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## Forced Play: Was the MLB Commissioner's Decision to Force a 2020 MLB season Amid Coronavirus Unenforceable, or Just a Bad Idea?

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FORCED PLAY: WAS THE MLB COMMISSIONER'S DECISION  
TO FORCE A 2020 MLB SEASON AMID  
CORONAVIRUS UNENFORCEABLE, OR  
JUST A BAD IDEA?

I. ERROR: STARTING OFF THE BASEBALL SEASON ON THE  
WRONG FOOT

The novel coronavirus has had an astounding impact on every aspect of life, from remote work and online learning to restaurant and store closures.<sup>1</sup> The sports industry has experienced an equally disruptive impact in school athletic programs, recreational leagues, and professional leagues.<sup>2</sup> Due to the coronavirus, not only is it unsafe for fans to gather in large crowds for events and entertainment, but sports stadiums were closed to all spectators at the start of the baseball season, and professional sports leagues have had to determine the safest way to play games in which compliance with social distancing is difficult.<sup>3</sup> There are obvious health and safety concerns for the players and fans, but those concerns are coupled with worry over the economic impact the coronavirus is having on leagues such as Major League Baseball (“MLB”).<sup>4</sup> The economic

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1. See *Most Americans Say the Coronavirus Has Impacted Their Lives*, PEW RES. CTR. (Mar. 30, 2020), <https://www.pewsocialtrends.org/2020/03/30/most-americans-say-coronavirus-outbreak-has-impacted-their-lives/> [https://perma.cc/RZU8-GER5] (reporting forty-four percent of Americans believe coronavirus had major impact on their life and nine out of ten Americans agree their life has changed in small ways).

2. See Victor Mather, *How the Coronavirus has Disrupted Sports Events*, N.Y. TIMES (Mar. 2, 2020), <https://www.nytimes.com/2020/03/02/sports/coronavirus-sports.html> [https://perma.cc/PF36-26BK] (detailing coronavirus's impact on various leagues, in particular on total revenue collected).

3. See Sebastian Pellejero & Heather Gillers, *As Covid-19 Closes Stadiums, Municipalities Struggle with Billions in Debt*, WALL ST. J. (June 4, 2020), <https://www.wsj.com/articles/as-covid-19-closes-stadiums-municipalities-struggle-with-billions-in-debt-11591263000> [https://perma.cc/8U5R-BXTU] (stating cities and municipalities are struggling to pay off debt acquired to build stadiums in light of reduced revenue from coronavirus restrictions).

4. See Jeff Passan & Kiley McDaniel, *What the MLB Deal with Players Means for 2020 Season and Beyond*, ESPN (Mar. 28, 2020), [https://www.espn.com/mlb/story/\\_/id/28964249/what-mlb-deal-players-means-2020-season-beyond](https://www.espn.com/mlb/story/_/id/28964249/what-mlb-deal-players-means-2020-season-beyond) [https://perma.cc/7L5L-NZG8] (recognizing shorter baseball seasons mean less money for owners and players, with coronavirus potentially causing losses of billions of dollars of revenue).

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concerns for the MLB are particularly acute as players' salaries are tied to any growths or losses in the MLB's revenue.<sup>5</sup>

The MLB season, including revenue sharing and players' salaries, is governed by a collective bargaining agreement signed by the Major League Baseball Players Association ("MLBPA") and the owners of the thirty major league teams, represented by the MLB Commissioner.<sup>6</sup> The agreement between the MLBPA and the owners provides for a wide array of terms, including the Uniform Player's Contract, negotiation and approval of contracts, scheduling, players' salary schedules, safety and health provisions, and spring training.<sup>7</sup> The interruption of the traditional baseball season caused by the coronavirus prevented the MLB from executing a full 2020 season because many provisions of the active collective bargaining agreement ("2017-2021 CBA") were simply unworkable in light of the impact coronavirus has had on every aspect of life.<sup>8</sup> This left the owners and the players to sort out a new arrangement for the 2020 season.<sup>9</sup>

The MLBPA and the MLB formed an initial agreement in March 2020 ("2020 Agreement"), and maintained ongoing negotiations between the MLBPA's and MLB's legal teams to determine

5. *See id.* (discussing financial impact of coronavirus on MLB). The MLB has experienced several years of growth, with revenues increasing consistently from \$3.58 billion in revenue in 2001 to \$10.7 billion in revenue in 2019. *See* Christina Gough, *Major League Baseball Total League Revenue from 2001 to 2018 (in billion U.S. Dollars)*, STATISTA (May 20, 2020), <https://www.statista.com/statistics/193466/total-league-revenue-of-the-mlb-since-2005/> [<https://perma.cc/2QKY-LL32>] (citing *Forbes*) (tracking MLB total league revenue from 2001 to 2019). However, even following a record setting year last year, the impact of coronavirus on the MLB's financial health will likely be large. *See* Passan and McDaniel, *supra* note 4 (discussing economic impact on MLB from coronavirus).

6. *See* Daniel A. Rascher & T.D. DeSchraver, *Smooth Operators: Recent Collective Bargaining in Major League Baseball*, 7 INT'L J. OF SPORT FIN. 176, 204 (2004) (acknowledging MLB as first league to establish collective bargaining). The MLBPA was formed in 1954 and has represented players since then. *See id.* (discussing MLBPA formation and relation to collective bargaining).

7. *See generally* 2017-2021 MLB-MLBPA COLLECTIVE BARGAINING AGREEMENT [hereinafter "2017-2021 CBA"], available at [https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2\\_95883690627349e0a5203f61b93715b5.pdf](https://d39ba378-ae47-4003-86d3-147e4fa6e51b.filesusr.com/ugd/b0a4c2_95883690627349e0a5203f61b93715b5.pdf) [<https://perma.cc/S88R-GLMC>] (last visited Aug. 30, 2020) (providing basic agreement between MLB and MLBPA for duration of five years).

8. *See* Dayn Perry et. al., *Timeline of How the Coronavirus Has Impacted the 2020 MLB Season*, CBS SPORTS (Jul. 29, 2020), <https://www.cbssports.com/mlb/news/timeline-of-how-the-covid-19-pandemic-has-impacted-the-2020-major-league-baseball-season/> [<https://perma.cc/WMG8-EL9J>] (demonstrating alterations to season schedule as set forth in agreement as early as March 12, 2020 when spring training was cancelled).

9. *See id.* (describing changes made to timing of MLB season as a result of coronavirus).

what an abbreviated, somewhat socially distant 2020 season could look like for several weeks.<sup>10</sup> The initial agreement in March stated that the MLB Commissioner could mandate a season, in which case players would get 100% of their prorated salaries, and stated that best efforts would be made to play as many games as possible.<sup>11</sup> The MLBPA and the MLB did not, however, agree on the length of an abbreviated season, leaving the MLB Commissioner to enforce his right to mandate a season and resulting in a sixty-game schedule beginning July 23, 2020.<sup>12</sup> Almost immediately after the 2020 MLB season officially began, the MLB faced several obstacles as players continued to test positive for coronavirus despite the health and safety protocols in effect.<sup>13</sup> Continued positive coronavirus tests from players, combined with the decision of some well-known players to opt-out of the season, raised confusion as to the motivation of players to continue playing as well as concerns regarding the level of protection afforded to players.<sup>14</sup> The idea of an imposed season during a global pandemic, even with new health and safety protocols in effect, leaves an impression of unfairness for players who are

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10. *See id.* (detailing continued changes to agreement between MLBPA and MLB from March to May and beyond).

11. *See* Michael Silverman, *MLB, Players Agree on Format for 2020 Season, with Games Starting in Late July*, BOS. GLOBE (June 23, 2020), <https://www.bostonglobe.com/2020/06/23/sports/mlb-season-now-only-being-held-up-by-health-safety-protocols/> [<https://perma.cc/5JNM-KV4Z>] (noting neither owners nor players really got what they wanted in negotiations). Owners wanted players to bear a portion of lost revenues, claiming the lost revenues from empty stadiums would be too much for owners to bear. *See id.* (describing dismay over negotiations). Players' distrust towards owners meant that they did not believe the owners' predicted losses were accurate, and this distrust was visible throughout negotiations about compensation for the 2020 season. *See id.* (identifying reasons for problems during negotiations and impact on ultimate result).

