

HAS COLLUSION RETURNED TO BASEBALL? ANALYZING WHETHER A CONCERTED INCREASE IN FREE AGENT PLAYER SUPPLY WOULD VIOLATE BASEBALL'S "COLLUSION CLAUSE"

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I. INTRODUCTION

In early January 2003, the Major League Baseball Players Association ("MLBPA") began to consider filing a labor grievance against baseball's thirty clubs for violating the "collusion clause" of the Major League Baseball Basic Agreement.¹ The grievance could allege that baseball clubs violated the "collusion clause" by flooding the 2002–03 labor market with free agents.²

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1. The Major League Baseball Basic Agreement is a collectively bargained agreement between all Major League Baseball players and clubs, which governs terms of employment. *See* Basic Agreement Between The American and National League Professional Baseball Clubs and Major League Baseball Players Association, effective Jan. 1, 1997. [hereinafter *Basic Agreement*]. The Agreement's "collusion clause" is set forth by Article XX(E) of the Agreement. *See* Willis, *infra* note 7, at 119 and accompanying text. The MLBPA believes clubs may have violated the Basic Agreement's "collusion clause" during the 2002–03 off-season. *See* Tom Haudricourt, *Inside the Winter Meetings*, THE BERGEN RECORD, Dec. 16, 2002, at S2. *See also* Ronald Blum, *Agents Report Similar Offers to Union Possible Prelude to Collusion Case*, THE ASSOCIATED PRESS, January 4, 2003, available at LEXIS, Academic Universe, AP File; Ross Newham, *Union Weighs Temptation to Call it a Ball of Collusion*, LOS ANGELES TIMES, Feb. 2, 2003, at part 4, D7; *Players May Charge Collusion*, THE WASHINGTON POST, Jan. 30, 2003, at D10.

2. By flooding the labor market with free agents, baseball's labor supply is increased, and the market price of each free agent player declines. *See generally* MICHAEL LEEDS & PETER VON ALLMEN, THE ECONOMICS OF SPORTS 1, 15–28 (2002) (explaining the basic economic working of supply and demand). However, some agents do not believe flooding the free agent market violates baseball's collusion clause. *See generally* Murray Chass, *Baseball Players See a Down Market but Smell Collusion*, THE NEW YORK TIMES, Jan. 31, 2003. Nevertheless, this is an issue of first impression, and economic analysis seems to indicate otherwise. *See generally* LEEDS & VON ALLMEN, *supra* note 1, at 15–28 (explaining the basic economic working of supply and

Whether flooding the baseball market with free agents violates baseball's "collusion clause" is a matter of legal debate. While baseball's "collusion clause" states that in the free agent market "[p]layers shall not act in concert with other Players[,] and Clubs shall not act in concert with other Clubs,"³ the clause does not explicitly define the sort of conduct that falls within the prohibition of the clause.⁴

Although no arbitrator to date has determined whether flooding the player market with free agents violates the collusion clause, some grievance arbitrators have found that Major League Baseball ("MLB") clubs violated the collusion clause⁵ by agreeing not to bid on one another's free agents,⁵ and by agreeing to maintain an information bank of all salary offers submitted by clubs in the free agent market.⁶

This article argues that a concerted agreement among baseball clubs to increase the supply of free agent players violates baseball's collusion clause, and therefore, MLB clubs are at risk of losing another collusion grievance. Part I of this article explains the evolution of baseball's collusion clause and discusses three past collusion grievances filed by the MLBPA in the 1980s. Part II explains baseball's collusion-free period, which began with the settlement of 1980s collusion disputes. Part III discusses why MLB clubs may have again violated the "collusion clause" in the 2002–03 off-season.

II. THE EVOLUTION OF BASEBALL'S COLLUSION CLAUSE AND COLLUSION DISPUTES

During the first 100 years of Major League Baseball, collusion among clubs was a common and legal occurrence.⁷ Although collusion is generally illegal under federal antitrust law,⁸ professional baseball teams have enjoyed a special non-statutory exemption from antitrust as set forth by the

demand curves with respect to sports).

3. *Basic Agreement*, *supra* note 1, at Article XX(E)(1).

4. *See generally id.* § (E) (stating that collusion is prohibited without specifically indicating what constitutes collusion).

5. *See Willis*, *infra* note 7, at 109–10.

6. *See* PAUL WEILER AND GARY ROBERTS, *SPORTS AND THE LAW* 232 (2d ed. 1998).

7. *See* MARVIN MILLER, *A WHOLE DIFFERENT BALLGAME* 257 (1991). The earliest cited examples of collusion in professional baseball occurred in the late 1800s when teams implemented the "reserve rule" to player mobility and salaries. *See* Stephen Willis, *A Critical Perspective of Baseball's Collusion Decisions*, 1 *SETON HALL J. SPORT L.* 109, 111 (1991).

8. Section One of the Sherman Act states, "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." Sherman Antitrust Act, ch. 647, § 1, 26 Stat. 209 (1890). 15 U.S.C. § 1 (2001).

Supreme Court in 1922.⁹

With the onset of baseball free agency in 1976,¹⁰ MLB clubs recognized that players, like clubs, would become able to act concertedly in the free agent market.¹¹ Consequently, the clubs became willing to disallow all concerted behavior on their part in exchange for a comparable behavioral limit on the players' parts.¹² This limit on concerted behavior was first documented by Article XVIII, Section H of the 1976 Major League Baseball Collective Bargaining Agreement, which states, "the utilization . . . of rights . . . is an individual matter to be determined solely by each Player and each Club and for his or her benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other clubs."¹³

According to baseball historians, Article XVIII(H) was simply intended to set basic ground rules for the free agent signing process, in a manner that would have improved players' financial opportunities without drastically revamping the existing market.¹⁴ Yet in practice, baseball's free agency combined with Article XVIII(H) to establish a new players' market, which drastically increased the value of free agent players' services.¹⁵

9. Baseball's antitrust exemption was set forth by the Supreme Court through a series of three cases, often known as the Baseball Trilogy. *See* *Federal Baseball Club of Baltimore v. Nat'l League of Professional Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. New York Yankees Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972). In 1998, Congress documented this antitrust exemption as the *Curt Flood Act*—a bill jointly initiated by baseball clubs and players, intended to clarify baseball's non-statutory exemption. *See* *Curt Flood Act*, 15 U.S.C. § 27 (1998); *see also* Marc Edelman, *Can Antitrust Law Save the Minnesota Twins? Why Commissioner Selig's Contraction Plan was Never a Sure Deal*, 10 *SPORTS LAW. J.* 45, 59–61 (Spring 2003) (discussing evolution of baseball's antitrust exemption.)

10. Baseball free agency was designed by the 1976 Basic Agreement, which was signed by the MLBPA and baseball's member clubs shortly after the United States Court of Appeals upheld an arbitration ruling that baseball's reserve clause was non-renewable. *See* WEILER & ROBERTS, *supra* note 6, at 230; *see also* *Kansas City Royals v. Major League Baseball Players Ass'n*, 532 F.2d 615 (8th Cir. 1976).

11. *See generally* WEILER & ROBERTS, *supra* note 6, at 230 (discussing the aim of paragraph H to prevent joint negotiations by players).

12. Owners wanted written language to ensure that players could not leverage their free-agent market value by colluding with each other in tandem. Before the implementation of free agency, tandem signings were one of the few ways that elite baseball players exercised market power. For example in 1966, Los Angeles Dodgers pitchers Sandy Koufax and Don Drysdale bargained in tandem to sign the game's two highest contracts. *See* WEILER & ROBERTS, *supra* note 6, at 230; *see also* LEE LOWENFISH, *THE IMPERFECT DIAMOND: A HISTORY OF BASEBALL'S LABOR WARS* 263 (DeCapo Press 1991) (1980).

13. *See* Willis, *supra* note 7, at 118–19.

14. *See, e.g.*, Paul M. Sommers, *Top of the First*, in *DIAMONDS ARE FOREVER* 3–4 (Paul M. Sommers ed., 1992).

15. *See* JAMES QUIRK & RODNEY FORT, *PAY DIRT* 212 (1992) (showing that from 1970 until 1976, baseball's average player salary in 1991 dollars hovered around \$100,000 per season).

Under direction of Article XVIII(H), baseball player salaries increased significantly beginning in 1976,¹⁶ even though not all clubs initially pursued the signing of free agents.¹⁷ One reason for the drastic increase in free agents' salaries was that the rules set forth in baseball's collective bargaining agreement allowed for a very limited number of free agent players per season, which established a sellers' market for free agent player services.¹⁸

A. Collusion I

While free agent salaries increased rapidly for almost a decade,¹⁹ MLB's free agent market suddenly and unexpectedly dried up during the 1985 off-season.²⁰ At first, the MLBPA seemed confused by the market change, especially since the 1985 collective bargaining agreement should have made the market friendlier toward free agent signings.²¹ Eventually, the MLBPA concluded that baseball clubs were tampering with the demand for free agents by concertedly violating the individual nature of the rights

By 1984, baseball's average salary in 1991 dollars had more than tripled, and by 1990, the average salary had increased almost eightfold.)

