formation of MLB employment contracts. Part IV will discuss why prompt rescission of the employment contracts upon discovery of previously undetected PED usage is critical to avoid a later argument of ratification as a counter-defense to fraudulent misrepresentation. Part V will conclude why MLB teams should shift away from current drug policy protections and start voiding contracts on the ground of misrepresentation if they are truly desirous of cultivating a PED-free game environment.

I. CIRCLING THE WAGONS: DENYING THAT WE HAVE A PROBLEM

In a discussion of PED-related contract avoidance, one question that is naturally raised is whether MLB actually cares about removing PEDs from the game. The current drug policy and consistent failures to bring meaningful punishment to those who operate outside the rules strongly suggests that it does not. Since steroid-using players have faced little civil or criminal liability for

¹³ See *supra* text accompanying notes 1–13.

¹⁴ E.g., Mitchell Grossman et al., *Steroids and Major League Baseball*, U.C. BERKELEY HAAS SCH. OF BUS., 4–5, <http://faculty.haas.berkeley.edu/rjmorgan/mba211/steroids%20and%20major%20league%20baseball.pdf> (last visited Jan. 4, 2014) [hereinafter *Steroids and MLB*] (showing a statistical decline in players' on base percentage, the "single metric of offensive prowess," from the last few years of the Steroid Era (2001–2004) to the Post-Steroid Era beginning 2005).

their transgressions,¹⁵ the decision on the part of many players as to whether or not to take PEDs can be said to strongly center on an economic determination, regardless of whether this determination is a conscientious one.¹⁶ So long as economic incentives continue to motivate players to use PEDs and attempt to evade detection by MLB's drug enforcement regime, players will continue to do so.¹⁷

While it is true that the current drug enforcement plan slightly disincentivizes PED use via suspension, were MLB to take steps to further impress the negative economic impact of a positive drug test on players, PEDs would likely play a less pervasive role in the sport.¹⁸ The economic benefit of increasing statistical production is just too substantial to ignore in many cases. This is especially true for players on the cusp of playing in the major leagues, where making the big leagues was worth at a bare minimum \$480,000 a year and the average annual salary was \$3.2 million in 2012.¹⁹

Imagine if, instead, the teams rescinded employment contracts in lieu of game suspensions for PED usage. If a player knew that he could be forfeiting otherwise guaranteed millions simply by using PEDs, then the problem of PEDs would likely vanish very quickly.

It is strange that the MLB Players Association does not take a more active role in lobbying for more intense PED punishments. While the increased punishment of PED usage is on its face a forfeiture of rights for the players' union,²⁰ when you consider the goal of protecting the entirety of the player base, stricter penalties have an upside. Consider the aforementioned case of the minor leaguer who is desperate to enter the major league. Ensuring that such an individual is never deprived of his chance in the majors due to his unwillingness to use potentially harmful PEDs would be an unquestionably positive development. Some have asserted that failing to do more to protect these minor leaguers may in fact be a

¹⁵ Richard D. Collins, *Of Ballparks and Jail Yards: Pumping Up the War on Steroids*, 30 CHAMPION 22, 23 (2006) ("Historically, even when elite-level athletes are alleged to have illegally procured and used anabolic steroids, their punishments are limited to athletic suspensions; the criminal justice system is not involved.").

¹⁶ See *Steroids and MLB*, *supra* note 14, at 10–11.

¹⁷ See *id.* at 11 (comparing the additional \$2.08 million in annual salary a player may gain by using PEDs to the \$2.5 million loss a player may sustain if discovered) ("[A] player is clearly motivated to use steroids even in the face of punishment . . .").

¹⁸ See *id.* (arguing that players would avoid steroids if the economic punishment was costly enough to outweigh possible gains in annual salaries).

¹⁹ Associated Press, *Average Salary Hits Record \$3.2M*, ESPN (Dec. 7, 2012, 6:47 PM), http://espn.go.com/mlb/story/_id/8724285/mlb-average-salary-38-percent-32-million.

²⁰ See Allan H. "Bud" Selig & Robert D. Manfred, Jr., *The Regulation of Nutritional Supplements in Professional Sports*, 15 STAN. L. & POL'Y REV. 35, 48 (2004).

violation of MLB's anti-trust exemption.²¹ Action on behalf of baseball to get out in front of the problem before it turns into a bigger litigious mess may serve the future health of the sport.

Despite these factors, there are also potential reasons why MLB may continue to favor a softer stance on PED punishments. Following a league strike in 1994, attendance figures were dismally low.²² MLB found itself on unsure footing both financially and in terms of its stature in American culture.²³ Then baseballs began flying out of the park at an unprecedented rate, exemplified perhaps most clearly by Sammy Sosa's and Mark McGwire's concurrent pursuits and eventual overtaking of Roger Maris's single season home run record in 1998.²⁴ Attendance began to quickly recover, and the entire nation found itself drawn back to "America's pastime."²⁵ The MLB marketed the home run chase to the fullest extent possible, taking advantage of the fascination with the long ball.²⁶ Both Sosa and McGwire were later tied to PEDs.²⁷

The ability of exponentially greater offensive production to draw fans to the game was made clear though, and it may be for this reason that MLB is hesitant to completely remove PEDs from its sport.²⁸ The current PED policy can be thought of as lip service, designed to comply with a threat from no less than the U.S. Congress.²⁹ While it acts as a check on PED usage, a more hard-

²¹ See Jonathan D. Gillerman, Comment, *Calling Their Shots: Miffed Minor Leaguers, the Steroid Scandal, and Examining the Use of Section 1 of the Sherman Act to Hold MLB Accountable*, 73 ALB. L. REV. 541, 571 (2010).

²² Associated Press, *1994 Strike Was a Low Point for Baseball*, ESPN (Aug. 10, 2004, 8:49 PM), <http://sports.espn.go.com/mlb/news/story?id=1856626> ("Attendance plunged 20 percent the following year, from a record average of 31,612 in 1994 to 25,260.")

²³ See *id.*

²⁴ *McGwire and Sosa Pass Maris*, INFOPLEASE, <http://www.infoplease.com/ipsa/A0766480.html> (last visited Jan. 4, 2014).

²⁵ Will Brooks, *Sammy Sosa, Mark McGwire Changed the Game for the Better*, BLEACHER REPORT (Nov. 12, 2008), <http://bleacherreport.com/articles/81049-sammy-sosa-mark-mcgwire-changed-the-game-for-the-better>.