12. *See* Silverman, *supra* note 11 (reporting stalled negotiations around number of games to be played in 2020, with players refusing to accept offers of fewer than seventy games). Players eventually decided not to counter the MLB owners' sixty-game offer, at which point the Commissioner was forced to exercise his ability to force a season. *See id.* (explaining how final result of negotiations came about).

13. *See* Matt Loede, *MLB Delivers 67-page Document to MLBPA Outlining Safety Protocols for Baseball's Return*, SPORTS ILLUSTRATED (May 16, 2020), <https://www.si.com/mlb/indians/news/mlb-delivers-67-page-document-to-mlbpa-outlining-safety-protocols-for-baseballs-return> [<https://perma.cc/2KX3-5LK3>] (highlighting new safety protocols including coronavirus tests "on a regular basis" and restrictions in MLB teams' facilities).

14. *See* Passan & McDaniel, *supra* note 4 (describing players' incentives to play for compensation and service time). Players are generally only allowed to enter arbitration without consent of the team to dispute salaries after three years of play. *See* 2017-2021 CBA, *supra* note 7, at art. 6, § E(1)(a) (discussing eligibility of players to arbitrate final salaries).

concerned about their health and safety.<sup>15</sup> This rings especially true when many activities such as going into the office for work and attending school in classrooms are still on hold in much of the country.<sup>16</sup>

This Comment discusses the various contract doctrines under which the MLBPA's performance could have been excused, ultimately assessing why these legal arguments reflect that the decision to play a 2020 MLB season was a bad idea (as implemented) regardless of whether the agreement was enforceable.<sup>17</sup> Part II discusses the history of MLB negotiations (including negotiations for the 2020 Agreement), assessing why the 2020 season interruption is unique.<sup>18</sup> Part III defines the legal doctrines the MLBPA could have relied on to defend a refusal to perform under the 2020 Agreement.<sup>19</sup> Part IV of this Comment analyzes the potential arguments the MLBPA would make under each of the defined doctrines and assesses why the arguments the MLBPA could make under each doctrine are also arguments likely to cause a stoppage during 2021 collective bargaining agreement negotiations.<sup>20</sup> Part V of this Comment analyzes the lessons the MLB and MLBPA can learn from their surprisingly successful 2020 season.<sup>21</sup> Finally, Part VI predicts

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15. See Amanda Diekman (@Amanda\_Diekman), TWITTER (Apr. 17, 2020, 3:35 PM), [https://twitter.com/Amanda\\_Diekman/status/1251232891373268996](https://twitter.com/Amanda_Diekman/status/1251232891373268996) [<https://perma.cc/L68V-6KBJ>] (stating unfairness of expecting players to risk health for entertainment of fans).

16. See Passan & McDaniel, *supra* note 4 (questioning likelihood of keeping players healthy throughout MLB season).

17. For further discussion of the agreement under a defense that the agreement is void as against public policy, see *infra* notes 177-211 and accompanying text. For further discussion of the agreement under a defense that it is unconscionable, see *infra* notes 212-250 and accompanying text. For further discussion of the agreement under a defense of undue influence, see *infra* notes 254-261 and accompanying text.

18. For further discussion of historic and current MLB negotiations, see *infra* notes 43-74 and accompanying text.

19. For further discussion of contract doctrines that reflect the MLBPA's grievances with the MLB, see *infra* notes 109-165 and accompanying text. For further discussion of which doctrines could have applied to the MLBPA's agreement with the MLB, see *infra* notes 252-253 and accompanying text.

20. For further discussion of the MLBPA's violation of public policy argument, see *infra* notes 177-211 and accompanying text. For further discussion of the unconscionability argument the MLBPA could make, see *infra* notes 212-250 and accompanying text. For further discussion of the undue influence argument the MLBPA could make, see *infra* notes 254-261 and accompanying text.

21. For further discussion of the 2020 season, see *infra* notes 97-108 and accompanying text.

how the forced season and the ugly negotiations surrounding it could negatively impact the MLB moving forward.<sup>22</sup>

## II. COVER YOUR BASES: MLB NEGOTIATIONS PAST AND PRESENT

This Section provides necessary background to understand the relationship between the MLB and the MLBPA and their 2020 negotiations – Part A of this Section discusses the legal structure under which the MLBPA and the MLB negotiate and structure their relationship.<sup>23</sup> Part B of this Section details past interruptions to MLB seasons, differentiating the 2020 season interruption.<sup>24</sup> Part C of this Section tracks the impact of coronavirus on the MLB, from early interruption of spring training to the final 2020 Agreement.<sup>25</sup>

### A. Major League Baseball and Collective Bargaining

The MLBPA has a long history of negotiating with team owners on behalf of the MLB's players.<sup>26</sup> Collective bargaining agreements between the MLBPA and the MLB owners are governed by the National Labor Relations Act, which establishes procedures for labor organizations as representatives of employees.<sup>27</sup> In particular, the National Labor Relations Act sets forth the requirement that employers and employees “meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.”<sup>28</sup> The MLBPA functions as a representative for all major league players, negotiating for the players as a group

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22. For further discussion of the impact of the 2020 season on the MLB, see *infra* notes 313-322 and accompanying text.

23. For further discussion of the MLBPA's relationship with the MLB, see *infra* notes 26-42 and accompanying text.

24. For further discussion of historical interruptions to MLB seasons, see *infra* notes 43-54 and accompanying text.

25. For further discussion of the impact coronavirus has had on MLB's 2020 season, see *infra* notes 55-108 and accompanying text.

26. See Rascher & DeSchraver, *supra* note 6, at 179 (detailing MLBPA's formation in 1954 and subsequent growth throughout 1970s beyond bargaining leverage of traditional unions).

27. See generally 29 U.S.C. § 157 (2018) (establishing right of employees to self organize).

28. See Ryan Probasco, *Revisiting the Service Time Quandary: Does Service Time Manipulation of Minor League Baseball Players Violate MLB's Collective Bargaining Agreement?*, 15 DEPAUL J. SPORTS L. 1, 11 (2019) (quoting 29 U.S.C. § 158(d) (2018)) (detailing that obligation set forth in National Labor Relations Act to confer in good faith does not require any party to agree on negotiated terms).

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to form the collective bargaining agreements with the MLB.<sup>29</sup> This makes the MLBPA-MLB relationship co-dependent because the MLB provides the only national and global platform for players in the MLBPA to play professionally, and the MLBPA provides the only source for players with unique skillsets that are difficult to replace.<sup>30</sup>

In the last half century, the collective bargaining agreements between the MLB and the MLBPA have ranged from three to five-year agreements.<sup>31</sup> During each collective bargaining agreement negotiation, different issues have created challenges in the negotiations.<sup>32</sup> In 1973, it was the adoption of salary arbitration, in 1985 (and again in 1993) it was revenue sharing, and in 2006 it was steroid use and drug tests.<sup>33</sup> A large cause of the difficult negotiations between the MLBPA and the MLB has been the players' distrust towards team owners, which was visible in the most recent negotiations for the 2020 MLB season.<sup>34</sup>

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29. See Rascher & DeSchrive, *supra* note 6, at 203 (describing MLBPA as a “close shop” union since it requires all players to be members of and represented by MLBPA).

30. See *id.* at 204-205 (noting there is no alternative league competing for professional baseball talent in United States or globally, with exception of rare few players who ever play overseas in foreign leagues). Rascher and DeSchrive also note that all players who want to participate in the MLB must join the MLBPA. See *id.* at 204 (explaining MLBPA and MLB relationship and MLBPA's representation of players since 1954).