16. See ROGER I. ABRAMS, *THE MONEY PITCH, BASEBALL FREE AGENCY AND SALARY ARBITRATION* at 38–39 (2000). In 1976, the average annual baseball salary in real dollars was \$52,300. *Id.* The average annual salary in real dollars increased to \$74,000 in 1977, \$97,800 in 1978, \$121,900 in 1979, \$146,500 in 1980, \$196,500 in 1981, \$245,500 in 1982, \$289,000 in 1982 and \$325,900 in 1984. *Id.*

17. See generally Willis, *supra* note 7, at 119 (discussing rise in players' salaries resulting from free agent competition).

18. See ROBERT F. BURK, *MUCH MORE THAN A GAME 201* (2001). These free agency guidelines were suggested by union negotiator Marvin Miller, specifically to optimize the free agent market for baseball players. See *id.* According to baseball historian Robert Burk:

For the union [during the 1976 collective bargaining negotiations], the question was where to draw the line on free agency. Any new system, the leadership argued, should have a service time threshold high enough not to flood the labor market, yet attainable enough that most players would have at least one chance during their careers to avail themselves to the process. Preferably the threshold would also be timed to match the typical player's period of top performance and thus maximize his bonanza.

Id.

19. See *supra* text accompanying notes 15 and 16; see also Eric Fisher, *On the Eve of Destruction*, WASH. TIMES, Dec. 13, 2000, at B1 (stating that under baseball's free agent system, New York Yankees outfielder Dave Winfield became the first player to earn over \$1 million per season in 1981).

20. See Willis, *supra* note 7, at 119–20.

21. Prior to the 1985 collective bargaining agreement, MLB teams that had signed and lost free agent baseball players were eligible to select a replacement player from an unprotected list as compensation. Subsequent to the 1985 agreement, teams that lost players to free agency became instead compensated by an additional amateur draft pick. See LOWENFISH, *supra* note 12, at 259.

requirement set forth in baseball's "collusion clause."²²

On January 31, 1986, the MLBPA filed its first collusion grievance against baseball owners.²³ The grievance charged that baseball clubs had acted in concert to boycott free agent players during the 1985–86 off-season—a violation of Article XVIII, Section H of the 1985 Basic Agreement.²⁴

Factually, during the 1985–86 off-season, only one of twenty-nine eligible free agent players received a bona fide contract offer from a rival team, down from sixteen in the previous season.²⁵ Although there did not exist a written plan among clubs that forbid the signing of free agents, the MLBPA showed evidence of a "common scheme" or motive against signing free agents.²⁶ The MLBPA also introduced as evidence statements made by then-baseball Commissioner Peter Ueberroth, which encouraged owners to take "fiscally responsible" actions such as "avoiding long-term contracts and agreeing not to negotiate with other teams' free agent[s]."²⁷ Further, the MLBPA provided evidence that the league commissioner had berated owners and general managers that did not follow his message of "fiscal responsibility."²⁸ For example, prior to the 1985 owners' meeting, the Kansas City Royals had pursued standout free agent Kirk Gibson; however, after stern warning at the meeting, the Royals' interest in Gibson ceased.²⁹

In response, the clubs claimed that they never violated Article XVIII(H).³⁰ According to the clubs, "Article XVIII(H) was drafted very narrowly, and only prevented clubs from forming small bargaining units to negotiate with free agents."³¹ The clubs argued there was not sufficient evidence to prove an agreement under Article XVIII(H) because a lack of player movement emerged from "individually made rational independent

22. See Willis, *supra* note 7, at 110.

23. *Id.* at 109.

24. See Susan Seabury, *The Development and Role of Free Agency in Major League Baseball*, 15 GA. ST. U. L. REV. 335, 361 (1998); see also Jeffrey Perron, *Administrative Law*, 12 SETON HALL J. SPORT L. 131, 134 (2002).

25. The only free agent who received a bona fide offer was future Hall of Fame catcher Carlton Fisk, who was courted by the New York Yankees. LOWENFISH, *supra* note 12, at 263; see also Seabury, *supra* note 24, at 361; Perron, *supra* note 24, at 134.

26. See Willis, *supra* note 7, at 120–23.

27. Seabury, *supra* note 24, at 361.

28. *Id.*

29. LOWENFISH, *supra* note 12, at 267.

30. See generally Willis, *supra* note 7, at 121 (discussing the clubs' statement that the "non-existent" 1985 free agency market was caused by "individually made rational economic decisions").

31. *Id.*

decisions [based on] the general economic condition of the industry, certain changes in the Basic Agreement, and the least attractive pool of free agents in recent years.”³²

Nevertheless, on September 27, 1987 an arbitration panel led by Thomas Roberts found that baseball clubs indeed violated Article XVIII(H) of the Major League Agreement.³³ In Arbitrator Roberts’ opinion, he rejected the clubs’ defense that their actions were the result of rational, independent decisions based on legitimate baseball, business management, and financial factors.³⁴ Roberts’ opinion further stated that “[w]hat is prohibited, is a common scheme involving two or more [c]lubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit,” and that such a prohibited, common scheme existed in the aforementioned case.³⁵

In addition to interpreting Article XVIII(H) based on its plain meaning, Roberts also relied heavily on antitrust case law to conclude that a prohibited plan according to Article XVIII(H) did not need to be in writing nor accompanied by all the formalities of a contract.³⁶ According to antitrust law, such a plan may be inferable from the totality of circumstances.³⁷ With the totality of circumstances indicating an agreement, Roberts awarded the MLBPA damages of \$10,528,086.71.³⁸

B. *Collusion II (Conduct During the 1986–87 Baseball Off-season)*

On February 18, 1987, before Arbitrator Roberts could rule on Collusion I, the MLBPA filed a second grievance against MLB clubs, charging that the clubs continued to act in concert with respect to those players who became free agents following the 1986 season.³⁹ This second claim was scheduled to be decided by baseball’s newly designated arbitrator George Nicolau.⁴⁰ At issue for Nicolau was whether the baseball clubs’ actions during the 1986–87 off-season had continued unabated from

32. *Id.*

33. See Seabury, *supra* note 24, at 362.

34. See generally Willis, *supra* note 7, at 121–23 (discussing the clubs’ contention that the lack of movement can be attributed to, “individually made rational independent decisions based on the general economic condition of the industry, certain changes to the Basic Agreement, and the least attractive pool of free agents in recent years”).

35. Seabury, *supra* note 24, at 362; Perron, *supra* note 25, at 135.

36. See Willis, *supra* note 7, at 122.

37. See *id.*

38. See Seabury, *supra* note 24, at 362; see also LOWENFISH, *supra* note 12, at 267–68.

39. See LOWENFISH, *supra* note 12, at 264; see also Willis, *supra* note 7, at 110.

40. See Willis, *supra* note 7, at 110.

the previous winter.⁴¹

The MLBPA argued that the baseball clubs' pattern of dealing with players did not change ostensibly from the 1985–86 to the 1986–87 off-season.⁴² According to the MLBPA, evidence suggested that the clubs' goals in 1986 were again “to reduce salaries and length of contractual commitments across the board.”⁴³ Although the MLBPA argued that direct proof of the defendants' agreement was not required under the antitrust doctrine of *conscious parallelism*,⁴⁴ the MLBPA again produced some evidence indicating there was a formal agreement, although not in writing.⁴⁵

As evidence of an agreement, the MLBPA alleged that during the 1986–87 off-season at least nine players were considered prime candidates to sign with new teams as free agents, but none of these players received a bona fide contract offer.⁴⁶ In fact, only one Major League player, Andre Dawson, received an offer to sign with a rival team.⁴⁷ Dawson's case was an anomaly because the outfielder was so willing to leave his current team, the Montreal Expos, that he called a unilateral press conference to announce he would sign a blank contract for the Chicago Cubs.⁴⁸ Embarrassed into signing Dawson, the Cubs offered the all-star outfielder a contract for \$500,000, almost half his previous season's salary.⁴⁹

As additional evidence of an agreement, the MLBPA provided examples of statements made by management during the 1986–87 off-season.⁵⁰ For example, the MLBPA indicated that the Philadelphia Phillies had pursued Detroit Tigers' free agent catcher Lance Parrish, whose contract with the Tigers had expired.⁵¹ However, during negotiations, the American League President Dr. Bobby Brown and two owners on the Player Relations Committee (“PRC”)⁵²—Milwaukee Brewers owner Alan [Bud] Selig and Chicago White Sox owner Jerry Reinsdorf—had “asked”

41. *See id.* at 123.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 123–24.

46. These nine players that were considered prime candidates for new employment included: pitchers Ron Guidry and Doyle Alexander, catchers Lance Parrish, Bob Boone and Rich Gedman, infielders Bob Horner and Willie Randolph, and outfielders Andre Dawson and Tim Lincecum. *See* LOWENFISH, *supra* note 12, at 264.