²⁶ Associated Press, *Hooked on Homers: Ads from MasterCard, Others Linked to Home Run Chase*, CNN/SPORTS ILLUSTRATED (Sept. 4, 1998, 6:44 PM), http://sportsillustrated.cnn.com/baseball/mlb/news/1998/09/04/mcgwire_ads/ (listing MasterCard, Pepsi-Cola Co., and Anheuser-Busch Inc. as major companies that exploited the record chase to sell their products).

²⁷ Greg Bishop, *Souvenirs and Scars from '98 Home Run Chase*, N.Y. TIMES, July 5, 2009, at SP2.

²⁸ See *Steroids and MLB*, *supra* note 14, at 7–8 ("[Franchise values] increased dramatically during the Steroids Era, with the average MLB franchise value rising from \$140 million in 1994 to \$332 million in 2004.")

²⁹ See Barry M. Bloom, *Players, Execs Testify at Hearing*, MLB (Mar. 18, 2005, 1:12 AM), http://mlb.mlb.com/news/article.jsp?ymd=20050317&content_id=969756&vkey=news_mlb&fe xt=.jsp&c_id=mlb (reporting that House Representative Henry Waxman (D-California) forced baseball officials to adopt stricter measures or face governmental intervention).

line stance would likely produce the results that the MLB claims to be desirous of.³⁰

II. THE MORALS CLAUSE

A. Generally

Morals clauses have their roots in 1920s Hollywood, where film executives sought to use them to control the conduct of actors in the burgeoning film scene.³¹ From these roots, the morals clause proliferated throughout various forms of employment contracts, gaining widespread acceptance in the sports world in the 2000s.³² The four major sports leagues (MLB, NBA, National Hockey League, and NFL) now all have morals clauses built into their league constitutions, which were established via CBAs.³³

In addition, morals clauses are often contained in individual player contracts.³⁴ Morals clauses can allow for suspensions, fines, and even the termination of a contract if the player acts in contravention of accepted standards of behavior and fair play.³⁵

B. Sponsors Avoidance of Contractual Liability via Morals Clause

Beyond their presence in team-to-player contracts, athletes often find themselves subjected to morals clauses in their endorsement contracts.³⁶ The dramatic increase of public visibility experienced by athletes in the modern world has increasingly led companies to look towards these morals clauses to protect their brands.³⁷

³⁰ Mike DiGiovanna, *Selig Says He Wants 'Zero-Tolerance' Drug Policy*, L.A. TIMES, Mar. 6, 2004, at D10.

³¹ Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 353–54 (2009).

³² *Id.* at 356–57.

³³ *Id.*; see Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS OF SPORT 5, 22–23 (2011).

³⁴ Epstein, *supra* note 33, at 23.

³⁵ See *id.*; Noah B. Kessler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005).

³⁶ See Pinguelo & Cedrone, *supra* note 31, at 356 (noting that by 2003 morals clauses were contained in at least seventy-five percent of athlete endorsement deals).

³⁷ Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 6 (2005); Brian R. Socolow, *What Every Player Should Know About Morals Clauses*, LOEB & LOEB LLP, <http://www.loeb.com/files/Publication/0953bcf8-0747-44dc-ab71-70e670d6285d/Presentation/PublicationAttachment/70f8fe3f-a00e-4882-83da-0096ecbab624/Brian%20Socolow,%20Moves%20Magazine.pdf> (last visited Jan. 4, 2014) (“[P]layers and sports professionals are under increased scrutiny by tabloids and the news

Certainly, an athlete can expect to have some leeway in the negotiation of his contract, but as of 2003, morals clauses were appearing in at least 75 percent of all athlete endorsement deals.³⁸ While morals clauses vary in their language from contract to contract, there is a reasonable amount of case law and scholarship defining when a morals clause in a contract is likely to be triggered.³⁹ Morals clauses can be loosely classified as narrowly or broadly drafted.⁴⁰

The specificity with which the contract provision defines the circumstances that lead to a breach of the clause is quite often determinative of what activities will be identified as triggering conduct.⁴¹ For instance, a morals clause that triggers upon actions that “offend . . . public decency [and] morality”⁴² is more likely to bring about disciplinary action than a clause that specifically limits discipline to “illegal activities.”⁴³

Consider, for instance, former NBA player Chris Webber. Webber held an endorsement deal with athletic wear manufacturer Fila and was on a trip promoting the brand when he was caught with eleven grams of marijuana in a Puerto Rican airport.⁴⁴ Fila attempted to invoke the morals clause in Webber’s contract and avoid payment of the monies due to him under the remainder of his contract.⁴⁵ However, language in Webber’s contract only allowed invocation of the morals clause in situations where he was convicted of a crime.⁴⁶ Since Webber only paid a fine, and was not formally convicted, an arbitrator held that the morals clause had not been violated, and that Fila’s attempts to avoid contractual liability were unjustified.⁴⁷

On the other end of the spectrum are broadly worded morals clauses that allow revocation of endorsement deals even in the absence of illegal activity.⁴⁸ NASCAR driver Mike Borkowski had in

media. Small transgressions that might have gone unnoticed by the general public a few years ago are now splashed across Internet pages in a matter of hours.”).

³⁸ Pinguelo & Cedrone, *supra* note 31, at 356.

³⁹ *See id.* at 374–75 (citing various cases and scholarly works dealing with the triggering of morals clauses).

⁴⁰ *Id.* at 374.

⁴¹ *Id.*

⁴² Twentieth Century-Fox Film Corp. v. Lardner, 216 F.2d 844, 850 (9th Cir. 1954).

⁴³ *See* Pinguelo & Cedrone, *supra* note 31, at 374.

⁴⁴ ‘Prematurely Terminated’: Kings’ Webber Wins Ruling Against Fila, CNN/SPORTS ILLUSTRATED (July 8, 1999, 4:07 PM), http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber_fila_ap/.

⁴⁵ Pinguelo & Cedrone, *supra* note 31, at 377.

⁴⁶ *Id.* at 377–78.