31. See *id.* at 181-83 (comparing features of collective bargaining agreements from 1973 to 2011). The negotiations took varying lengths of time depending on factors such as the volatile relationship between the players and the owners, the negotiating styles of the MLB Commissioner and the MLBPA's president, the issues of contention between the negotiating parties, and the players' trust (or lack thereof) in the owners. See *generally id.* (discussing causes of varying success of negotiations for MLB collective bargaining agreements).

32. See *infra* notes 33-34 (discussing points of disagreement between MLB and MLBPA).

33. See *generally* Rascher & DeSchrive, *supra* note 6 (tracking collective bargaining history in Major League Baseball). While the MLB has ultimately had fewer stoppages and strikes due to disagreements around collective bargaining than other American major sports leagues, there are still moments in which the MLB has experienced interruptions due to these disagreements. See *id.* at 205-06 (comparing MLB's collective bargaining issues with other leagues' bargaining issues). For further discussion of the interruptions Major League Baseball has experienced as a result of failed collective bargaining negotiations, see *infra* notes 43-54 and accompanying text.

34. See Ryan Probasco, *supra* note 28, at 3-4 (“The driving force of the intensifying strain between baseball players and club owners is rooted in the economic landscape of the league.”); see also Rascher & DeSchrive, *supra* note 6, at 185 (citing Andrew Zimbalist, *May the Best Team Win: Baseball Economics and Public Policy*, BROOKINGS INST. (2003)) (recognizing players' distrust towards owners has negatively impacted collective bargaining negotiations).

The 2017-2021 CBA is a five-year agreement, spanning the 2017 season through the 2021 season.<sup>35</sup> The 2017-2021 CBA mandates each of the thirty teams within the league be scheduled for 162 games in each season, spanning across a total of 183 days with up to twenty interleague games per season.<sup>36</sup> The agreement also sets a minimum salary for each season based on service time, and a calculation for daily rate of pay based on the standard length of a season.<sup>37</sup> It also creates a Safety and Health Advisory Committee and sets forth the guidelines for handling player injury – though with no mention of a pandemic or epidemic.<sup>38</sup> These provisions, suitable for a traditional season, quickly became unworkable as the MLB postponed spring training, then pushed the season's start date, creating necessity for the MLB and the MLBPA to make several alterations to accommodate coronavirus health and safety precautions throughout the last year.<sup>39</sup>

Additionally, topics at issue in past collective bargaining negotiations were again contentious in both the negotiations for the 2017-2021 CBA and negotiations for the 2020 season.<sup>40</sup> In particular, the luxury tax, salary arbitration, free agency, and higher minimum compensation were areas of contention, as players have increasingly felt they are undercompensated and undervalued by the team owners.<sup>41</sup> These topics were all at issue prior to the worldwide spread of

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35. See generally 2017-2021 CBA, art. I (setting forth terms of employment for all MLB players for baseball seasons in 2017 through 2021).

36. See *id.* at art. V § A (discussing length of season, process for qualification in postseason play following completion of regular season, and impact of international “openers” on schedule); *id.* § D (proffering rotational format of interleague play in season).

37. See *id.* at art. VI, §§ A, C (setting minimum salary requirements based on service time, adjusted each year for inflation, and providing formula for calculating daily pay based on season length).

38. See *id.* at art. XIII (creating Safety and Health Advisory Committee tasked with “deal[ing] with emergency safety and health problems as they arise” and “engag[ing] in review of, planning for and maintenance of safe and healthful working conditions for Players”).

39. See Perry et al., *supra* note 8 (highlighting uncertainty surrounding MLB's 2020 season due to coronavirus).

40. See Gabe Lacques, *MLB Players Are Ready to 'Burn the Whole System Down.'* *Here's What They Want to Avoid a Strike*, USA TODAY (Feb. 22, 2019), <https://www.usatoday.com/story/sports/mlb/columnist/gabe-lacques/2019/02/22/mlb-collective-bargaining-agreement-strike/2948101002/> [https://perma.cc/3YKV-U5VD] (reviewing players' grievances with team owners and terms unfavorable to players in 2017-2021 CBA); Rascher & DeSchriver, *supra* note 6 (noting areas of contention in recent collective bargaining negotiations); see generally Perry et al., *supra* note 8 (tracking proposals and counterproposals between MLB and MLBPA during 2020 negotiations).

41. See Lacques, *supra* note 40 (analyzing terms of 2017-2021 CBA to show why players are upset with active agreement).



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the coronavirus, and they were put at the forefront of players' minds again as the MLB and the MLBPA negotiated compensation for a season unworkable under the terms of the 2017-2021 CBA.<sup>42</sup>

### B. Past Interruptions to MLB Seasons

The coronavirus pandemic not only created the need for a new agreement between the MLB and the MLBPA during an active collective bargaining agreement, but the coronavirus uniquely interrupted MLB game play.<sup>43</sup> There have been several interruptions to traditional MLB seasons historically, each of which had varying impacts on the season at the time.<sup>44</sup> The interruption most similar to the current season occurred in 1918, when a combination of World War I and the Spanish Influenza caused the 1918 season to be cut one month short and the start of the 1919 season to be delayed.<sup>45</sup> The 1918-1919 seasons were the only stoppages in MLB's history in which a government order impeded on gameplay – during World War II President Roosevelt famously wanted baseball played.<sup>46</sup>

42. See Silverman, *supra* note 11 (acknowledging initially optimistic negotiations derailed as players' and owners' positions failed to align).

43. See Craig Calcaterra, *Looking Back at Baseball's Previously Shortened Seasons*, NBC SPORTS (Mar. 13, 2020), <https://mlb.nbcsports.com/2020/03/13/looking-back-at-baseballs-previously-shortened-seasons/> [<https://perma.cc/8997-BVPF>] (describing current situation for sports leagues due to pandemic as “uncharted territory”).

44. See *id.* (analyzing whether past MLB interruptions provide guidance for 2020 season).

45. See Grant Suneson, *World War I is Among the Times Entire Sports Leagues Were Cancelled Before Covid-19*, USA TODAY, (Apr. 12, 2020) <https://www.usatoday.com/story/money/2020/04/12/16-times-entire-sports-leagues-were-cancelled-before-coronavirus/111525066/> [<https://perma.cc/3N24-8LT2>] (describing shortened 1918 season and early World Series as effort to free up players for war effort); see also Calcaterra, *supra* note 43 (ascribing early end of 1918 season to WWI). But see Thomas Boswell, *Baseball Has Survived Pandemics Before, and for Desperate Fans, That Counts*, WASH. POST (Mar. 18, 2020), <https://www.washingtonpost.com/sports/2020/03/18/baseball-has-survived-pandemics-before-desperate-fans-that-counts/> [<https://perma.cc/LC8P-V2ZX>] (attributing 1918 season interruption to Spanish Influenza pandemic of 1918). The U.S. Secretary of War, Newton D. Baker, issued an order that draft-eligible men whose jobs were considered “non-essential” were to sign up for war related work, at which point the regular season was cut short and the World Series moved to September. See Matt Kelly, ‘On Account of War’, NAT'L BASEBALL HALL OF FAME, <https://baseballhall.org/discover-more/stories/short-stops/1918-world-war-i-baseball> [<https://perma.cc/9AD4-4N87>] (last visited Sept. 1, 2020) (describing accelerated end of 1918 regular season with seven doubleheaders in one day to make time for September 5 to September 11 World Series). The Secretary of War required “draft-eligible men employed in ‘non-essential’ occupations” to apply for work that supported the war, or risk being drafted. See Calcaterra, *supra* note 43 (noting by July, teams were missing an average of fifteen players between drafted and enlisted players).