47. *See id.* at 265.

48. *See id.*

49. *See id.*

50. *See* Willis, *supra* note 7, at 127.

51. *See* LOWENFISH, *supra* note 12, at 268–69.

52. *See* WEILER & ROBERTS, *supra* note 6, at 54.

Phillies' president William Giles not to sign Parrish.⁵³

In response to the MLBPA allegations in Collusion II, baseball clubs again asserted that their conduct did not violate Article XVIII(H) because no agreement to collude existed.⁵⁴ As an alternative explanation to negate collusion, baseball clubs claimed that a meager free agent market emerged from a cultural change in baseball with legitimate business underpinnings, as well as heightened levels of legal, conscious parallelism.⁵⁵ According to the clubs, when Commissioner Ueberroth opened baseball's books in the 1985 negotiations,⁵⁶ individual teams learned that some of their on-the-field competitors were losing money.⁵⁷ As a result, teams began implementing cost control mechanisms.⁵⁸

However, much like Collusion I, Collusion II was decided in favor of the MLBPA.⁵⁹ In taking a similar stance to Arbitrator Roberts, Nicolau stated that Article XVIII(H) is violated when a plan or "common scheme for a common benefit" is proven.⁶⁰ According to Nicolau, a "common scheme for a common benefit" did not need to be either written or spoken, as long as circumstantial evidence of "sufficient clarity and force" could be shown to demonstrate its existence.⁶¹ In Collusion II, the MLBPA was awarded an additional \$38 million in damages.⁶²

C. Collusion III (Conduct During the 1987–88 Baseball Off-season)

Collusion III was filed by the MLBPA during the 1987–88 off-season, as the pattern of reduced player movement and depressed player salaries had abated somewhat but not entirely.⁶³ During the 1987–88 off-season, owners had begun to bid on free agents, but they also established a so-called "'Information Bank' under the auspices of the Players Relations Committee."⁶⁴ The "Information Bank" provided all teams with access to detailed information about every contract offer made to any free agent

53. See LOWENFISH, *supra* note 12, at 268–69.

54. See Willis, *supra* note 7, at 124.

55. See *id.* Major League Baseball argued conscious parallelism was not sufficient to prove a conspiracy and that some "plus factor" was required to negate the possibility that individual teams acted independently based on market sources. See *id.* at 124 n.124.

56. See LOWENFISH, *supra* note 12, at 256.

57. See *id.* at 257.

58. See *id.* at 257–58.

59. See *id.* at 268.

60. Willis, *supra* note 7, at 125.

61. *Id.*

62. See WEILER & ROBERTS, *supra* note 6, at 232.

63. See LOWENFISH, *supra* note 12, at 269.

64. See WEILER & ROBERTS, *supra* note 6, at 232.

player and permitted every team to get immediate knowledge of the demand for services of every player in the free agent market.⁶⁵ Consequently, only twelve of seventy-six players eligible for free agency received offers, and only three players received offers that were persuasive enough to lead them to switch teams.⁶⁶

In Collusion III, Arbitrator Nicolau again found the clubs' arrangement to violate Article XVIII's bar against concerted action, even though the grievance did not involve an agreement to avoid signing free agents.⁶⁷ Recognizing the comparable economic implications of an information bank, Nicolau awarded the players \$65 million in lost salaries for the 1988 season.⁶⁸

D. Settlement

With Collusion I, II and III each decided against the clubs, the twenty-six Major League Baseball clubs, rather than appeal, agreed to pay the MLBPA a \$280 million settlement.⁶⁹ As part of the settlement agreement, the MLBPA agreed not to file a grievance for any collusion claims that may have emerged during the 1989–90 off-season.⁷⁰ However, by 1990, the clubs were expected to comply with the Basic Agreement in its entirety, or else risk another labor grievance.

III. BASEBALL'S "COLLUSION-FREE" ERA

Two hundred eighty million dollars poorer, but legally wiser, Major League Baseball clubs began to recognize the importance of avoiding further collusion. On April 1, 1989, the clubs elected esteemed lawyer A. Bartlett Giamatti to serve as the game's new commissioner.⁷¹ Giamatti provided fresh leadership, promising baseball owners to curb salaries through legal means rather than collusion.⁷²

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See Willis, supra* note 7, at 148.

70. *See id.*

71. BURK, *supra* note 18, at 262. A. Bartlett [Bart] Giamatti "came across as a Renaissance scholar in a Red Sox cap." His resume was most impressive. From 1986–89, Giamatti served as president of baseball's National League. Before he became National League President, he was a Yale professor. *See id.* In fact, had he not accepted a job in baseball, Giamatti strongly considered running for United States Senate. *See id.*

72. *See generally id.* at 263 (explaining that Giamatti "lined up former academic colleague Richard Levin to develop models for the pay-scale proposal").

Before Giamatti could fully acclimate himself to the commissioner's job, he died tragically of a massive heart attack.⁷³ Deputy commissioner Francis Vincent Jr. took over for Giamatti, and enforced an equally strong stance against collusion.⁷⁴ Vincent was then succeeded by Brewers' owner Bud Selig, who remained popular among baseball owners despite his earlier leadership role within the PRC during the 1980s.⁷⁵ Vincent and Selig pursued very different approaches in attempting to curb baseball salaries without colluding; unfortunately, both approaches ultimately failed.

A. *Baseball under Fay Vincent's Leadership*

Fay Vincent sought to make headway with the Players Association through amicability and legal bargaining tactics.⁷⁶ However, Vincent's measures were relatively unsuccessful and ultimately resulted in further angering baseball owners.⁷⁷

Under Vincent's direction, baseball clubs voted on February 16, 1990 to lock the players out of spring training.⁷⁸ The clubs then demanded that the MLBPA consent, as a matter of curbing salaries, to a salary cap and a total end to salary arbitration—drastic changes to the terms and conditions of employment from the existing collective bargaining agreement.⁷⁹ The

73. *See id.* at 266.

74. *See generally* BURK, *supra* note 18, at 266–67 (describing that Fay Vincent, Giamatti's hand-picked assistant, had earned degrees from Williams College and Yale Law School and had worked as "a corporate lawyer, a Securities and Exchange Commissioner officer and head of Columbia Pictures").

75. *See generally* LOWENFISH, *supra* note 12, at 268–69 (discussing Selig's role as a member of the Player Relations Committee).

76. *See* BURK, *supra* note 18, at 267. Two ways that Vincent attempted to improve baseball's relationship with the MLBPA were hiring as his deputy, Steven Greenberg, who was a former players' agent, and inviting former MLPBA representative Marvin Miller to lunch. *See id.*

77. *See generally id.* (suggesting that some believed Vincent took his attempt to improve relations with the MLPBA too far).

78. *See* LOWENFISH, *supra* note 12, at 274. By the time the baseball lockout began, salaries were in rapid increase, with 10 players earning \$3.0 million per season or more; *see also* Ken Picking, *Highest Salaries*, USA TODAY, Feb. 21, 1990, at 3C. Baseball's highest paid player, Will Clark had recently signed a four-year contract, worth on average \$3.75 million per season. *See id.* While, just one year earlier, baseball did not have a single player that earned \$3.0 million or more per season. *See Sport Magazine Highest Salaries*, ASSOCIATED PRESS, May 4, 1989, available at LEXIS, Academic Universe, AP File (citing the highest paid MLB player as of May 1989 as Los Angeles Dodgers pitcher Orel Hershiser, who made \$2.8 million per season).

79. *See* BURK, *supra* note 18, at 269. The owners demanded a salary cap, which called for them to pay the players' salaries equaling 48 percent of 82 percent of league revenues. *See* Murray Chass, *Lockout's on, but Vincent Has Suggestions*, N.Y. TIMES, Feb. 14, 1990, at B9. The intended effect of this cap was to drive down player salaries. *See generally id.* During this period, salaries were rapidly increasing in baseball. As of February 1990, 10 MLB players were earning at least three million dollars per season. *See Highest Salaries*, USA TODAY, Feb. 21, 1990, at 3C.

MLBPA quickly responded with an alternate set of demands.⁸⁰

Having anticipated a lockout, the MLBPA had set aside \$80 million of licensing revenues as “lockout insurance.”⁸¹ With the ability to continue providing for players, the MLBPA cavalierly threatened that if the lockout persisted, it would help to form a rival professional baseball league.⁸² Alternatively, the MLBPA offered baseball clubs the chance to restore baseball under a different set of changes to the Basic Agreement, which included maintaining a comparable salary structure as existed before the lockout and revising the league’s “collusion clause” to strongly discourage a repeat of the clubs’ recent conduct.⁸³

While most owners balked at the MLBPA counterproposal, Commissioner Vincent decided to involve himself in the collective bargaining process and took a surprisingly union-friendly position.⁸⁴ To many club owners’ dismay, Vincent’s union-friendly position signaled to the MLBPA a belief that with continued pressure, the clubs would submit to all MLBPA demands.⁸⁵ Consequently, the MLBPA did not budge.⁸⁶

Thirty-two days after baseball spring training was supposed to begin, MLB clubs reached a new collective bargaining agreement with the

While just twenty-one months earlier baseball’s highest paid player Orel Hershiser made less than \$3 million per year. *See Sport Magazine Highest Salaries*, THE ASSOCIATED PRESS, May 4, 1989, available at LEXIS, Academic Universe, AP File.