⁴⁷ *Id.*

⁴⁸ *See* Auerbach, *supra* note 37, at 12 (discussing revocation of endorsement contracts on

his endorsement deal with AT&T a morals clause that allowed termination if Borkowski committed, “any act or bec[ame] involved in any situation or occurrence tending to bring AT&T into public disrepute, contempt, scandal or ridicule . . . or reflecting unfavorably on AT&T, or its name, reputation, public image or products.”⁴⁹ AT&T invoked this morals clause to terminate Borkowski’s endorsement deal after he clipped the cars of two other drivers in the midst of a NASCAR race—a wholly ordinary occurrence.⁵⁰ The broad nature of this clause enabled its invocation in these circumstances, and serves to show how important the specific language of a morals clause is in determining its applicability.⁵¹

Having established the parameters and applicability of morals clauses, how does this reflect on an endorsee’s ability to avoid contractual liability in the event of PED usage? Obviously, the effectiveness of a morals clause in this situation will depend on its terms. While an endorsee company that has employed broad language in the morals clause in question is unlikely to encounter any pushback when it attempts to invoke the clause after an acknowledgement or unveiling of PED use, a morals clause such as Chris Webber’s that relies on conviction is not going to trigger barring criminal prosecution.

Judging by the mass exodus of sponsors Lance Armstrong experienced in the wake of his ban from cycling via the United States Anti-Doping Agency, it is probable that morals clauses in his contracts were broadly worded.⁵² The best thing an endorsee company can do to avoid contractual liability to an athlete who may be using PEDs is to be aware of this contingency in drafting the provisions of his or her contract, and use a morals clause that is

two separate occasions; one from making “racially charged statements” and another from causing a crash in a NASCAR race).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *See id.* at 17.

⁵² *Big Sponsors Exercise “Morals Clause” Rights to Dump Lance Armstrong*, PERKINS L. (Oct. 21, 2012), http://www.ericperkinslaw.com/index.php/whats-new/post/big_sponsors_exercise_morals_clause_rights_to_dump_lance_armstrong/; Brian Socolow, *Armstrong’s Endorsement Contracts and the “Morals Clause”*, LOEB & LOEB LLP, http://www.loeb.com/files/Publication/224938bf-3a94-4c96-a35d-2cbf7c4c23a5/Presentation/PublicationAttachment/b21a81ed-22ae-4879-a86f-31db8766fd08/Socolow_Brian_SportsLitigationAlert_Nov2012.pdf (last visited Jan. 4, 2014) (“However, based on reports that several of his long-time endorsement relationships have been terminated, it seems likely that there was some language in the morals clauses of his endorsement contracts that allowed these companies to terminate the agreements.”).

either broadly worded or references PED usage explicitly.⁵³

C. Teams Avoidance of Contractual Liability via Morals Clause

The morals clauses contained in the default team-to-player contracts of the MLB vary in language.⁵⁴ Despite this variety, they all generally allow dismissal for violations of fair play and sportsmanship, or any conduct that the team might find detrimental to its values.⁵⁵ In baseball, all employment contracts must comply with the MLB CBA.⁵⁶ The relevant part of the MLB CBA that speaks to an athlete's conduct states:

The Club may terminate this contract upon written notice to the Player (but only after requesting and obtaining waivers of this contract from all other Major League Clubs) if the Player shall at any time:

- (1) fail, refuse or neglect *to conform his personal conduct to the standards of good citizenship and good sportsmanship* or to keep himself in first-class physical condition or to obey the Club's training rules; or
- (2) fail, in the opinion of the Club's management, to exhibit *sufficient skill or competitive ability* to qualify or continue as a member of the Club's team; or
- (3) fail, refuse or neglect to render his services hereunder or in any other manner materially breach this contract.⁵⁷

On the basis of this morals clause, it seems like there would be a strong case for baseball teams to avoid contractual liability when an athlete is caught using PEDs that are often illegal,⁵⁸ and are clearly

⁵³ See generally Socolow, *supra* note 37 (“[A] player will want a short list of actions that will trigger the clause, such as a conviction on criminal charges or violation of league rules. A company paying for the endorsement services will want a broadly-worded clause that lets the company determine, in its sole discretion, if the player's actions warrant termination or a fine.”).

⁵⁴ See MAJOR LEAGUE BASEBALL PLAYERS ASS'N, 2012-2016 BASIC AGREEMENT 279 (2011), available at http://mlb.mlb.com/pa/pdf/cba_english.pdf [hereinafter MLB CBA] (“The Player . . . pledges himself to the American public and to the Club to conform to high standards of personal conduct, fair play and good sportsmanship.”).

⁵⁵ See Auerbach, *supra* note 37, at 3.

⁵⁶ See MLB CBA, *supra* note 54, at 1–2.

⁵⁷ *Id.* at 284 (emphasis added).

⁵⁸ See, e.g., Anabolic Steroids Control Act of 1990, Pub. L. No. 101–647, sec. 1902, §§ 102, 202, 104 Stat. 4851, 4851–52 (codified as amended at 21 U.S.C. §§ 802, 812) (adding anabolic steroids to schedule III classification of outlawed drugs under the Controlled Substances Act and defining “anabolic steroid”); see also Anabolic Steroid Control Act of 2004, Pub. L. No. 108–358, sec. 2, § 102, 118 Stat. 1661, 1661–63 (codified as amended at 21 U.S.C. § 802) (clarifying and expanding the list of anabolic steroids).

outside the bounds of fair play and morality. This is not the case, however, as a problem is often encountered when the triggering act falls within the scope of the drug policy. Consider the MLB's Joint Drug Prevention and Treatment Program.⁵⁹ Section 7(M) states:

All authority to discipline Players for violations of the Program shall repose with the Commissioner's Office. No Club may take any disciplinary or adverse action against a Player (including, but not limited to, a fine, suspension, or any adverse action pursuant to a Uniform Player's Contract) because of a Player's violation of the Program.⁶⁰

By funneling disciplinary actions to the Commissioner, the teams lack individual authority to deal with players who are in violation of the drug policy. Furthermore, section 7(A) limits the punishments for these violations. The sequence of punishments is listed below:

A Player who tests positive for a Performance Enhancing Substance, or otherwise violates the Program through the use or possession of a Performance Enhancing Substance, will be subject to the discipline set forth below.