46. See Suneson, *supra* note 45 (noting sports were encouraged to continue during WWII, despite roster shortages due to war efforts, as President Roosevelt

Aside from the shortened MLB seasons during World War I, the only other cause of an abbreviated or cancelled season in the history of the MLB has been due to labor strikes and lockouts.<sup>47</sup> These labor dispute stoppages have revolved around similar issues to the ones that stalled negotiations during the most recent collective bargaining negotiations, namely salary arbitration, free agency, player compensation, and revenue-sharing.<sup>48</sup> The longest of these labor dispute stoppages was caused by a labor strike during the 1994-95 collective bargaining agreement negotiations, which ended the MLB regular season about fifty games early, cancelled the post-season, and concluded only after a U.S. District Court forced the MLB and the MLBPA to reach an agreement.<sup>49</sup> In fact, the National Labor Relations Board (“NLRB”) found that the MLB owners negotiated and acted unfairly towards the players during the 1994-95 negotiations.<sup>50</sup> The unfair tactics used by the MLB owners during 1994-95 negotiations harbored a distrust between the MLBPA

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sought to keep up public morale). *See generally* Calcaterra, *supra* note 43 (reviewing all mass interruptions in baseball). The All-American Girls Baseball League was also created in 1943 to fill the void the draft had left in MLB baseball during the war. *See League History*, ALL-AMERICAN GIRLS PROFESSIONAL BASEBALL LEAGUE, <https://www.aagpbl.org/history/league-history> [<https://perma.cc/4T8D-XJ65>] (last visited Mar. 1, 2021) (explaining womens’ league as Chicago Cubs owner Philip Wrigley’s solution to expected loss of MLB players to draft).

47. *See* Calcaterra, *supra* note 43 (detailing mass cancellations (excluding one-game cancellations) impacting MLB were either WWI, WWII or labor related); *see also* Rascher & DeSchraver, *supra* note 6, at 177 (citing Andrew Zimbalist, *May the Best Team Win: Baseball Economics and Public Policy*, BROOKINGS INSTIT. (2003)) (noting MLB’s history of work stoppage from strikes or lockouts from 1972 to 1995).

48. *See* Rascher & DeSchraver, *supra* note 6, at 185-87 (discussing each collective bargaining agreement negotiation in detail alongside strikes or lockouts occurring during negotiations, where applicable and describing 1994-1995 strike as most contentious collective bargaining negotiation in MLB’s history). The lockout lasted 232 days and cost the league 938 regular season games across all thirty teams. *See id.* at 177 (describing impact of lockout on league). The bargaining agreement was opened in 1993 by owners, with little communication between owners and managers for the first six months of the year. *See id.* at 185 (detailing owners voted to open current agreement early by vote of fifteen to thirteen). The owners had the ability to declare an impasse and impose the new collective bargaining agreement for the 1994 season as they wrote it if the players did not agree to it by the end of 1993. *See id.* at 186 (describing owners’ negotiations on revenue sharing as a dealing tactic so they could impose owners’ last offer). The players scheduled the strike for August 12, 1994 when there was still no agreement between owners and players. *See id.* (noting owners then refused to pay into players’ pension funds).

49. *See* Suneson, *supra* note 45 (discussing terms at issue in negotiations and concessions owners asked players to make as obstacle to new agreement).

50. *See* *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 255-61 (S.D.N.Y. 1995) (holding NLRB had reasonable cause to believe owners engaged in unfair labor practices and that injunction against owners was proper). *Silverman*, written by now-Supreme Court Justice Sotomayor, found that the owners had failed to negotiate in good faith with the players in violation of

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and MLB owners that was still visible during both 2017-2021 CBA negotiations and the 2020 Agreement negotiations.<sup>51</sup>

Whenever MLB games have been cancelled due to game play stoppages – whether because of war, lockouts, or labor strikes – the MLB has seen a corresponding decrease in revenue.<sup>52</sup> Money is a driving factor in the collective bargaining agreement negotiations, and following the 1994-95 strike and shortened 1995 season, massive efforts were made on the part of both the MLB and the MLBPA to avoid stoppages due to failed negotiations because of the negative impact on revenue.<sup>53</sup> Unfortunately, as the 2020 season has been played without revenue-generating activity, the stalled negotiations between the MLBPA and MLB owners has been unsurprising, foreshadowing continuing animosity between the two groups.<sup>54</sup>

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National Labor Relations Act §§ 8(a)(1), 8(a)(5). *See id.* at 261 (explaining lack of good faith in negotiations and unlawful activity by owners).

51. *See* Suneson, *supra* note 45 (describing owners' tactics in 1994, including changing terms to benefit owners and asking for concessions from players on "salary caps, arbitration, revenue splitting, pensions, licensing revenue, free agency, and more"); *see also* Rascher and Deschrive, *supra* note 6, at 186 (explaining owners' tactics to unilaterally impose their last offer as new collective bargaining agreement when new agreement favored owners considerably). Once players set a strike date of August 12, owners refused to pay into the players' pension fund, so players sued for unfair labor practices. *See* Rascher & Deschrive, *supra* note 6, at 186 (describing long term results of strike).

52. *See* Victor A. Matheson, *The Effects of Labour Strikes on Consumer Demand in Professional Sports: Revisited*, 38 APPLIED ECON. 1173, 1179 (2006) (reporting short-term revenue loss after labor strikes and additional long-term revenue loss as result of strikes, though losses were offset by new stadiums drawing in fans and increasing attendance).

53. *See* Rascher & DeSchrive, *supra* note 6, at 201 (noting both MLB and MLBPA recognized lost revenue as product of 1994 labor strike and commenting that both sides worked to avoid similar strike in 2011); *see also* Lacques, *supra* note 40 (reporting major tensions between players and owners under 2017-2021 CBA, marking end of peaceful labor relation driven by high revenue for both players and owners); Anthony Witrado, *If it Weren't for the Money, the 2020 MLB Season Would be Cancelled*, FORBES (Aug. 4, 2020) <https://www.forbes.com/sites/anthonywitrado/2020/08/04/if-it-werent-for-the-money-the-2020-mlb-season-would-be-cancelled/#353835055ba7> [<https://perma.cc/5EC6-YESR>] (arguing MLB's concerns over health and safety are only stated for publicity's sake, and MLB is driven solely by money to keep season going).

54. *See* Silverman, *supra* note 11 (describing both MLB and MLBPA as "entrenched" in their positions, leading to stalemate for 2020 season and likely leading to difficult negotiations in 2021 when 2017-2021 CBA expires). The loss of revenue-generating activity owners relied on to support argument for lower salaries include fans in the stands, concession sales in ballparks, and special broadcasting deals. *See* Elizabeth Swinton, *MLBPA Rejects MLB's Proposal, Does Not Plan to Counter*, SPORTS ILLUSTRATED (Jun. 13, 2020), <https://www.si.com/mlb/2020/06/14/mlbpa-rejects-mlb-proposal-does-not-plan-counter> [<https://perma.cc/UY3F-34LJ>] (citing lack of gate fees as huge revenue loss for MLB).

## C. MLB and Coronavirus

1. *Coronavirus's Early Impact on the MLB*

The interruption to the 2020 MLB season was not the result of a strike, but rather the ongoing health pandemic in which the 2017-2021 CBA cannot safely be followed.<sup>55</sup> The coronavirus's impact was visible in March 2020, when universities began to close, employers sent their employees home, and state governments issued stay-at-home orders and bans on large gatherings.<sup>56</sup> Then, the National Basketball Association ("NBA") announced its decision to indefinitely suspend its season.<sup>57</sup> Despite these early warning signs, the MLB began spring training optimistic that they would find a way to play a full season.<sup>58</sup> However, the MLB had to reconsider when the World Health Organization classified the coronavirus as a pandemic rather than an epidemic on March 11, 2020.<sup>59</sup> Also on March 11, Washington's governor placed a ban on all group gatherings, originally through March of 2020, which left the Seattle Mariners unable to play in Seattle's T-Mobile Park.<sup>60</sup> These obstacles all combined to cause the MLB to reverse course and cancel spring training in addition to postponing the regular season by two weeks.<sup>61</sup> Unfortunately, as stay-at-home orders remained in effect well beyond the MLB's optimistic two-week postponement of their season start date, the MLB and the MLBPA had to work to create an

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55. See Perry et al., *supra* note 8 (monitoring and recording updates to 2020 MLB season, including early positive coronavirus tests among players and minor alterations to baseball season when owners and players thought regular season could happen).