80. The MLBA demanded restoration of salary arbitration for players with two years experience (in 1985, the eligibility requirement for salary arbitration shifted from two to three years), increasing the league’s minimum salary, restoring an old formula that fixed owners’ pension revenue contributions, and increasing team rosters from 24 to 25 players. *See BURK, supra* note 18, at 270; *see also* Chass, *supra* note 79, at B11 (describing the player’s approach as “more conventional”).

81. *See BURK, supra* note 18, at 270.

82. *See id.* The MLBPA encouraged Dick Moss and an investor group featuring Donald Trump to initiate plans for the rival league. *Id.*

83. *See id.*

84. *See generally* Chass, *supra* note 79, at B11 (discussing the commissioner’s visible involvement in negotiations). Vincent’s primary aim seemed to be restoring labor peace and player trust in baseball owners. *See* Murray Chass, *Arbitration Eligibility is Major Hangup*, SPORTING NEWS, Mar. 5, 1990, at 13. However, Vincent’s involvement in the collective bargaining process angered many owners and played a principal role in owners asking him to resign. *See* Seabury, *supra* note 24, at 366. Convinced that the owners’ demands were futile, Vincent pulled the owners’ proposal from the bargaining table and replaced it with his own four-year plan, which retained the arbitration status quo and delayed decision-making on a salary cap. *See BURK, supra* note 18, at 271. “Privately, [owners] conceded that the commissioner’s action had left them to fight over nothing.” *Id.*

85. *See generally* BURK, *supra* note 18, at 271–72 (discussing the MLBPA’s representative, Donald Fehr’s, reaction to Vincent’s proposals).

86. *See id.* at 272; *see also* Chass, *supra* note 84, at 13 (explaining that while the MLBPA maintained a status quo position, the clubs were frequently changing their proposals, since Vincent’s perspective was markedly different from many baseball owners’ perspectives).

MLBPA, in a manner decisively favorable to the players.⁸⁷ As part of the 1990 Basic Agreement, the old “collusion clause,” previously documented as Article XVIII(H), was expanded into the new article XX(E).⁸⁸ The new Article XX(E)(1) restated the independent rights of players,⁸⁹ while Article XX(E)(2) established a treble damages remedy to dissuade owners from any future colluding.⁹⁰

With the addition of Article XX(E)(2)’s treble damage remedy, baseball clubs now had stronger incentive to follow the Basic Agreement’s rules against collusion.⁹¹ But, at the same time, the clubs failed to implement a legal mechanism for containing player salaries.⁹² With salaries destined to continue increasing and collusion becoming less feasible, most owners ordered Vincent to relinquish his role in future collective bargaining.⁹³

Unwilling to accept a diminution of power, Vincent resigned as commissioner on September 7, 1992.⁹⁴

B. Baseball During Selig’s Early Leadership

On September 8, 1992, baseball owners selected Milwaukee Brewers’

87. See generally John Shea, *Vincent Still Skeptical of Selig*, S.F. CHRON., Sept. 1, 2002, at B6 (comparing Vincent’s record for successful bargaining agreements with Commissioner Selig’s in 2002). The 1990 Basic Agreement provided arbitration to seventeen percent of players with two years of experience. See also BURK, *supra* note 18, at 272–73. The new agreement also restored rosters to 25 players and added direct language to the Major League Agreement declaring the owners liable for treble damages in the event of future collusion—all demands made by the MLBPA. See *id.* at 273.

88. See Seabury, *supra* note 24, at 362–63.

89. Article XX(E)(1) states: “The utilization or non-utilization of rights . . . is an individual matter to be determined solely by each Player and each Club for his or its own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.” See *Basic Agreement*, *supra* note 1.

90. Article XX(E)(2) states: “Upon any finding of a violation of Section E(1) of this Article XX by two or more Clubs, any injured Player (or Players) shall be entitled to recover in monetary damages three (3) times the lost baseball income, he (or they) would have had but for the violation . . .” *Id.*

91. See *id.*

92. Within a year, eight players would surpass Will Clark’s \$3.75 million per year salary. See *Highest Salaries*, USA TODAY, Apr. 8, 1991, at 4C. As of Opening Day 1991, Boston Red Sox pitcher Roger Clemens had become baseball’s highest paid player, earning almost \$5.4 million per season. See *id.* Clemens was closely followed by New York Mets’ pitcher Dwight Gooden, who earned almost \$5.2 million per year. See *id.*

93. See BURK, *supra* note 18, at 279; see also Shea, *supra* note 87, at B6.

94. See Tony DeMarco, *Vincent Resigns Rather than Fight: Commissioner Cites “Best Interest of Baseball” for his Decision*, FORT WORTH STAR TELEGRAM, Sept. 8, 1992, at 1; see also Seabury, *supra* note 24, at 366–67; BURK, *supra* note 18, at 280–81; Shea, *supra* note 87, at B6.

owner Bud Selig to replace Vincent as commissioner on an interim basis.⁹⁵ Unlike the relatively amicable Vincent, Selig was notorious among club owners for his hard-line approach to union negotiations.⁹⁶

Under Selig's direction, MLB clubs sought to achieve various bargaining concessions, which were denied during Vincent's reign.⁹⁷ By the end of 1992, Selig "pushed through a requirement that any specific collective bargaining stance . . . had to receive support from three-fourths of the clubs"—the first step to baseball owners' new and hardened bargaining position.⁹⁸

Selig's hard-line approach, nevertheless, proved just as unsuccessful at tempering player salaries as Vincent's amicability.⁹⁹ On June 14, 1994, baseball clubs re-proposed to the MLBPA the initial offer made during the 1990 negotiations—a salary cap and complete elimination of salary arbitration.¹⁰⁰ When the MLBPA rejected this offer, Selig advised baseball owners not to make a mandatory payment to the players' pension plan.¹⁰¹ Consequently, the clubs provoked another MLBPA strike.¹⁰²

With MLB players on strike and awaiting a more palatable offer, Selig announced on September 14, 1994 the cancellation of baseball's regular season, playoffs and World Series.¹⁰³ Selig's decision marked the

95. See Tony DeMarco, *Selig Takes Over Vincent's Duties; Giants May Stay Put*, FORT WORTH STAR TELEGRAM, Sept. 10, 1992, at 5.

96. See BURK, *supra* note 18, at 281.

97. See *id.* at 280–81.

98. *Id.* at 281. Selig's requirement of three-quarters endorsement placed the burden on owners' new chief negotiator Richard Ravitch to develop a collective bargaining proposal that met the needs of both small and large market teams. See *id.* For a proposal to achieve such large-scale support among owners would require significant concessions on the part of the MLBPA. See generally *id.* (discussing the need for a reduction in player salaries).

99. By December 1993, San Francisco Giants outfielder Barry Bonds had become baseball's highest paid player, earning \$7.29 million per season. See *Highest Salaries*, THE COMMERCIAL APPEAL (Memphis, TN), Dec. 24, 1993, at D1. See also ABRAMS, *supra* note 16, at 38–39 (showing the continued rise in median player salary during Selig's leadership); see also *Highest Salaries*, *supra* note 79, at 3C (listing baseball's ten highest salaries as of February 1990); see also *Baseball's Highest Salaries*, PALM BEACH POST, Sept. 18, 1997, at 4C (listing baseball's highest salaries as of September 1997).

100. See Seabury, *supra* note 24, at 367–68; see also BURK, *supra* note 18, at 287.

101. According to baseball historian Robert Burk:

As part of an effort to deny funds to the union strike pool and hoard more for themselves, the owners refused to make a scheduled \$7.8 million pension contribution. Furious players called for an immediate retaliatory strike, but representatives convinced them that the owners' actions had been intended "to push our hot buttons and to get us to go out earlier"

See BURK, *supra* note 18, at 288.

102. See *id.* at 287–88.

103. *Id.* at 290.

first time in ninety years that baseball's post-season had been cancelled.¹⁰⁴

The cancellation of baseball's World Series, which was intended to signal commitment to hard-line bargaining, alienated both baseball's fans and business partners.¹⁰⁵ During the 1994–95 players' strike, baseball players missed three full paychecks, with the average MLB player forfeiting \$300,000 in salary.¹⁰⁶ Meanwhile, Major League Properties, which is the licensing arm of Major League Baseball, endured a sales decline of 15 percent.¹⁰⁷ By the time the players' strike finally ended, MLB players had forgone \$230 million in salaries and the owners had lost \$580 million in revenues.¹⁰⁸ Both parties also had lost the respect of their fans and partners.