1. First violation: 50-game suspension;
2. Second violation: 100-game suspension; and
3. Third violation: Permanent suspension from Major League and Minor League Baseball; provided, however, that a Player so suspended may apply, no earlier than one year following the imposition of the suspension, to the Commissioner for discretionary reinstatement after a minimum period of two (2) years.⁶¹

This limiting provision nullifies a team's ability to take action via a morals clause against a player who is found to be in contravention of MLB's drug policy.⁶² Because of this limitation, the morals clause is little more than "window dressing" as it applies to a PED-using player.⁶³ Worse yet, "[i]ndividual contracts cannot reduce the protections for players that are negotiated collectively,"⁶⁴ meaning that even if a team wished to take a hard-line stance against users

⁵⁹ MAJOR LEAGUE BASEBALL PLAYERS ASS'N, MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM (2011), *available at* <http://mlb.mlb.com/pa/pdf/jda.pdf> [hereinafter DRUG AND TREATMENT PROGRAM].

⁶⁰ *Id.* at 28.

⁶¹ *Id.* at 22.

⁶² *See id.* at 28.

⁶³ Sean Gregory, *Can the Dodgers Get a Refund on Manny Ramirez?*, TIME (May 08, 2009), <http://www.time.com/time/nation/article/0,8599,1896882,00.html>.

⁶⁴ *Id.*

of PEDs, the CBA prevents it from doing so.⁶⁵

Two illustrations of this limitation have been demonstrated in the cases of Jason Giambi, formerly of the New York Yankees, and Gary Matthews, Jr., formerly of the Los Angeles Angels. Giambi made an ambiguous confession to PED usage three years after signing with the Yankees.⁶⁶ He started using human growth hormones (“HGHs”) in 2003 and used steroids “for at least three seasons.”⁶⁷ Giambi faced suspension, but the Commissioner pardoned him in exchange for his cooperation with the Mitchell Report investigation and several charitable donations.⁶⁸ The language of section 7(M) preempted the team’s ability to deal with the player directly and entrusted all powers of discipline to the Commissioner.⁶⁹

Similarly, Matthews signed a \$50 million, five-year contract with the Angels in 2006.⁷⁰ Subsequently, he was linked to a Florida pharmacy that allegedly distributed steroids and HGHs to athletes and celebrities.⁷¹ Team owner Arte Moreno was enraged that Matthews did not publicly respond to the drug rumors.⁷² Again, due to the language of section 7(M), all matters relating to drug use were referred to the Commissioner’s office. Absent an admission or other concrete evidence, the Commissioner could not proceed with disciplinary actions.⁷³ Essentially, Matthews survived the scandal without incurring any penalties.⁷⁴ Without any other legal

⁶⁵ MLB CBA, *supra* note 54, at 2 (“Should the provisions of any Contract between any individual Player and any of the Clubs be inconsistent with the terms of this Agreement, the provisions of this Agreement shall govern.”).

⁶⁶ Teri Thompson, *Giambi Admits He Took Steroids*, N.Y. DAILY NEWS, May 18, 2007, at 108 (“I was wrong for doing that stuff . . . We made a mistake.” (internal quotation marks omitted)). Regarding steroids, Giambi replied, “Maybe one day I’ll talk about it, but not now.” *Id.* (internal quotation marks omitted). However, he has told conflicting stories regarding steroid use. Associated Press, *Giambi Told Grand Jury He Used Steroids*, FOX NEWS (Dec. 2, 2004), <http://www.foxnews.com/story/2004/12/02/giambi-told-grand-jury-used-steroids/>.

⁶⁷ *Giambi Told Grand Jury He Used Steroids*, *supra* note 66. Giambi also told a grand jury that he used steroids from 2001 to 2003. *Id.*

⁶⁸ Jack Curry, *After Cooperating, Giambi Earns Selig’s Praise, Not his Punishment*, N.Y. TIMES, Aug. 17, 2007, at D3; T.J. Quinn, *Giambi & Mitchell Meet at Last*, N.Y. DAILY NEWS, Jul. 14, 2007, at 45.

⁶⁹ DRUG AND TREATMENT PROGRAM, *supra* note 59, at 28.

⁷⁰ Associated Press, *Matthews, Angels Agree to 5-year, \$50 Million Deal*, ESPN (Nov. 23, 2006, 10:44 AM), <http://sports.espn.go.com/mlb/news/story?id=2672448>.

⁷¹ Bill Shaikin & Mike DiGiovanna, *Pharmacy Raid Linked to Athletes: Owners Are Arrested on Suspicion of Distributing Illegal Steroids and Other Substances. Angels’ Matthews is Said to be Among Customers*, L.A. TIMES, Feb. 28, 2007, at D3.

⁷² Bill Shaikin, *Matthews Deal Leaves Angels’ Outfield Thin*, L.A. TIMES, Jan. 23, 2010, at C3.

⁷³ See Bill Shaikin, *It’s Time For Another Impression*, L.A. TIMES, Apr. 3, 2007, at D4 (“[P]rosecutors say they won’t charge Matthews, because of the remote possibility Matthews might have to testify against a supplier and explain those shipping documents.”).

⁷⁴ Bill Shaikin, *Angels’ Matthews Won’t Be Suspended: Commissioner’s Office Says There is*

recourse, the Angels traded Matthews' to the Mets but had to pay all but \$2 million left on his contract.⁷⁵

It seems clear that the MLB, via language of the CBA, has expressed a clear desire to avoid claims based on morals clauses as they relate to the usage of PEDs.⁷⁶ While the league has often publicly stated a desire to eliminate the usage of PEDs in the sport,⁷⁷ it has not been aggressive in punishing players who are linked to the banned substances. Even when a team expresses a desire to disassociate from a player in the midst of PED violations, it may not do so without going through the administration of the Commissioner's office.⁷⁸ It seems the easiest way to address the problem head-on would be to subject athletes using the banned substances to severe consequences such as contract forfeiture.

III. FRAUDULENT MISREPRESENTATION: HOME RUN OR STRIKE OUT?

Although the MLB CBA seems to be constructed with the protection of player contracts in mind at the expense of the teams, there may be other legal stances that a member team could assert in seeking to avoid contractual liability. While the MLB drug policy may prevent adverse contract action for a violation of its terms, one could argue that a challenge to the contract based on its improper formation is not included in this type of banned action.⁷⁹ In order to establish improper formation, the claim of fraudulent misrepresentation may be an aggrieved team's best hope of wriggling out of the grasp of a PED user's contract.⁸⁰

Insufficient Evidence on HGH. Guillen, Gibbons Get 15-Day Penalties, L.A. TIMES, Dec. 7, 2007, at D6.

⁷⁵ Shaikin, *supra* note 73.

⁷⁶ See *supra* text accompanying note 60.