56. See eg. Yuki Noguchi, *Coronavirus Triple Duty: Working, Parenting, and Teaching from Home*, NAT'L PUB. RADIO (Mar. 17, 2020), <https://www.npr.org/2020/03/17/816631571/coronavirus-triple-duty-working-parenting-and-teaching-from-home> [<https://perma.cc/73CX-B3XG>] (discussing massive shift from office and work life to working and teaching kids from home in wake of Washington's stay-at-home orders).

57. See Perry et al., *supra* note 8 (recognizing once NBA announced suspension of its season, it was only matter of time before other leagues followed suit, which is exactly what occurred when several leagues including MLB postponed or suspended play following NBA's announcement).

58. See *id.* ("March 9, 2020: Following a conference call with all [thirty] teams, MLB announces its intent to continue playing spring training games and to open the regular season on March 26 as planned. The statement notes that MLB has been in regular contact with health officials.").

59. See *id.* (noting World Health Organization's classification of coronavirus as pandemic fell on same day as NBA's suspension of its season).

60. See *id.* (detailing calendar of major decisions made by MLB and events occurring within league such as player opt-outs from March through August).

61. See *id.* (recognizing MLB's postponement of spring training correlated to NBA's suspension of game play).

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agreement on uncertain foundation.<sup>62</sup> Further complications arose in the MLB's attempt to start the 2020 season as state government orders dictated various precautions required for combating the coronavirus.<sup>63</sup>

Initially, state governments imposed precautions such as stay-at-home orders.<sup>64</sup> However, these policies were replaced as coronavirus numbers came down and the public began to lose patience with quarantining.<sup>65</sup> Now, state mandates are present in the form of limited building capacities and social distancing and mask mandates, though the presence and strictness of mandates varies across states.<sup>66</sup> Additionally, while states do not generally require that people take coronavirus tests, some states have eased other requirements so that quarantine after travel is not necessary so long as the traveler receives a negative coronavirus test upon return.<sup>67</sup>

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62. See Witrado, *supra* note 53 (discussing continued positive test results as MLB's 2020 season got underway, arguing that MLB is prioritizing money and mitigating revenue loss over player health).

63. For further discussion of the precautions required for players, see *infra* notes 64-67 and accompanying text.

64. See *Deciding to Go Out*, CTRS. FOR DISEASE CONTROL: COVID-19 (2019) <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/deciding-to-go-out.html> [<https://perma.cc/5AD5-463F>] (presenting basic precautions against spread of coronavirus include maintaining six feet of space between yourself and others, holding activities outside, wearing masks, avoiding crowded spaces and washing hands frequently). Quarantine orders were in place statewide in forty-two states in the U.S. and locally in parts of an additional three states during the initial attempts to control the virus. See Sarah Mervosh, Denise Lu, & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (updated Apr. 20, 2020), <https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html> [<https://perma.cc/BW8B-B82Y>] (reporting ninety-five percent of Americans were under government instructions to prevent spread of coronavirus by staying home).

65. See Miriam Berger et al., *Surge in Anxiety and Depression Shows Coronavirus Toll on Mental Health in America*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/nation/2020/05/26/coronavirus-update-us/> [<https://perma.cc/RE2C-EZRE>] (reporting American mental health reflects toll of coronavirus, as one third of Americans show signs of clinical anxiety or depression).

66. See Jasmine C. Lee et al., *See How All 50 States are Reopening (and Closing Again)*, N.Y. TIMES (Updated Sept. 11, 2020), <https://www.nytimes.com/interactive/2020/us/states-reopen-map-coronavirus.html> [<https://perma.cc/SD98-8JW3>] (addressing variation in states' reopening procedures and analyzing rush to reopen due to struggling economy as cause of backtrack in procedures); see also Andy Markowitz, *State-by-State Guide to Face Mask Requirements*, AARP (last updated Sept. 14, 2020), <https://www.aarp.org/health/healthy-living/info-2020/states-mask-mandates-coronavirus.html> [<https://perma.cc/2HLJ-VC7N>] (providing link to each state's coronavirus page for state-by-state recommendations for coronavirus precautions).

67. See Megan Marples, *Covid-19 Travel Restrictions State by State*, CNN (last updated Sept. 14, 2020), <https://www.cnn.com/travel/article/us-state-travel-restrictions-covid-19/index.html> [<https://perma.cc/Q4TA-4JVT>] (reporting Alaska

These government mandates have been enacted by the executive branches of state governments under authority granted by those states' legislatures.<sup>68</sup> Additionally, the Centers for Disease Control ("CDC") issued guidance to wear masks, social distance, and prevent close contact, representing the federal government's precautionary recommendations.<sup>69</sup> In addition to the mandates, there has been wildly divergent public opinion regarding masks, which impacts how Americans view the risks associated with major league sports generally.<sup>70</sup>

As the state restrictions altered over the course of the pandemic, the MLB continued to push the start of the 2020 season

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requires negative coronavirus tests to cross into its border, and that some states with mandates requiring travelers to quarantine upon arrival allow those travelers to skip quarantine by providing proof of negative test).

68. *See, e.g.*, City & Cty. of Honolulu Exec. Order No. 2020-25 (Aug. 25, 2020), [https://governor.hawaii.gov/wp-content/uploads/2020/08/2008106-CCH\\_Emergency-Order-No.-2020-25-distribution-signed.pdf](https://governor.hawaii.gov/wp-content/uploads/2020/08/2008106-CCH_Emergency-Order-No.-2020-25-distribution-signed.pdf) [<https://perma.cc/Q7KB-DF6E>] (addressing resurgence of coronavirus in city under power granted by city charter and Hawai'i revised statutes); Colo. Exec. Order. No. D 2020 178 (Sept. 5, 2020), <https://www.colorado.gov/governor/sites/default/files/inline-files/D%202020%20178-Protect%20Our%20Neighbors.pdf> [<https://perma.cc/LW2T-YNHP>] (extending Executive Orders already in effect restricting daily business under authority of Colo. Disaster Emergency Act, C.R.S. § 24-33.5-701); Miss. Exec. Order No. 1522 (Sept. 13, 2020), [sos.ms.gov/content/executiveorders/ExecutiveOrders/1522.pdf](https://sos.ms.gov/content/executiveorders/ExecutiveOrders/1522.pdf) [<https://perma.cc/W6BJ-M64N>] (extending limited capacities and reopening procedures and limiting group gatherings pursuant to Miss. Code Ann. § 33-15-11(b)(17)); N.C. Exec. Order No. 163 (Sept. 1, 2020), <https://files.nc.gov/governor/documents/files/EO163-New-Phase-2.5.pdf> [<https://perma.cc/4Y6N-H6ZE>] (requiring face coverings in public facilities pursuant to N.C. Gen. Stat. § 166A-19.10(b)(2) (2020)); N.D. Exec. Order No. 2020-02.3 (July 28, 2020), [https://www.health.nd.gov/sites/www/files/documents/Files/MSS/coronavirus/State%20Health%20Officer%20Orders/2020-02.3\\_International\\_Travel.pdf](https://www.health.nd.gov/sites/www/files/documents/Files/MSS/coronavirus/State%20Health%20Officer%20Orders/2020-02.3_International_Travel.pdf) [<https://perma.cc/QT9U-VYQR>] (mandating quarantine for travelers entering North Dakota pursuant to N.D. Cent. Code Adv. Legis. Serv. § 23-01-05.1(West 2012)); N.J. Exec. Order No. 173 (Aug. 3, 2020), [nj.gov/in-fobank/eo/056murphy/pdf/EO-173.pdf](https://nj.gov/in-fobank/eo/056murphy/pdf/EO-173.pdf) [<https://perma.cc/5SQ7-DXT3>] (rescinding numerical limits for outdoor gatherings and maintaining all other requirements set forth to mitigate spread of virus pursuant to N.J. Stat. Ann. § App.A: 9-33 (1953)); R.I. Exec. Order No. 20-67 (Aug. 28, 2020), <https://governor.ri.gov/documents/orders/Executive-Order-20-67.pdf> [<https://perma.cc/J46Q-RGB9>] (extending travel restrictions for domestic travelers and expanding indoor gatherings to fifteen people or less pursuant to 23 R.I. Gen. Laws § 23-8-4)).