With both sides feeling the strike's economic and social effects, MLB clubs made a new offer to the MLBPA, which included a luxury tax rather than a salary cap as the method for curbing player salaries.¹⁰⁹ Consistent with their past bargaining position, the MLBPA again rejected the clubs' offer and replied with different terms, including a reduced luxury tax proposal.¹¹⁰ The clubs rejected the counteroffer and declared an impasse to bargaining, indicating the clubs would unilaterally implement their final offer.¹¹¹ These terms included: a salary cap, elimination of free agency, and removal of baseball's collusion clause.¹¹²

In response to these new terms, the MLBPA promptly filed a labor grievance against the clubs, contending that the clubs were forbidden from unilaterally implementing terms that fell outside of mandatory topics of

104. See Marc Topkin, *Strike Could Put Out Spring*, ST. PETERSBURG TIMES (Florida), Sept. 2, 1994, at 1C.

105. See generally BOB COSTAS, *FAIR BALL: A FAN'S CASE FOR BASEBALL* 30–31 (2001) (discussing how Commissioner Selig should have handled the 1994 collective bargaining process to preserve baseball for the fans); see also G. RICHARD MCKELVEY, *FOR IT'S ONE, TWO, THREE, FOUR STRIKES YOU'RE OUT AT THE OWNERS' BALL GAME* 161–74 (2001) (discussing in detail the bargaining process leading to canceling baseball's World Series).

106. See BURK, *supra* note 18, at 289.

107. See *id.* at 290. Major League Properties were projected to fall an additional 25 percent during the 1995 season with net losses projected to total \$364 million dollars. See *id.*

108. See *Baseball Strike*, THE ASSOCIATED PRESS, Oct. 2, 1994, available at LEXIS, Academic Universe, AP File.

109. See BURK, *supra* note 18, at 291.

110. See MCKELVEY, *supra* note 105, at 184. On December 10, the MLBPA responded to management with a plan for a 5.02 percent flat tax on club payrolls. See *id.*

111. Impasse was declared on December 23 in an announcement stating: "Due to the continued existence of this deadlock and the need to prepare for the 1995 season, the executive council voted today to exercise Major League Baseball's right under Federal Labor Law to implement the clubs' final salary cap proposal, effective 12:01 A.M. EST Dec. 24, 1994." *Id.* at 186 (citing Larry Whiteside, *Salary Cap in Place*, THE BOSTON GLOBE, Dec. 23, 1994, at 73).

112. See Seabury, *supra* note 24, at 368–69; see also BURK, *supra* note 18, at 291.

bargaining.¹¹³ Since the terms appeared outside the mandatory terms of collective bargaining, the National Labor Relations Board authorized a request for an injunction and restored baseball's 1994 collective bargaining system.¹¹⁴

This ruling was appealed to the courts, and on March 31, 1995, Judge Sonia Sotomayor granted a final injunction, ordering baseball players back to work under the old player-friendly 1994 version of baseball's Basic Agreement.¹¹⁵

With Selig's plan to unilaterally implement new terms forestalled by the courts, on November 26, 1996, the clubs conceded to a new labor agreement extending through the 2000 season, with an MLBPA option to extend it through 2001.¹¹⁶ Under the new Basic Agreement, the MLBPA once again avoided a salary cap.¹¹⁷ In turn, the MLBPA yielded to the owners' demand for a "luxury tax" provision, which shifted some revenue from high-salary teams to lower-salary teams.¹¹⁸

In essence, Selig's bargaining strategy garnered the introduction of a luxury tax into baseball in exchange for forgoing \$580 million in revenue.¹¹⁹ Despite this steep price, baseball's new luxury tax proved unsuccessful at curbing salaries.¹²⁰

C. Baseball During Selig's Later Leadership

Although the MLBPA was initially concerned about the luxury tax's effect on player contracts,¹²¹ baseball's luxury tax did little to curb player

113. See Seabury, *supra* note 24, at 369.

114. See BURK, *supra* note 18, at 293.

115. See Seabury, *supra* note 24, at 370; see also BURK, *supra* note 18, at 293.

116. See Seabury, *supra* note 24, at 372; see also BURK, *supra* note 18, at 295.

117. See Seabury, *supra* note 24, at 372; see also BURK, *supra* note 18, at 295. Baseball's eighth Basic Agreement was technically a five-year deal because it operated retroactively to the start of the 1996 season. MCKELVEY, *supra* note 105, at 198.

118. See Seabury, *supra* note 24, at 372-73. According to the 1996 collective bargaining agreement, salary expenditures above \$51 million would be taxed at a 35% rate for the 1997 season. The threshold then increased to \$55 million for 1998 and \$58.9 million in 1999. After the 1999 season, the agreement did not provide for any luxury tax. *Id.* The contract also included a provision for revenue sharing between owners, where the thirteen most profitable teams transfer a portion of their profits to the thirteen least profitable clubs. See *id.* at 373. In return, the MLBPA secured an increase in the minimum salary from \$109,000 to \$200,000 by 2001, and all players who were on a Major League roster during the strike received credit for time served. See MCKELVEY, *supra* note 105, at 198.

119. See *Baseball Strike*, *supra* note 108.

120. See BURKE, *supra* note 18, at 295-96.

121. See generally *id.* at 294 (quoting Bill Giles, "[t]he irony is that players don't like the idea of a drag on salaries, but they've already put the biggest drag on salaries ever created.").

salaries.¹²² Annual earnings, which had dropped from a pre-strike average of \$1.17 million per player to less than \$900,000 by 1995, regained momentum—increasing to a \$1.4 million average in 1998 to nearly \$2.0 million by Opening Day 2000.¹²³

Top-tiered players did especially well in baseball's new system.¹²⁴ As of July 1996, Ken Griffey Jr. was baseball's highest paid player with an \$8.5 million annual salary.¹²⁵ Yet, by December 2000, 17 Major Leaguers were earning more than \$12.5 million annually,¹²⁶ led by shortstop Alex Rodriguez, who in 2000 had signed a 10-year, \$252 million contract—the largest payout for a single player in the history of professional team sports.¹²⁷

As player salaries continued to rise, small market teams began to contend they no longer could compete on the field with large market teams.¹²⁸ With no other strategy seeming to unite the clubs' interests, owners decided to reorganize and centralize baseball's power.¹²⁹ In July 1998, the clubs named Selig as the game's official commissioner.¹³⁰ Then, in January 2000, the clubs expanded Selig's power to allow him to maintain competitive balance in baseball via revenue sharing,¹³¹ even

122. *See id.* at 294–96 (stating that part of the reason salaries only increased three percent in 1996 was not due to the luxury tax but rather due to owners' losses suffered during the work stoppage; after a year of market recovery and announcement of new five-year television deals with FOX, NBC and ESPN salaries began to again increase).

123. *See id.* at 298.

124. *See generally id.* (pointing to a trend between 1996 and 1998 in which more and more playoff teams were the teams with the highest payrolls).

125. *See Highest Average Salaries by Sport*, CHARLESTON GAZETTE (West Virginia), July 19, 1996, at 2B, available at LEXIS, Academic Universe.

126. *See Highest Baseball Salaries*, THE ASSOCIATED PRESS, Dec. 12, 2000, available at LEXIS, Academic Universe, AP File. These players included: Alex Rodriguez, Manny Ramirez, Carlos Delgado, Roger Clemens, Mike Hampton, Kevin Brown, Chipper Jones, Mike Mussina, Shawn Green, Mo Vaughn, Randy Johnson, Mike Piazza, Albert Belle, Ken Griffey Jr., Pedro Martinez, Bernie Williams and Larry Walker. *Id.*

127. *Id.* (citing the highest annual player salaries as of December 2002 were: Alex Rodriguez (\$25.2 million per year), Manny Ramirez (\$20.0 million per year) and Carlos Delgado (\$17.0 million per year); *see also* John Niyo, *It Pays to Have A-Rod*, DETROIT NEWS, May 8, 2001, at 1E (discussing Alex Rodriguez's 10-year, \$252 million contract); *see also* Peter Schmuck, *Rodriguez Springboard for Mind-Boggling Deals*, BALT. SUN, Nov. 5, 2000, at B2 (discussing baseball's rapidly increasing salaries during the 2000 off-season).

128. *See generally O's Top Salary Chart with \$69M Payroll*, TAMPA TRIBUNE (Florida), Apr. 2, 1998 at Sports-4 (quoting Expos General Manager Jim Beattie saying "[t]here's a few clubs that can be at \$70 million every year . . . To have your payroll in the 30s, I just don't think that you can compete."), available at LEXIS, Academic Universe.

129. *See generally* BURK, *supra* note 18, at 299 (describing "administrative reshuffling" as the solution to the unchanged economic realities in baseball).