⁷⁷ See generally Bob Baum, *MLB to Expand Testing for HGH*, NORTHWEST HERALD (Ill.), Jan. 11, 2013, at C4 (continuing the trend of PED detection through increased blood testing of human growth hormones). Commissioner Selig remarked, "This is remarkable when you think of where we were 10, 12, 15 years ago and where we are today . . . [n]obody could have dreamed it." *Id.* (internal quotation marks omitted).

⁷⁸ DRUG AND TREATMENT PROGRAM, *supra* note 59, at 28.

⁷⁹ The intent and purpose of the MLB CBA "is to set forth their agreement on certain terms and conditions of employment of all Major League Baseball Players for the duration of this Agreement." MLB CBA, *supra* note 54, at 1. However, if the employment contract is voidable due to a valid contract defense and the aggrieved party chooses to void the contract, then provisions of the agreement no longer have any effect. SAMUEL WILLISTON & RICHARD A. LORD, 1 A TREATISE ON THE LAW OF CONTRACTS § 1:20 (4th ed. 2007).

⁸⁰ See discussion *infra* Part III.B.

A. General Principles of Voidable Contract

“A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.”⁸¹ A party holding a voidable contract would be able to assess the worth of the continued performance of that contract and decide whether it makes economic sense to hold the other party to his end of the bargain.⁸² If the contract was thought to be worth its cost, a party could simply take no action against the other signor and the contract would be ratified.⁸³ In the case of a “lemon” contract where the performance of the contract no longer justifies the cost, or in the case where a party simply wishes to take a moral stance and disassociate from the other party on account of impropriety, the aggrieved party could seek to void the contract and be relieved from the duty to pay the payee.

There are a variety of circumstances that may serve to create this voidable contract.⁸⁴ Contracts have been found voidable in cases of mistake, duress, and most importantly, for the matter at hand, misrepresentation.⁸⁵

B. Misrepresentation

The situations in which a misrepresentation serves to make a contract voidable are clearly established by the law as occurring “[i]f a party’s manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying.”⁸⁶ This definition of a misrepresentation from the Restatement (Second) of Contracts (“Restatement”) has been further refined to the four element test commonly recognized in case law today.⁸⁷ This test will find a

⁸¹ RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981).

⁸² *See id.* cmt. c.

⁸³ WILLISTON & LORD, *supra* note 79, at § 1:20.

⁸⁴ *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. b.

⁸⁵ *Id.*; *Id.* reporter’s note, cmt. b.

⁸⁶ *Id.* § 164(1).

⁸⁷ *See, e.g.,* *Greene v. Gibraltar Mortg. Inv. Corp.*, 488 F. Supp. 177, 179 (D.D.C. 1980) (“A contract is void for fraud or misrepresentation where a party makes assertions not in accord with the facts regarding essential terms of the proposed contract, reasonably inducing apparent assent by one who neither knew or had reasonable opportunity to know what those essential terms were. Omission or concealment of material facts can constitute a misrepresentation, just as a positive, direction assertion can. Where a party’s assertion not in

misrepresentation making a contract voidable where there is (1) a fraudulent misrepresentation of a material fact, (2) the plaintiff's reliance on the material misrepresentation, (3) the plaintiff's right or justification in relying on the misrepresentation, and (4) reliance resulting in damages.⁸⁸

The question at hand is whether the failure of a baseball player to admit to usage of PEDs prior to signing a contract meets these four elements and grants the MLB team holding the contract the power to render it void on the ground of misrepresentation. In order to assess the validity of such a claim, we must look at each element in kind.

i. Fraudulent Misrepresentation of a Material Fact

This first element of a claim for misrepresentation is essentially asking the asserting party to prove one of two separate points.⁸⁹ He must show that there was either a fraudulent representation, or put differently, an assertion made with intent to deceive, or that a false representation was made in regard to a material fact.⁹⁰ Before either of these issues can be addressed, however, it must first be shown that a representation was actually made.

a. *Proving a Representation*

Establishing the occurrence of a representation creates a difficult problem for a team attempting to assert a claim against a using player, since the default major league contract does not require a player to make any clear statements that his previous performance was achieved without the usage of PEDs.⁹¹ An assertion, however, can be found in circumstances where there is not a direct affirmative statement of the fact in question.⁹² Assertions can be implicit or explicit⁹³ and may also be found in a case of non-disclosure.⁹⁴ It has been held that “[a]ction intended or known to be likely to prevent another from learning a fact is equivalent to an

accord with the facts induces the apparent assent of another party, there is no meeting of the minds and hence no contract. This is so even where the misrepresentation inducing assent is not deliberate.” (citations omitted).

⁸⁸ RESTATEMENT (SECOND) OF CONTRACTS § 164(1).

⁸⁹ *Id.* cmt. a.

⁹⁰ *Id.* (“First, the misrepresentation must have been either fraudulent or material.”).

⁹¹ See MLB CBA, *supra* note 54, at 277–89.

⁹² RESTATEMENT (SECOND) OF CONTRACTS §§ 160–161.

⁹³ *United States v. McBride*, 571 F. Supp. 596, 608–09 (S.D. Tex. 1983).

⁹⁴ RESTATEMENT (SECOND) OF CONTRACTS § 161.

assertion that the fact does not exist.”⁹⁵

Many players who have either admitted to steroid usage or have failed MLB PED tests, have been accused of, or admitted to, using various methods to hide their usage of PEDs from the league and their current and potential future employers.⁹⁶ The usage of techniques such as employing masking agents and surreptitiously rigging hormone levels to avoid detection would qualify as an assertion on behalf of the player that PEDs were never used.⁹⁷ There seems to be no practical reason to take such actions other than to “prevent another from learning a fact.”⁹⁸ This being the case, these behaviors will have met the requirements to be considered assertive conduct that PEDs were not taken in the course of the athlete compiling his pre-contractual statistics.

Absent proof of conduct designed to hide steroid usage, it is still possible that an assertion can be found to have existed on grounds of simple non-disclosure.⁹⁹ “A person’s non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist . . . where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation”¹⁰⁰ In other words, where a party to the contract has previously asserted something falsely, a failure to point out the falsity of the previous statement amounts to an assertion.¹⁰¹ This being the case, one can see how the failure of a baseball player to disavow his previous statements detailing a lack of PED usage can function as a present and ongoing assertion of PED abstinence.

⁹⁵ *Id.* § 160; see *Bank of Montreal v. Signet Bank*, 193 F.3d 818, 827 (4th Cir. 1999); *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund*, 38 P.3d 12, 34 (Ariz. 2002).