69. *See Government Response to Covid-19*, USAGov (last updated Aug. 26, 2020), <https://www.usa.gov/coronavirus> [<https://perma.cc/4EM3-YERR>] (defining CDC's health information regarding coronavirus in U.S. response to pandemic).

70. *See Bobby Allyn & Barbara Sprunt, Poll: As Coronavirus Spreads, Fewer Americans See Pandemic as a Real Threat*, NAT'L PUB. RADIO (Mar. 17, 2020), <https://www.npr.org/2020/03/17/816501871/poll-as-coronavirus-spreads-fewer-americans-see-pandemic-as-a-real-threat> [<https://perma.cc/A7K5-MAC9>] (reporting about fifty-six percent of Americans "consider the coronavirus a 'real threat'" and that growing number of Americans think it is "blown out of proportion").

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back, first to March 26, then to the middle of May, then to early July, until the first pitch of the season was thrown on July 23, 2020.<sup>71</sup> The continued delays were the result of ongoing concerns for player safety, compounded by the MLB/MLBPA's futile negotiations.<sup>72</sup> The parties went through several rounds of negotiations beyond the time frame of stay-at-home orders in an attempt to reach an agreement independent of the 2017-2021 CBA to govern the 2020 season.<sup>73</sup> Once these negotiations stalled, Commissioner Rob Manfred ultimately imposed a schedule to finalize the 2020 Agreement.<sup>74</sup>

## 2. *Negotiating the Final "Agreement"*

Early on in the MLB's 2020 Agreement negotiations spurred by the pandemic, both the MLB and the MLBPA were optimistic about the outlook of negotiations for a season workable during the coronavirus pandemic.<sup>75</sup> The new agreement was negotiated by MLBPA Executive Director Tony Clark on behalf of all players.<sup>76</sup> On March 26, 2020, the two parties actually reached an agreement that laid out the framework for a 2020 season, though the basic 2020 Agreement did little to prevent future difficult negotiations which ultimately extended beyond the initial delay caused by the

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71. See Perry et. al., *supra* note 8 (indicating each announced date during negotiations for potential game play as MLB owners and players pushed forward with play as soon as feasible).

72. See *id.* (tracking each new start date announced by MLB and MLBPA).

73. See Passan & McDaniel, *supra* note 4 (reviewing difficult terms of negotiations).

74. See *id.* (indicating continuously pushed back start date was caused by combination of delays associated with positive coronavirus tests and difficult negotiations, ending in stalemate). Such a stalemate, as occurred between the MLB and the MLBPA, was the purpose behind giving Commissioner Manfred the power to force a season, so long as players received prorated salaries. See Dayn Perry, *Why MLB's 2020 Season will Still be Played Despite Labor Fight; And When the Schedule Could Start*, MAJOR LEAGUE BASEBALL (June 15, 2020), <https://www.cbssports.com/mlb/news/why-mlbs-2020-season-will-still-be-played-despite-labor-fight-and-when-the-schedule-could-start/> [<https://perma.cc/7FPK-ZQDS>] (explaining negotiations from March 26 giving Commissioner Manfred power to mandate 2020 season as imperfect option for both players and owners, but best option for getting game play in this season).

75. See Silverman, *supra* note 11 (noting harmony between players and owners, which allowed parties to form 2020 Agreement quickly, dissipated once it was clear there would be no revenue from fans).

76. See Dave Sheinin, *MLB, Union Appear within Reach of a Deal for 2020 Season After Owners Concede on Prorated Salaries*, WASH. POST (June 17, 2020), (noting MLBPA has acknowledged power it gave to Commissioner to enforce terms of 2020 season so long as players were paid their full prorated salaries).

coronavirus pandemic and ended in a stalemate.<sup>77</sup> The basic terms of the 2020 Agreement dictated three main features of the season's framework, including that players would receive one hundred percent of their prorated salaries based on the number of games played in the 2020 season, that the MLB Commissioner would have the right to implement a schedule for the season if one could not be agreed upon, and finally that the MLB would make best efforts to play as many games as possible.<sup>78</sup>

Unfortunately, these initial terms did not pave the way for a fast or smooth negotiation process.<sup>79</sup> The ten-week negotiations between owners and players extended beyond the delay caused by the coronavirus, and ended in a stalemate when the number of games played and the compensation per game became sticking points between the two parties.<sup>80</sup> Players wanted to fit as many games as possible into the shortened season, in light of their prorated salary structure for the season.<sup>81</sup> The players suspected, and the owners' behavior suggested, that owners wanted to avoid too high a number of games for the same reason – fewer games played

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77. See Tim Stebbins, *Rob Manfred Guarantees a 2020 MLB Season, With or Without Agreement*, NBC SPORTS CHI. (June 10, 2020) <https://www.nbcsports.com/chicago/cubs/rob-manfred-guarantees-2020-mlb-season-or-without-agreement> [<https://perma.cc/R3C2-PK8P>] (reporting Manfred's stance as of June that owners hoped to avoid falling back to March agreement to impose mandated season, but it would be done if necessary). After the 2020 Agreement, owners wanted to reopen the term guaranteeing players a full prorated salary if a season is mandated on account of a clause allowing change if games were to be played without fans. See *id.* (noting owners want players to share revenue losses); see also Silverman, *supra* note 11 (identifying clause as "vaguely worded" to allow for discussion of feasibility issues of paying players prorated salaries if stadiums remained closed).

78. See Silverman, *supra* note 11 (suggesting owners attempted to back out of term promising players prorated salaries due to expected revenue losses from empty stadiums).

79. See Perry et. al., *supra* note 8 (marking dates between initial agreement on March 26 and final announcement of league owners' vote to impose season on June 22).

80. See Silverman, *supra* note 11 (tracking offers and counteroffers between owners and players in negotiations just prior to Commissioner Manfred's announcement of imposed sixty-game season). The owners' offers began at eighty-two games, which players countered with 114 games. See *id.* (noting owners steadily decreased number of games in their offers and never included full pro rata salaries, whereas players continually countered with full pro rata pay and higher number of games played). The owners' final offer was a sixty-game season at fully prorated salaries, and this is the schedule the Commissioner imposed after the MLBPA rejected the sixty-game offer. See *id.* (noting final offer was lowest number of games MLB offered to players).

81. See Perry, *supra* note 74 (describing forced season as less than ideal for both parties, for players in particular because they want longest regular season possible, considering salaries are tied to number of games played).



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meant less money the owners had to put towards players' salaries.<sup>82</sup> Due to the inability of the parties to agree on the length of the 2020 season, the MLBPA cut off negotiations, forcing Commissioner Rob Manfred to impose a 2020 schedule consisting of sixty games.<sup>83</sup>

In the background of ongoing negotiations for the compensation framework for 2020, players and owners made progress on other necessary terms such as the health and safety protocols players followed to accommodate the CDC's recommendations for coronavirus mitigation.<sup>84</sup> These health and safety protocols included precautions such as closing water fountains, prohibiting sunflower seeds in the dugout, discouraging high-fives, and discouraging players from showering at the stadium.<sup>85</sup> Health and safety protocols notwithstanding, players continued to test positive, which resulted in the postponement of games.<sup>86</sup>

Another consequence of increasing positive coronavirus cases among the public and MLB players was the decision of some players to opt out of the 2020 season altogether.<sup>87</sup> Players who opted out

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82. See Silverman, *supra* note 11 (suggesting owners dragged out negotiations so that if they were forced to give players full pro rata pay, MLB's season would be significantly shorter and total loss of revenue to pay players' salaries would be "suitable").