130. *See id.*

131. *See id.*

though the commissioner could not technically enforce revenue sharing without the MLBPA agreement.¹³² The owners also voted to terminate the league president positions, consolidating central control within Selig's Milwaukee and New York offices.¹³³

With the owners' vote of confidence, Selig set out in the 2002 season to achieve salary concessions,¹³⁴ which owners had failed to obtain during both the 1990 and 1994 work stoppages.¹³⁵ Yet, once again, the clubs relented to a player-friendly result.¹³⁶

When the MLBPA threatened to strike during the 2002 season, baseball clubs quickly remembered the 1994 fiasco, and feared that another work stoppage would hurt the game's reputation with fans and businesses.¹³⁷ Recognizing that the clubs could not endure another strike, Selig caved into accepting a new four-year collective bargaining agreement—facially similar to the previous one.¹³⁸

The parties consented to a new luxury tax threshold of \$117 million with fixed, increasing thresholds from 2003 to 2006.¹³⁹ Initially, this tax threshold would not burden the players, as only three Major League teams—the New York Yankees, Texas Rangers and Los Angeles Dodgers—had salaries exceeding the \$117 million threshold in 2002.¹⁴⁰

The parties also agreed to a 2003 luxury tax rate of 17.5 percent—just half that of the previous collective bargaining agreement.¹⁴¹ Additionally, the new Basic Agreement increased the amount of local revenues shared

132. *See id.*

133. *See id.*

134. *See* Mike Klis, *Labor Deal's Impact May Be Years Away*, THE DENVER POST, Sept. 1, 2002, at 1C; *see also* Ronald Blum, *Baseball Owners Ratify New Labor Agreement 29-1*, THE ASSOCIATED PRESS, Sept. 5, 2002, available at LEXIS, Academic Universe, AP File.

135. *See generally*, BURKE, *supra* note 18, at 265–293.

136. *See generally* Blum, *supra* note 134 (“while clubs have all kinds of opinions . . . they all understood this is the agreement we're going to have to live with. We have to move on.”)

137. *See generally* Murray Chass, *Baseball; 29 Years for Labor Deal; Yanks Say Nay*, THE NEW YORK TIMES, Sept. 6, 2002, at D8 (recounting how the owners accepted the deal just hours before the players were set to strike for the sixth time in three decades).

138. Under the new terms, teams would have to wait until 2005 before garnering a meaningful increase in luxury tax payments. *See* Klis, *supra* note 134, at C1. Using next year's tax numbers with the Yankees' 2002 payroll of \$171.4 million, the Yankees would pay \$9.5 million in luxury tax in 2002—the most of any team. *See* Chass, *supra* note 137.

139. *See* Blum, *supra* note 134.

140. *See* Chass, *supra* note 2, at D4 (The Yankees payroll, however, appears significantly above this threshold in 2003; as of January 31, 2003, their anticipated player payroll stood at \$170.5 million.).

141. *Id.*; *see also* Klis, *supra* note 134, at C1 (The luxury tax rate would then increase to 22.5 percent in 2004 and potentially as high as 40 percent in 2005.).

between teams from 20 to 34 percent,¹⁴² increased the minimum annual salary from \$200,000 to \$300,000,¹⁴³ and provided for mandatory random testing for illegal steroids.¹⁴⁴ Reviewing the entirety of the new agreement, the clubs seemed to have again failed to legally curb baseball's salary structure.¹⁴⁵

IV. HAS COLLUSION RETURNED TO BASEBALL?

A. *The Facts about Baseball's 2002–03 Off-season*

Although baseball's new collective bargaining agreement was not expected to dramatically alter the game's player-friendly labor market, the 2002–03 off-season was filled with conduct varying starkly from past seasons.

Beginning shortly after the 2002 World Series, clubs began to discuss plans to reduce payroll.¹⁴⁶ The clubs then started threatening to release players that were eligible for salary arbitration.¹⁴⁷ According to published reports, the owners of the Texas Rangers, Atlanta Braves, Los Angeles Dodgers, Boston Red Sox and New York Mets all publicly discussed measures to reduce their team's payrolls.¹⁴⁸ Meanwhile, Commissioner Selig began to publicly state that he would only become encouraged about baseball's prospects once payrolls began to fall.¹⁴⁹

142. See Blum, *supra* note 135.

143. *Id.*

144. *See id.*

145. Tim Tucker, *Baseball Changes likely Short-lived*, THE ATLANTA JOURNAL-CONSTITUTION, Sept. 1, 2002, at 2F. (“[B]ased on past practice, it would not be a surprise if several big-market clubs eventually abandon better judgment and—tax notwithstanding—drive salaries even higher, all the while complaining about the game's financial problems.”); *see also* Hal Bodley, *Yankees in a Taxing Situation*, USA TODAY, Nov. 13, 2002, at 1C (stating that based on 2002 payroll levels, only three teams in 2003 would have become affected by the tax—the New York Yankees, Texas Rangers and Los Angeles Dodgers); Murray Chass, *Luxury Tax on Clubs: Less than Meets the Eye*, N.Y. TIMES, Sept. 8, 2002, at Section 8, p. 7 (stating that the tax, in the first year at least and maybe beyond, does not appear to be as potentially favorable to the clubs as the tax they had in the previous agreement).

146. *See* Josh Dubow, *Selig Likes Results of New Labor Deal*, THE ASSOCIATED PRESS, Nov. 14, 2002, available at LEXIS, Academic Universe, AP File (According to Dubow, “[t]here's been much more talk about cutting payroll than breaking salary barriers—a change the commissioner hopes lasts a long time.”).

147. *See e.g.*, Bob Hohler, *Daubach Ditched by the Sox; Floyd Signs Four-Year Deal with the Mets*, THE BOSTON GLOBE, Dec. 21, 2002, at G1. The clubs contended that many arbitration-eligible players would earn more money through salary arbitration than they would in the 2003 free agent market. Dave Campbell, *Twins Release DH Ortiz to make Room for Morban*, THE ASSOCIATED PRESS, Dec. 16, 2002, available at LEXIS, Academic Universe, AP File.

148. *See* Dubow, *supra* note 146.

149. *See id.*

With prodding from the commissioner and various owners, most clubs did not pursue new long-term contracts with many players that were eligible for salary arbitration.¹⁵⁰ Then, on December 20, 2002, MLB clubs simultaneously released forty-six arbitration-eligible players from their rosters rather than offer these players arbitration to determine their 2003 salaries.¹⁵¹ Among the released players included a few “superstars” such as the Texas Rangers’ Ivan Rodriguez.¹⁵² Rodriguez had produced some of the most prolific all-time numbers as a catcher.¹⁵³ At age 31, he had played 1,479 games with the Rangers, hitting .303 with 215 home runs and batting in 829 runs.¹⁵⁴

By releasing superstars and other high-caliber players,¹⁵⁵ the clubs increased the pool of players available on the free agent market.¹⁵⁶ By increasing free agent supply, the market price for each free agent declined.¹⁵⁷ With falling free agent market value, even superstar players

150. For example, the deadline to offer new contracts to free-agent eligible players came and passed without future Hall of Fame players such as Ivan Rodriguez (formerly of the Texas Rangers) and Greg Maddux (both formerly and currently with the Atlanta Braves) receiving serious, long-term contract offers from their current teams. See Drew Olson, *Quiet Meetings Just a Prelude: Expos, Others Will Still Be Dealing*, MILWAUKEE JOURNAL SENTINEL, Dec. 17, 2002, at 5C. Maddux was eventually offered one-year salary arbitration by the Braves, while the Rangers refused to even offer Rodriguez salary arbitration, instead paying him a \$2 million severance fee. See *Marlins Pay Pudge \$10M for One Year*, THE SEATTLE TIMES, Jan. 23, 2002, at D2. See generally Ronald Blum, *Teams Not Paying for Free Agents*, THE ATHENS BANNER-HERALD, Dec. 26, 2002, at C1 (describing teams’ reluctance to pay free agents).

151. The list of released players included some big names such as: Edgardo Alfonzo (New York Mets), David Bell (San Francisco Giants), Jose Cruz Jr. (Toronto Blue Jays), Brian Daubach (Boston Red Sox), Robert Fick (Detroit Tigers), Brad Fullmer (Anaheim Angels), David Ortiz (Minnesota Twins), and Ivan Rodriguez. See Troy Renck, *Rockies Bennett, Elarton Not Offered New Contracts*, THE DENVER POST, Dec. 22, 2002, at C21; see also Gordon Edes, *Less Dollars, More Sense in New Market*, THE SUNDAY BOSTON GLOBE, Dec. 22, 2002, at C13; Matthew Tresague, *Making First Moves, for Starters*, THE PRESS-ENTERPRISE (Riverside, CA), Dec. 21, 2002, at C1. See *Marlins Pay Pudge \$10M for One Year*, *supra* note 150, at D2. Teams usually do not release top-caliber players such as these based on the assumption that salary awards are lower than the salary these players command on the free market, and that when all else is equal, teams are better off keeping their current roster in tact. See generally *id.*

152. See *Marlins Pay Pudge \$10M for One Year*, *supra* note 150, at D2; see also Mike Klis, *This Time, Collusion Too Tough to Unearth: Superstars’ Big Contracts Provide Defense*, THE DENVER POST, Feb. 2, 2003, at 5C. Other released players generally considered “superstars” include Edgardo Alfonzo, formerly of the New York Mets, and Jose Cruz Jr., formerly of the Toronto Blue Jays. See *id.*

153. See *Marlins Pay Pudge \$10M for One Year*, *supra* note 150, at D2.

154. *Id.* The Rangers had claimed concern about Rodriguez’s health; however, Rodriguez had an excellent second half to the 2002 season and proclaimed himself healthy. See *id.*

155. See Olsen, *supra*, note 150. But see Tony Massarotti, *Reality Check, Please*, THE BOSTON HERALD, Feb. 2, 2003, at B12.