⁹⁶ See generally Bob Nightengale, *Is HGH Hiding Steroid Use?; MLB Players Can Avoid Positive Tests, Some Say*, USA TODAY, Sept. 12, 2007, at 1C (“Gary Wadler of the World Anti-Doping Agency believes athletes are using HGH, for which there is no reliable test, to help conceal the use of steroids . . .”).

⁹⁷ See, e.g., Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, SFGATE (Dec. 2, 2004, 4:00 AM), <http://www.sfgate.com/sports/article/Giambi-admitted-taking-steroids-2631890.php> (“Giambi also said he had taken ‘undetectable’ steroids known as ‘the clear’ and ‘the cream’—one a liquid administered by placing a few drops under the tongue, the other a testosterone-based balm rubbed onto the body.”).

⁹⁸ RESTATEMENT (SECOND) OF CONTRACTS § 160 & cmt. a.

A, seeking to induce B to make a contract to buy his house, paints the basement floor in order to prevent B from discovering that the foundation is cracked. B is prevented from discovering the defect and makes the contract. The concealment is equivalent to an assertion that the foundation is not cracked, and this assertion is a misrepresentation.

Id. illus. 1.

⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 161.

¹⁰⁰ *Id.* § 161(a).

¹⁰¹ *Id.*

b. Fraudulent Representation

Sometimes, fraudulent representation is plainly obvious. Players have consistently denied use and later have been exposed as liars through positive drugs tests or official investigations. From the baseball players called before Congress,¹⁰² to Alex Rodriguez's infamous 60 Minutes interview,¹⁰³ denial of PED usage until the bitter end has been the modus operandi of many guilty players.

In these situations, a player's *scienter* plays an important role.¹⁰⁴ *Scienter* refers to "the requirement that the maker know of the untrue character of his assertion."¹⁰⁵ In PED-related cases where players go the extra length to conceal their prohibited activities, they would be hard-pressed to claim ignorance when they are eventually caught. It is impossible to go through the process of ingesting PEDs without being aware of one's actions.

c. Materiality of the Representation

The second point held within the first prong of the fraudulent misrepresentation test asks whether the misrepresented fact was material. The Restatement states that, "[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so."¹⁰⁶ Put more simply, a fact is material if it is "important."¹⁰⁷ Is a baseball player's claim of non-usage of PEDs, through either assertive or non-assertive conduct, likely to induce a reasonable person to manifest assent? Is it important in a team's decision? Ultimately this question is determined by the impact on valuation that PED use has on a player.

Consider the three possible outcomes when contracting with a "closeted" PED-using player as they relate to the contracting

¹⁰² See Adam Berenbak, *Congressional Play-by-Play on Baseball*, NAT'L ARCHIVES, <http://www.archives.gov/publications/prologue/2011/summer/baseball.html> (last visited Jan. 4, 2014) ("Congress increased its scrutiny as the 20th century ushered in an age of major interstate commerce.").

¹⁰³ *A-Rod: I've Never Used Steroids*, CBSNEWS (Dec. 13, 2007), http://www.cbsnews.com/8301-18560_162-3617425.html ("For the record, have you ever used steroids, human growth hormone or any other performance-enhancing substance?" [TV host Katie] Couric asked. 'No,' Rodriguez replied.").

¹⁰⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 162.

¹⁰⁵ *Id.* cmt. b.

¹⁰⁶ *Id.* § 162(2).

¹⁰⁷ See *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.").

parties.¹⁰⁸ First, a player can simply continue to use PEDs for the length of the contract, and will likely continue to produce in a manner consistent with his previous performance. In such a case, non-disclosure of PED usage is a non-issue as it relates to contractual liability if his secret is never revealed.

The second possible outcome is that a player will voluntarily discontinue the usage of PEDs, and will likely show a statistical decline as a result.¹⁰⁹ After all, these drugs are called performance enhancing for a reason.¹¹⁰ In this case, the fact that previous statistical performance was achieved with the help of outside chemical influence is certainly material to the contract. The values of player contracts in MLB are closely tied to past statistical achievements.¹¹¹ If discontinuing PED usage renders it less likely that such statistical output can be maintained in future years, then the previous usage is necessary data to properly determine appropriate future compensation by accounting for the possibility of “quitting” in the contract price.

The third possible outcome is that the PED user in question will continue to use until MLB’s drug testing policy, or the media, catches him. The negative publicity generated by such an incident can be of tremendous financial consequence to the employer of a PED user.¹¹² In addition, the MLB’s drug testing policy mandates suspension of the player, leaving a team without his services unexpectedly.¹¹³ It is likely that a player caught in this manner would have little choice but to discontinue PED use, due to scaling punishment for subsequent violations. At that point, the economic argument of outcome two comes into play, and the player is significantly devalued from his contract price, no longer having the aid of PEDs.

In two of the three possible outcomes, it is clear that a reasonable team would be induced to enter into a contract at a higher price

¹⁰⁸ The contract is certain to have an impact on opposing teams, the fans, and the league in general, but for the purpose of our discussion, contemplation of the two contracting parties is sufficient.

¹⁰⁹ See *Steroids and MLB*, *supra* note 14, at 5.

¹¹⁰ See *id.* at 7 (“‘Steroids unquestionably work extremely well—no denying it,’ says Dr. Harrison Pope of McLean Hospital in Belmont, Mass.”).

¹¹¹ See *id.* at 6 (“[O]ur average increase in [on base percentages] due to steroids of .104 leads to additional annual salary of \$2,085,438.”).