83. See Hoynes, *MLB Owners, Players Force 2020 Season Upon Us Not by Agreement, but by Disagreement*, CLEVELAND.COM (June 23, 2020), <https://www.cleveland.com/tribe/2020/06/mlb-owners-players-force-2020-season-upon-us-not-by-agreement-but-by-disagreement.html> [<https://perma.cc/G3CF-A4T2>] (highlighting Manfred did not fully unilaterally impose MLB season, just scheduling and prorated salary terms players and owners could not agree on); see also Scott Lauber, *Players' Union Cuts off 'Futile' Negotiations with MLB, Asks Commissioner to Impose Season*, PHILA. INQUIRER (June 13, 2020), <https://www.inquirer.com/phillies/mlb-players-labor-negotiations-tony-clark-rob-manfred-2020-season-20200613.html> [<https://perma.cc/3VXM-MFFD>] (recognizing MLB's last proposal called for seventy-two game season with seventy percent of prorated pay for players, which disregarded players' position against negotiating another pay reduction).

84. See Jabari Young, *MLB Bans Players from Spitting and Adds Hitting Position in New Coronavirus Rules*, CNBC (July 29, 2020), <https://www.cnbc.com/2020/06/29/mlb-releases-new-coronavirus-rules-for-season-restart.html> [<https://perma.cc/QMB9-FPE4>] (comparing health and safety protocols to previous rules of baseball and noting "unique features" of MLB's 2020 season such as formalizing no spitting and introducing the designated hitter's position in the National League for 2020 season).

85. See Loede, *supra* note 13 (discussing "highlights" of sixty-seven page health and safety protocol presented to MLBPA by owners in order to safely reconvene from baseball hiatus that began March 12, 2020).

86. See Perry et al., *supra* note 8 (reporting Commissioner Manfred's expectation that players "need to do better" to prevent continued spread of coronavirus throughout season).

87. See James Wagner & Marc Stein, *As Sports Begin Reopening, Athletes Weigh the Health Risks*, N.Y. TIMES (May 23, 2020), <https://www.nytimes.com/2020/05/23/sports/coronavirus-athletes.html?action=click&module=related-Links&pgtype=article> [<https://perma.cc/BQP4-X8AS>] (commenting on

because they were considered to be at higher risk for the coronavirus were placed on the injured list, allowing these players to accumulate service time and salaries for the season.<sup>88</sup> However, players not deemed as high-risk who opted out were considered to have “forfeited” their season.<sup>89</sup> This left them unable to receive pro rata salaries or accumulate service time, which caused a larger issue within accruing service time for salary arbitration.<sup>90</sup> The expectation that non-high-risk players play when public life has changed to accommodate public safety efforts created a stark division between players who wanted to play as many games as possible and players who opted out due to health concerns.<sup>91</sup>

Overall, players were not pleased with the 2020 Agreement, either due to the potentially lower pro rata salaries, or the potential forfeiture of player salaries if the player opted out and was not deemed high-risk.<sup>92</sup> The MLBPA’s grievances, which are sure to

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coronavirus’s specific impact on athletes who have managed to succeed in professional sports while managing health conditions).

88. See James Wagner, *Ryan Zimmerman, Ian Desmond and 2 Others Opt Out of M.L.B. Season*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/sports/baseball/ryan-zimmerman-nationals-opt-out.html?action=click&module=relatedLinks&pgtype=article> [<https://perma.cc/3R7X-7UTM>] (explaining while any player could opt out of MLB’s 2020 season, only athletes who have medical histories making them high-risk for coronavirus were eligible for service time and pay while sitting out).

89. See *id.* (highlighting service time was unavailable to players who opted out without high-risk health concerns).

90. See Alex Pavlovic, *MLB Opt-Out Tracker: Every Player Who Has Declined to Play 2020 Season*, NBC SPORTS (Aug. 10, 2020), <https://www.nbcsports.com/bayarea/giants/mlb-opt-out-tracker-every-player-who-has-declined-play-2020-season> [<https://perma.cc/U6F9-ZEER>] (tracking players who have sacrificed pay and service time by deciding to sit out of 2020’s MLB season due to coronavirus concerns).

91. See Wagner, *supra* note 88 (analyzing players who choose to opt out of 2020 season without underlying health conditions were generally only highly successful athletes who could afford to do it). Ryan Zimmerman of the Washington Nationals, for example, has made over \$133 million and has won the World Series, and this previous success provided Zimmerman with a decision to opt out of the 2020 season without receiving service time or pro rata pay that is not similarly available to players just starting out or without the same financial success up to this point in their careers. See *id.* (“[Deciding who to reassign or sit out for the season is] about as difficult a decision all as you’re going to get in baseball.”).

92. See Silverman, *supra* note 11 (reporting MLBPA’s statement following MLB proposal that “[The MLBPA] believe[s] [the owners’] position is part and parcel of [the owners] general bad faith determination to play as few games as possible to punish players for refusing to capitulate to MLB’s demands for massive pay cuts.”); see also Diekman, *supra* note 15 (“Also, no offense, but I really don’t care that Bob from wherever is bored at home with no sports and it’d be ‘good for him’ to watch. Not at my husband’s expense . . . .”); John Perrotto, *Money Helps Drive Decision of Whether MLB Players Opt Out of Season*, FORBES (July 7, 2020), <https://www.forbes.com/sites/johnperrotto/2020/07/07/money-helps-drive-decision-of-whether-mlb-players-opt-out-of-season/#1191cbc5527f> [<https://perma.cc/UJ98-SPFQ>] (“Ultimately, [Pirates’s pitcher Trevor] Williams decided to play, and fi-

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come to light in 2021 negotiations for a new collective bargaining agreement, are reflected in various legal arguments that the 2020 Agreement is unenforceable.<sup>93</sup> For many players, the idea of a forced season seemed outright unfair, or even a bad idea – to the extent that some well-known players opted out of the season.<sup>94</sup> Unfortunately for those players who could not afford to opt out, the season was played with a massive reduction in salaries and continued positive coronavirus tests.<sup>95</sup> The contract doctrines that allow for termination of a contract, discussed below, are all fact-specific, and depend on the circumstances surrounding the formation of the contract and the individual parties to the contract.<sup>96</sup>

### 3. *The 2020 Season*

On “Opening Day” of the 2020 season on July 23, 2020, the players showed up to work as scheduled.<sup>97</sup> Although the players complied with the imposed schedule, the MLBPA accused the owners of negotiating in bad faith to secure a shorter season against the wishes of players and the requirements of the 2020 Agreement’s framework.<sup>98</sup> Once players began working, they began testing positive for coronavirus.<sup>99</sup> Not only did teams struggle to stay on the

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nances were a major part of his decision. . . . “[T]his is my livelihood and we couldn’t afford to opt out.”).

93. See 1 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:21 (4th ed. 1993) (defining unenforceable contracts as ones for which duty of performance depends on legal consequences of contract, not on election of party in contract); see also 35 ROBERT H. DIERKER & RICHARD J. MEHAN, MO. PRACTICE. § 12:8. (2020 ed.) (listing defenses for breach of contract including duress or undue influence, mistake, public policy, fraud, estoppel, unconscionability, adhesion, and impossibility). While it varies by state, most courts treat these contract doctrines as defenses for a breach of contract claim, as opposed to independent cause of action. See *id.* (providing examples from various jurisdictions of doctrines as defenses for breach of contract).

94. For a full discussion of players’ options to opt out of the 2020 season, see *supra* notes 87-91 and accompanying text.