156. See Chass, *supra* note 2, at D1.

157. *Id.* Many players consequently signed significantly lower contracts than expected

found they were unable to receive the kind of contract offers they expected to find on the market.¹⁵⁸

The release of arbitration-eligible players had an especially dramatic effect on certain positions that became especially saturated, such as the ninth-inning relief pitcher (often, referred to in baseball as the closer). In baseball's overly-saturated market, long-time closer Ugueth Urbina, who had twice saved forty games in a season, could find no better 2003 contract offer than a one-year \$4 million deal, despite having earned \$6.7 million in 2002.¹⁵⁹ Similarly, closer Roberto Hernandez, who averaged thirty saves per season over the past ten seasons, relented to a salary decrease from \$6.0 million in 2002 to \$600,000 in 2003.¹⁶⁰

The release of many arbitration-eligible players also had a dramatic effect on the salaries of mid-level veteran free agents.¹⁶¹ For example, veteran Brad Fullmer, who started at designated hitter for a 2002 World Champion Anaheim Angels, had to settle for a salary reduction from \$3.25 million in 2002 to \$1.0 million in 2003 despite producing career-best statistics.¹⁶² Additionally, many veteran relief pitchers found themselves accepting significant pay cuts despite career seasons in 2002.¹⁶³

Similarly, the seventy-two players that clubs offered new contracts to, through salary arbitration, were also adversely affected.¹⁶⁴ Because of

under market conditions. *See generally Top 50 Free Agents*, ESPN.com, Nov. 12, 2002, at <http://espn.go.com/mlb/s/top50.html> (stating the new contractual terms of baseball's most desirable 2003 free agents). Especially telling of the market was that as of December 26, 2002 only 18 players had signed new deals for a total contract price of \$5 million or more, down from 25 players in 2002-03. *See Ronald Blum, Blum on Baseball: Falling Prices for Free Agents*, THE ASSOCIATED PRESS, Dec. 26, 2002, available at LEXIS, Academic Universe, AP File.

158. *See Blum, supra* note 157 (stating that first baseman Jim Thome was the only player as of December 26, 2002 to sign a new contract in the 2002-03 off-season with a total value exceeding \$40 million). *See also Edes, supra* note 151, at C13 (stating that neither Greg Maddux nor Ivan Rodriguez received a real offer from another team, and this is why Maddux eventually accepted the Braves' offer of salary arbitration; Rodriguez even considered playing 2003 in Japan as a result).

159. *See Rangers Acquire Reliever Urbina*, THE SEATTLE TIMES, Dec. 23, 2002, at D2 (Overall, Urbina's statistics showed he was a highly effective pitcher. Urbina maintained a 3.00 earned-run average, holding right-handed batters to the sixth lowest batting average in the league and striking out the fourth most batters per inning pitched of all relievers.).

160. By most standards, Hernandez had an average season in 2002—earning 26 saves for baseball's Kansas City Royals with a 4.33 earned run average. Hernandez had just completed a five-year, \$28.0 million contract. *See Chass, supra* note 2, at D1.

161. *See Tom Haudricourt, Agent: Yankees Hold Key to Clemens' Fate*, THE RECORD, Dec. 16, 2002, at S2.

162. *See Klis, supra* note 152, at 5C.

163. *See id.*

164. *See Ronald Blum, Arbitration Increases Slow*, THE ASSOCIATED PRESS, Feb. 21, 2003 available at LEXIS, Academic Universe, AP File.

the reduced number of market price free agents, baseball's seventy-two arbitration-eligible players accepted new contracts at lower salaries than if the market had remained strong.¹⁶⁵ These players' salaries declined because in baseball, a salary arbitrator is expected to determine players' fair market value based on the salaries of similarly situated players in the market.¹⁶⁶ Therefore, when free agent salaries declined, the salary awards by baseball arbitrators to arbitration-eligible players were also expected to drop.¹⁶⁷

In total, thirty-eight arbitration-eligible players, fearing a radical market decline, reached an agreement with their clubs before exchanging arbitration numbers.¹⁶⁸ Twenty-seven more players reached new contract agreements after exchanging arbitration salary figures, but before going before an arbitrator.¹⁶⁹ Among the many players that reached agreements, few were offered long-term contracts.¹⁷⁰ Additionally, only seven players'

165. *See id.* (The average salary increase for the 72 arbitration eligible players was 92 percent, down from a 130 percent rise from the previous season. This was the lowest salary increase for an arbitration eligible class since 1996, when arbitration salaries rose 73 percent.)

166. *Basic Agreement, supra* note 1, at Article VI. The explicit language of Article VI(F)(12) of the Basic Agreement states a salary arbitrator should determine the appropriate salary as follows:

- (a) The criteria will be the quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the Player's past compensation, comparative baseball salaries . . . , the existence of any physical or mental defects on the part of the Player, and the recent performance record of any Club including but not limited to its League standing and attendance as an indication of public acceptance . . .
- (b) Evidence of the following shall not be admissible:
 - (i) The financial position of the Player and the Club;
 - (ii) Press comments, testimonials or similar material bearing on the performance of either the Player or the Club, except that recognized annual Player awards for playing excellence shall not be excluded;
 - (iii) Offers made by either Player or Club prior to arbitration;
 - (iv) The cost to the parties of their representatives, attorneys, etc.;
 - (v) Salaries in other sports or occupations.

167. *See id.*

168. *See* Hal Bodley, *Final Arbitration Score: Owners 5, Players 2*, USA TODAY, Feb. 20, 2003, at 4C. According to *New York Times* columnist Murray Chass: "Because [these players] signed before exchanging figures, most of the players most likely accepted salaries more in line with what their clubs wanted to pay. They signed early after witnessing the decline in the market for free agents, figuring they better get what they could while they could still get it." *See* Murray Chass, *Decline in Market Leads to Fewer Arbitration Cases*, N.Y. TIMES, Jan. 18, 2003, at D2 (Some of the most expensive, one-year contracts that players signed before exchanging arbitration numbers include: "Derek Lee of Florida (\$4.25 million), Trot Nixon of Boston (\$4 million), Roy Halladay of Toronto (\$3,825,000), Adrian Beltre of Los Angeles and J.D. Drew of St. Louis (\$3.7 million each).").

169. *See* Bodley, *supra* note 168, at 4C. Also noteworthy, the number of players that exchanged arbitration offers was the lowest in fifteen years. *See* Chass, *supra* note 2, at D2.

170. *See* Blum, *supra* note 164. Only five players received multiyear deals, down from 17 in 2002 and 27 in 2001. However, only four of these players received total deals exceeding \$10

salary disputes proceeded to arbitration.¹⁷¹ As expected, the clubs won five of these seven cases.¹⁷²

B. Does Baseball Risk Losing another Collusion Grievance?

As a framework for analyzing whether there existed illegal collusion during the 2002–03 baseball off-season, a grievance arbitrator should consider as precedent the rulings in Collusion I, II and III and the holdings of relevant bodies of law.¹⁷³ Since collusion generally is a matter of federal antitrust law, antitrust case analyses are highly probative.¹⁷⁴

With proper guidance from legal sources, the first issue for an arbitrator to consider is whether an agreement existed between clubs to increase the supply of free agent players.¹⁷⁵ This aspect of the arbitrators' analysis is primarily factual and cannot be assessed decisively absent a formal record.¹⁷⁶

However, it is at least possible that a grievance arbitrator could find that an implicit agreement existed among MLB clubs to increase the supply of free agents during the 2002–03 off-season. In Collusion I, Arbitrator Roberts determined that an agreement violating baseball's collusion clause does not have to exist in writing.¹⁷⁷ Similarly, in Collusion II Arbitrator Nicolau determined that a "common scheme for common benefit" is enough to establish collusion even without a writing or spoken evidence.¹⁷⁸

Relying on these grievance rulings, an agreement among clubs seems to also exist here, even though baseball in 2002–03 operates under a slightly revised collusion clause from the 1980s.¹⁷⁹ Here, a grievance arbitrator may point to Selig's statements that encouraged payroll reduction and the statements made by teams including the Braves, Red Sox and Mets to signify a concerted plan to decrease payroll.¹⁸⁰

million (Torii Hunter, 4-years \$32 million; Danny Graves, 3-years \$17.25 million, Greg Maddux, 1-year \$14.75 million, Billy Koch 2-years, \$10.625 million), as opposed to eight or more players in the previous two seasons. *Id.*

171. See Bodley, *supra* note 169, at 4C.

172. See *id.*

173. See *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597–98 (1960) (discussing the arbitrator's legal responsibilities in the collective bargaining process); see also Willis, *supra* note 7, at 129.