¹¹² *Id.* at 9 (“To estimate the impact of the [PED] scandal on team revenue, we analyzed the expected impact of the scandal on the five individual revenue streams for a franchise: game receipts, local media, post-season, other local, and national.”). Using 2005, annual revenue could fall by as much as \$32.2 million. *Id.*

¹¹³ DRUG AND TREATMENT PROGRAM, *supra* note 59, at 22.

point than would be justified if they had knowledge of a player's PED usage. Had the reasonable team been able to appraise a using player's true performance levels without the enhancement of PEDs, then the team would not have entered into the contract, or at the very least, would not have paid the overly inflated value to secure the player's services. Whether this meets the requirement of materiality would ultimately be an issue for the courts, but it seems to bear all the hallmarks of a material fact.

ii. Reliance on the Material Misrepresentation

Once it has been established that either a fraudulent misrepresentation or a misrepresentation of a material fact has been made, the party asserting the claim then bears the burden of proving that he relied on that misrepresentation in deciding to contract.¹¹⁴ This showing is, by necessity, factual in nature, and based on the objective viewpoint of the party.¹¹⁵ The ultimate question thus becomes, would a reasonable team in the contractor's position have relied upon the misrepresentation of the player?¹¹⁶

In old school baseball, scouts would travel all over the country to evaluate every potential recruit.¹¹⁷ Finding talent was more of an art than a science. The new school of recruitment places more emphasis on a player's measurable productivity and less on gut instinct of subjective recruiters.¹¹⁸ To determine a player's value in baseball, his contributions to the team are broken down into subsets of statistical data and ranked against other players in the same playing position.¹¹⁹ The practice, started by statistics keeper Allan Roth of the then Brooklyn Dodgers,¹²⁰ has evolved into a set of complex mathematical algorithms called sabermetrics.¹²¹

Every aspect of a player's relevant on-field performance such as

¹¹⁴ 48 AM. JUR. 3D *Proof of Facts* § 13 (1998).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ See Matthew J. Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 ALB. GOV'T L. REV. 240, 261 (2012) (stating that prior to the use of sabermetrics, "players were evaluated primarily through the use of subjective, in-person scouting").

¹¹⁸ See Jonah Keri, *MLB Trade Value Rankings, Part 1*, GRANTLAND (Nov. 26, 2012, 12:00 AM), http://www.grantland.com/story/_id/8627606/rating-players-contracts-major-league-baseball-part-.

¹¹⁹ *Id.* ("In theory, no sport makes it easier to rank players' value than baseball does.")

¹²⁰ *Id.*

¹²¹ Jim Albert, *An Introduction to Sabermetrics*, BOWLING GREEN ST. U., <http://www-math.bgsu.edu/~albert/papers/saber.html> (last visited Jan. 4, 2014).

hitting, running, and pitching, is tracked and analyzed.¹²² Owners and team scouts rely heavily on these numbers to determine which recruits may be worth an investment of time and money.¹²³ A recruit's high statistical worth rationally translates into a higher salary in contract negotiations.¹²⁴ This system has been accepted by the baseball industry and made its way into mainstream culture by the 2003 publication *Moneyball: The Art of Winning an Unfair Game* ("Moneyball"), a book that detailed the rise of the Oakland Athletics who succeeded despite having only a fraction of the salary money of large market teams.¹²⁵

The rising popularity of sabermetrics and *Moneyball* has had an undeniable influence on how teams reach their hiring decisions.¹²⁶ Most front offices now staff professional sabermetric analysts.¹²⁷ This is overwhelming evidence that the teams really do rely on a player's historical performance, recorded in statistical terms, when making important hiring decisions. If a player represents that he has innate talent for production in certain areas, then the likelihood of gaining employment is correspondingly high. For these reasons, there is justifiable reliance on a player's misrepresentation that these are numbers produced in the absence of PEDs and reflective of his true potential.

iii. Right or Justification in Relying Upon the Misrepresentation

Beyond the requirement of reliance, there is a further requirement that the reliance on the misrepresentation be shown to be justifiable.¹²⁸ Again, a very factual inquiry must be made as to the circumstances surrounding the contract. This standard appears

¹²² Keri, *supra* note 118.

¹²³ See Adam Houser, *Which Baseball Statistic Is the Most Important When Determining Team Success?*, 13 PARK PLACE ECONOMIST 29, 29 (2005) ("The underlying economic theory within the game of baseball is undoubtedly the human capital theory, which states that players will be paid for their productivity; fortunately for baseball productivity can be readily measured by the plethora of performance statistics . . .").

¹²⁴ See *id.*

¹²⁵ MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* xi–xii (2003) (comparing the 2002 Athletics' \$40 million budget to the 2002 Yankees' \$126 million budget).

¹²⁶ Susan Slusser, *Price of a Best-Seller: "Moneyball"; How the Landmark Book—Now Turned Into a Movie—Actually Might Have Hurt A's*, S.F. CHRON., Sept. 18, 2011, at B1 ("[Yankees' general manager Brian] Cashman doesn't doubt that 'Moneyball' had an impact on front offices.").

¹²⁷ Jeff Passan, *Sabermetrician in Exile*, POST GAME (Jan. 25, 2011, 1:08 AM), <http://www.thepostgame.com/features/201101/sabermetrician-exile> ("[A]ll 30 teams have at least one employee who does quantitative analysis. Boston, Tampa Bay and others employ armies of the mathematically inclined . . .").

¹²⁸ RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981).

to be deferential to the asserting party, however, and it has been held that even in cases where an investigation may have revealed the falsity of the misrepresentation, a party may still be justified in its reliance.¹²⁹ The general acceptance of sabermetrics as the industry norm saves the teams from evaluating players through other methodologies. All teams find mathematical comfort in their hiring decisions, which is supposed to bring objectivity into an otherwise subjective situation. It is unfortunate that the current method of contractual evaluation, which relies upon statistical analysis, almost functions to encourage PED use in players.¹³⁰ Even with this encouragement though, it is an unfair burden to place on a contracting team to mandate consideration of all talented players as possibly guilty of PED usage when they are deciding upon a suitable contract.¹³¹ A team's reliance on a player's asserted "clean" performance level, shown through seemingly valid statistical inferences, is justifiable.

Additionally, when players are concealing their PED use through undetectable techniques, it is unlikely that teams have the ability to discover the misrepresentation through medical checkups or random testing. The league might not be as up-to-date on the latest ways to cheat PED tests as the rule-breakers and their shady doctors. In addition, history shows the MLB to be slow in revising its drug policy to include the newest drugs. For example, the League did not institute mandatory steroid testing until 2004, a year after more than 5% of the players tested positive.¹³² Under circumstances such as these, a team is justified in its reliance on the accuracy of a player's assertion of "clean" play when violations are often undetected and the system in place can be so easily outsmarted.

iv. Reliance Resulting in Damages

An aggrieved party alleging the defense of misrepresentation "must show damage in order to establish his defense."¹³³ The case

¹²⁹ *Field v. Mans*, 516 U.S. 59, 70 (1995).

¹³⁰ *Steroids and MLB*, *supra* note 14, at 11.