174. See Willis, *supra* note 7, at 131–33.

175. See *id.* at 129.

176. See *id.*

177. See *id.* at 122.

178. See *id.* at 125.

179. See *id.* (discussing 1980's collusion clause).

180. See Dubow, *supra* note 146.

Similarly, federal antitrust law finds that an agreement to effect price exists even when there is a tacit or inferred agreement.¹⁸¹ Tacit or inferred agreements, according to antitrust law, are admissible when they serve as a statement by a co-conspirator in furthering a conspiracy.¹⁸² For example, in *American Tobacco Co. v. United States*,¹⁸³ the Supreme Court stated that “[w]here the circumstances are such as to warrant . . . finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified.”¹⁸⁴

Similarly, in *Monsanto Co. v. Spray-Rite Service Corp.*,¹⁸⁵ the Supreme Court held that to find an agreement, evidence is needed to exclude the possibility that defendants were acting independently, in a consciously parallel manner.¹⁸⁶ The independence presumption is only overcome when a “plus factor” exists beyond similar behavior.¹⁸⁷ A “plus factor” is inferable when either: the accused party’s actions were a radical departure from private practice, the defendant had been invited to engage in the alleged agreement, or the defendant had a substantial profit motive for concerted action.¹⁸⁸

Applying standards of antitrust law, a grievance arbitrator may infer an agreement based on any of these three “plus factors.”¹⁸⁹ The release of forty-six arbitration eligible players certainly is a radical departure from past seasons when most teams perceived salary arbitration as a cheaper alternative to signing players on the free agent market.¹⁹⁰ Moreover, Commissioner Selig’s statements are arguably an invitation to engage in collusion.¹⁹¹ Finally, as long as most clubs participate in such an

181. See E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS §4.15[A][2], at 182 (3d. ed. 1998). See generally PHILLIP AREEDA & LOUIS KAPLOW, ANTITRUST ANALYSIS: PROBLEMS, TEXT AND CASES ¶ 227, at 257 (5th ed. 1997) (discussing available channels of verbal and nonverbal communication).

182. See SULLIVAN & HARRISON, *supra* note 181, at §4.15[A][3], at 181; see also FED. R. EVID. 801(d)(2)(E).

183. 328 U.S. 781 (1946).

184. *Id.* at 810.

185. 465 U.S. 752 (1984).

186. See *id.* at 764, 768.

187. See SULLIVAN & HARRISON, *supra* note 181, at §4.15[A], at 187–88.

188. See *id.*

189. See *id.*

190. See generally Chass, *supra* note 2, at D1 (providing an example of forty-six players with whom clubs did not tender contracts by the December 20th deadline). This profit motive is based on the fact that a concerted agreement to increase free agent supply, absent significant holdout, reduces the market price to sign each free agent on the market. See *id.*

191. See Dubow, *supra* note 146. A basic tenet of economics is an increase in supply while demand is held constant decreases market price. See Chase, *supra* note 2, at D1.

agreement, there is a clear profit motive for flooding the free agent market.¹⁹²

A grievance arbitrator may also discount the alternative explanations that the clubs provide for the decline of the free agent market.¹⁹³ The clubs, as publicly quoted by various newspaper reporters, have presented three alternative explanations for players' salary decline. These explanations include baseball's new collective bargaining agreement, a poor economy, and a naturally changing market.¹⁹⁴ Baseball's new collective bargaining agreement does not seem to facially alter teams' spending incentives—especially for those twenty-seven teams that are below the 2003 luxury tax threshold.¹⁹⁵ Such a conclusion is especially unlikely because the 2003 luxury tax rate is lower than the tax rate under the 1996–2002 collective bargaining agreement, which had minimal effect on escalating player salaries.¹⁹⁶

Likewise, the argument that a recession has led baseball teams to independently reduce the player salaries fails to account for why teams during the 2002–03 off-season offered some of the largest contracts ever to team managers.¹⁹⁷ For example, the Chicago Cubs hired Dusty Baker to manage their team for between \$3.5 and \$3.75 million per year—the second highest annual salary ever paid to a baseball manager.¹⁹⁸ In addition, the Tampa Bay Devil Rays hired Lou Piniella to manage at a \$15 million salary over four years and the New York Mets hired Art Howe to manage for \$2.35 million per year.¹⁹⁹ Furthermore, the “changing market” explanation as argued by the clubs was previously rejected by grievance arbitrators in Collusion I and II.²⁰⁰

192. See Massarotti, *supra* note 155, at B12.

193. In an interview for a January 4, 2003 article, baseball's chief operating officer Bob DuPuy told reporter Ronald Blum that: “Any thought there has been any violation in our newly negotiated collective bargaining agreement is both disappointing and farfetched. . . . The market is behaving as it always does, reacting to economic stimuli and the quality of the players on the marketplace.” Blum, *supra* note 1.

194. See *id.*; see also John Shea, *A Whole Lot of Big Leaguers Still Are Looking for Work*, S.F. CHRON., Dec. 22, 2002 at B7; Chase, *supra* note 2, at D1; Massarotti, *supra* note 156, at B12.

195. See BURK, *supra* note 18, at 298; see Klis, *supra* note 134, at 1C, 12C; see Blum, *supra* note 135 and accompanying text.

196. See Blum, *supra* note 134 and accompanying text; see Klis, *supra* note 135, at 1C.

197. See *supra* notes 184–86 and accompanying text.

198. See John Shea, *Both Alou and Macha Have Ties to Montreal*, S.F. CHRON., Nov. 17, 2002, at B15.

199. See *id.*; see also David Lennon & Jon Heyman, *In Surprising Move, Devil Rays Offer Piniella 4-year Deal Worth \$15M*, NEWSDAY, Oct. 23, 2002, at A69, available at <http://pgasb.pgarchiver.com/newsday/219649321.html>.

200. See *supra* Part II.A–B.

If an agreement to increase free agent supply is found, the next issue for an arbitrator to determine is whether this agreement is the type prohibited by Article XX(E) of the Major League Agreement.²⁰¹ Collusion grievances I, II and III clearly involved the individual rights of players because these grievances emerged from alleged agreements among clubs not to make offers to specific free agents within the context of the free agent labor market.²⁰² Indeed, the current dispute is somewhat different because clubs made offers to free agent players during the 2002–03 off-season.²⁰³

Nevertheless, the economic effect of an agreement to increase the number of available free agents seems similar to the effect of an agreement not to sign other teams' free agents. Under both scenarios, the alleged agreement reduces players' market salaries—albeit, the traditional collusion claim affects the demand side and this potential claim affects the supply side.²⁰⁴

Given the relatively similar economic effects of a concerted agreement to decrease player demand and a concerted agreement to increase player supply, it seems that if an agreement in fact existed to increase the supply of baseball free agents, then that agreement violates baseball's collusion clause as set forth by Article XX(E) of the Major League Agreement.²⁰⁵

V. CONCLUSION

When considering both the documented series of events that occurred during baseball's 2002–03 off-season and their economic effects, it seems plausible that a baseball grievance arbitrator may find that Major League Baseball clubs once again violated baseball's "collusion clause".

A fourth collusion finding in favor of the players would have a more damaging effect on MLB clubs than the previous three.²⁰⁶ Since the average baseball salary has increased from \$412,000 in 1987 to \$2.3 Million in 2002, the cognizable losses, if a grievance arbitrator finds collusion in today's market, are significantly higher than in the 1980s.²⁰⁷ Further, unlike in the 1980s, today's Basic Agreement compounds the

201. See *Basic Agreement*, *supra* note 1, at Article XX(E).

202. See WEILER & ROBERTS, *supra* note 6, at 230.

203. See Blum, *supra* note 193.

204. See generally LEEDS & VON ALLMEN, *supra* note 2.

205. See *Basic Agreement*, *supra* note 1, at Article XX(E).

206. See Willis, *supra* note 7, at 148.

207. See Blum, *supra* note 193.

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losses for MLB clubs because the agreement provides a treble-damage remedy in the event collusion is found.²⁰⁸

When Major League Baseball in 1989 replaced Peter Ueberroth as commissioner, the league began making a concerted effort to utilize collective bargaining rather than collusive practices to curb player salaries.²⁰⁹ However, an analysis of the events of the 2002–03 off-season provides the possibility that clubs are seeking to engage in a prohibited form of collusion.

Based on the analysis of events of 2002-03 off-season, Major League Baseball risks losing a fourth collusion grievance based on the theory that a concerted increase in free agent player supply violates baseball's "collusion clause" in the same way a concerted decrease in free agent player demand violates the "collusion clause."

208. *See id.*

209. *See supra* notes 71–75 and accompanying text.