¹³¹ *But see* Brent Schrotenboer, *Armstrong to Argue Technicalities*, USA TODAY, Feb. 26, 2013, at 3C. Lance Armstrong is defending his fraud claim by arguing the government knew or should have known about doping on the team. "The law is that if the government knew of the fraud, you can't prosecute someone for fraud . . ." *Id.* (internal quotation marks omitted).

¹³² Selena Roberts & David Epstein, *Sources Tell SI Alex Rodriguez Tested Positive for Steroids in 2003*, CNN/SPORTS ILLUSTRATED (Feb. 9, 2009, 12:27 PM), <http://sportsillustrated.cnn.com/2009/baseball/mlb/02/07/alex-rodriguez-steroids/index.html>.

¹³³ V. Woerner, Annotation, *Necessity of Showing Damage to Establish Fraud as Defense to*

of Alex Rodriguez best highlights the last element of what the MLB needs to prove to render the contract void. Even though Rodriguez can no longer perform at his previous star level, now known to be aided by PED usage, the Yankees are still locked into his massive deal.¹³⁴ Even if the Yankees were successful in trading Rodriguez, the team would most likely still have to foot a large sum of his remaining pay. This economic loss establishes damage.

IV. PROMPT RESCISSION: TAKE ME OUT OF THE BALL GAME!

Despite the widespread occurrence of PED usage and decades of incidents involving prominent players that have marred MLB's history, the question remains why have the teams not been successful in rescinding player contracts by pursuing the defense of misrepresentation? One need not look further than the lack of trying. The enormous financial gain generated by record-chasing media sensations and fan frenzies via increased ticket and paraphernalia sales often make otherwise financially sensible teams shortsighted.¹³⁵

There are, however, significant costs attributed to turning a blind eye to the problem of PEDs. In the case of Jason Giambi, even though he was a career .300 hitter, he only batted above .250 twice from 2003 to 2008.¹³⁶ His declining performance did not justify the salary paid by the Yankees.¹³⁷ The team is not faring better with Rodriguez as it struggles to escape liability for the remaining sum due on his contract.¹³⁸ These heavy financial burdens could only have been avoided had the Yankees immediately took action upon

Action on Contract, 91 A.L.R.2d 346, § 2 (1963).

¹³⁴ See Wallace Matthews & Andrew Marchand, *Yankees Eye Voiding A-Rod's Contract*, ESPN (Jan. 30, 2013, 1:41 PM), http://espn.go.com/new-york/mlb/story/_id/8894904/new-york-yankees-attempting-void-alex-rodriguez-contract-according-sources.

¹³⁵ Socolow, *supra* note 37, at 2 ("Whether a team invokes a morals clause to terminate a player is 'a value question based on how valuable a player is to the team.'). Rodriguez was "instrumental" to the team's 2009 World Championship win. Matthews & Marchand, *supra* note 134.

¹³⁶ *Jason Giambi Stats*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/players/player.php?p=giambja01> (last visited Jan. 4, 2014).

¹³⁷ See William C. Symonds, *Breaking the Curse: Can John Henry's Red Sox Finally Win a World Series?*, BUSINESSWEEK, Apr. 26, 2004, at 83 ("No sabermetrically oriented team would ever have signed Jason Giambi to the backloaded deal the Yankees did . . . He's already 33 and has injury issues." (internal quotation marks omitted)).

¹³⁸ Craig Calcaterra, *So Apparently the Consensus Is That A-Rod Should Commit Insurance Fraud. Lovely.*, NBC SPORTS (Jan. 30, 2013, 8:31 AM), <http://hardballtalk.nbcsports.com/2013/01/30/so-apparently-the-consensus-is-that-a-rod-should-commit-insurance-fraud-lovely/> (debating satirically the possibility of mitigating the balance by bringing in insurance companies).

discovery of PED usage.¹³⁹

Restatement section 381(2) states in relevant part:

The power of a party to avoid a contract for misrepresentation or mistake is lost if after he knows of a fraudulent misrepresentation or knows or has reason to know of a non-fraudulent misrepresentation or mistake he does not within a reasonable time manifest to the other party his intention to avoid it. . . .¹⁴⁰

In other words, if the aggrieved party does not raise the misrepresentation defense soon after learning the truth, then the party is said to have accepted the misrepresentation and thus ratified the contract.

When the Yankees first learned of Giambi's or Rodriguez's PED usage, the team should have taken affirmative actions to seek rescission or even contract modification to adjust the deal according to the players' actual values. However, the Yankees acquiesced in Giambi's efforts at avoiding liability for PED use and by doing so performed ratification, barring the team from later asserting contractual misrepresentation.¹⁴¹ Equally damaging was the Yankees' inaction after the 2009 Rodriguez confession. It could be argued by Rodriguez that the team ratified his contract by failing to take action in the face of newly revealed information about his past. As demonstrated by these two examples, failure to act promptly on the part of the aggrieved party can potentially carry major legal significance.

V. CONCLUSION

The current drug policy of MLB seems to have had some positive impact on the steroid explosion witnessed by baseball fans in the early 2000s. This being said, one only need look at the latest headlines from the sports page to see the problem is far from eradicated as players become more savvy at gaming the system. Because of this seemingly never-ending black eye worn by MLB, it

¹³⁹ See Matthews & Merchand, *supra* note 134.

¹⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 381(2) (1981).

¹⁴¹ Another contributing factor in the Yankee's decision not to be more aggressive may have been its "blind eye" approach in handling this matter. Murray Chass, *Contract Omission Says It All for Yanks*, N.Y. TIMES, Feb. 11, 2005, at D7 ("They wanted Giambi badly enough that they relinquished the right to suspend him or stop payment on the contract or terminate the contract or convert it into a nonguaranteed contract if he was found to use steroids."). When Yankees owner George Steinbrenner was asked if he suspected that Giambi used steroids, Steinbrenner replied tellingly, "Umm." *Id.*

is time for a pioneering team to attempt to void a contract tainted by PED usage.

Due to the restrictions of teams' powers to discipline over PED-related matters within CBA, the morals clause is limited in its effectiveness.¹⁴² However, teams should become more aggressive in attempting to void player contracts under grounds of misrepresentation. This should be done as soon as the teams uncover the players' misrepresentation to avoid unintentional ratification of the contract.¹⁴³ By teams taking a more forceful stance, MLB can finally achieve its asserted goal of liberating its sport from an epidemic of PEDs.

¹⁴² See *supra* Part II.C.

¹⁴³ See *supra* Part IV.