95. See Perry et al., *supra* note 8 (reporting statement made by Commissioner Manfred about 2020 season and coronavirus that “I am not a quitter in general and there is no reason to quit now. We have to be fluid, but it is manageable.”).

96. See, e.g., *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990), *abrogated by* *In re Larry Doiron, Inc.*, 879 F.3d 568 (5th Cir. 2018) (“Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry.”).

97. See Silverman, *supra* note 11 (discussing contentious lead-up to opening day).

98. See *infra* notes 245-246 for MLBPA Executive Director Tony Clark’s representations that players want the longest season possible.

99. See Perry et al., *supra* note 8 (highlighting turbulent start for MLB’s new spring training and beginning of season as players tested positive, delaying players’ return to camp).

field during “summer training,” but several games were cancelled throughout the season because of players testing positive for coronavirus.<sup>100</sup>

Despite the forty-five games that were postponed due to players testing positive for coronavirus, the regular season ended with all but two teams completing their full sixty-game season.<sup>101</sup> In an effort to avoid further disruptions to game play in the postseason, the MLB implemented bubble sites for the duration of the playoffs.<sup>102</sup> The MLB and the MLBPA also agreed on an expanded postseason for the playoffs, though this was more as a result of the financial benefits to both parties than due to any sudden positive change in the relationship between the two.<sup>103</sup> The World Series was played between the L.A. Dodgers and the Tampa Bay Rays, and for the first time it was played in a neutral location – Globe Life Field in Arlington, Texas.<sup>104</sup> The L.A. Dodgers came away victorious in game six

100. See Mike Axisa & R.J. Anderson, *MLB Schedule Has 43 Total Games Postponed Due to Positive COVID-19 Cases*, CBS SPORTS (Sept. 15, 2020), <https://www.cbssports.com/mlb/news/mlb-schedule-has-43-total-games-postponed-due-to-positive-covid-19-cases/> [https://perma.cc/E7KY-B7UZ ] (discussing MLB hopes to make up all missed games with doubleheaders and by skipping rest days).

101. See *MLB Standings 2020*, ESPN, <https://www.espn.com/mlb/standings> [https://perma.cc/9UJS-X9TV] (last visited Oct. 6, 2020) (reporting final standings for MLB’s regular season, showing Detroit Tigers and Washington Nationals as only two teams with fewer than sixty games—both ended with fifty-eight games played).

102. See *MLB Postseason Games to be Played at Bubble Sites, Beginning with Division Series*, ESPN (Sept. 15, 2020), [https://www.espn.com/mlb/story/\\_/id/29891648/sources-mlb-mlbpa-agree-hold-playoffs-bubble-setting](https://www.espn.com/mlb/story/_/id/29891648/sources-mlb-mlbpa-agree-hold-playoffs-bubble-setting) [https://perma.cc/59NR-VECY ] (“[T]he bubble was preferred for the latter stages of the postseason, when there is little time available for rescheduling.”).

103. See Tyler Kepner, *M.L.B. Expands Playoffs for 2020 Season*, N.Y. TIMES (July 23, 2020), [https://www.nytimes.com/2020/07/23/sports/baseball/mlb-playoffs.html#:~:text=now%2C%20M.L.B.%20will%20begin%20the, championship%20and%20World%20Series%20rounds.&text=would%20play%2065%20postseason%20games,43%20under%20the%20previous%20format](https://www.nytimes.com/2020/07/23/sports/baseball/mlb-playoffs.html#:~:text=now%2C%20M.L.B.%20will%20begin%20the,) [https://perma.cc/XA8A-G28J ] (“With only 60 regular-season games this year – and teams unable to sell tickets, at least initially – owners had a strong interest in generating additional revenue by adding more postseason games to sell to networks. The players, whose postseason bonuses ordinarily come from ticket sales, will get a \$50 million pool to divide under the new plan.”). The MLB is also required to get the MLBPA’s approval for any changes to the postseason, so the one-time expanded postseason for 2020 does not apply to the 2021 negotiations for the new collective bargaining agreement. See *id.* (noting requirement for player approval of expanded postseason as leverage in future negotiations).

104. See *World Series 2020: Schedules, Postseason Bracket, Analysis and Updates*, ESPN (Oct. 19, 2020), [https://www.espn.com/mlb/story/\\_/id/29955449/2020-mlb-playoffs-schedules-postseason-bracket-analysis-updates](https://www.espn.com/mlb/story/_/id/29955449/2020-mlb-playoffs-schedules-postseason-bracket-analysis-updates) [https://perma.cc/EBK5-K3V7] (noting 2020’s World Series is scheduled at Globe Life Field in Arlington, Texas, rather than at L.A. Dodgers’ or Tampa Bay Rays’ team parks in California and Florida, respectively).

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of the World Series, but not without drama.<sup>105</sup> After successfully completing playoffs without any additional coronavirus cases, Dodgers' "pulse of the clubhouse" Justin Turner had to take a rapid coronavirus test that came back positive during the seventh inning of game six.<sup>106</sup> Despite this, when the last strike was thrown to end the ninth inning, Turner stormed the field with the rest of the team, removing his mask and joining the huddle to celebrate the wild accomplishment of winning the World Series in one of the most difficult seasons the MLB has encountered.<sup>107</sup> The scene was described as "a superspreader event on live TV" and raised the same concerns that have been expressed at large among the United States public over what individual responsibilities are and what they should be regarding the spread of coronavirus.<sup>108</sup>

### III. WHAT THE MLB OWNERS MISSED: LOOPHOLES IN THE 2020 AGREEMENT THAT COULD HAVE EXCUSED MLBPA PERFORMANCE

All of the complaints the MLBPA had throughout negotiations for the 2020 Agreement raise the question of whether it was enforceable at all.<sup>109</sup> To excuse performance, the MLBPA needed to argue that one of the various contract doctrines created to protect parties against oppressively unfair contracts is applicable to the 2020 Agreement.<sup>110</sup> The arguments that were likely to be successful were those that clearly reflected the MLBPA's complaints surrounding the 2020 season and help to predict future consequences the MLB may face come 2021 negotiations.<sup>111</sup> These legal doctrines include, but are not limited to, unconscionability, fraud, misrepre-

105. See Jeff Passan, *World Series 2020: The Oddest of World Series Ends with the Most 2020 Moment of the Season*, ESPN (Oct. 28, 2020), [https://www.espn.com/mlb/story/\\_/id/30202748/world-series-2020-oddest-world-series-ends-most-2020-moment-season](https://www.espn.com/mlb/story/_/id/30202748/world-series-2020-oddest-world-series-ends-most-2020-moment-season) [<https://perma.cc/XD26-FPWX>] (highlighting Dodgers' win as first in thirty-two years).

106. See *id.* (describing Turner's inconclusive tests over previous two days, resulting in decision to expedite Turner's latest test during game six of World Series).

107. See *id.* (describing Turner passing World Series trophy among teammates and sitting next to Dodgers' manager, diagnosed with cancer, unmasked and smiling with team over their achievement).

108. See *id.* (reporting description of "superspreader event" from one unnamed general manager).

109. For further discussion of the difficulties negotiating the 2020 Agreement, see *supra* notes 79-83, 87-91 and accompanying text.

110. For further discussion of some of the legal doctrines providing relief from unfair contracts, see *infra* notes 118-165 and accompanying text.

111. For further discussion of some of the legal doctrines providing relief from unfair contracts, see *infra* notes 118-165 and accompanying text.

sentation, undue influence, duress, declaring a contract void as against public policy, and a violation of the covenant of good faith and fair dealing.<sup>112</sup>

While the 2020 MLB season was played successfully, the contract doctrines that the MLBPA could have argued in a breach of contract suit are useful because they not only reflect the grievances the MLBPA is likely to bring up during negotiations for the upcoming 2021 collective bargaining agreement, but also mirror the “costs” the MLB is likely to pay for its forced season regardless of the successful season.<sup>113</sup> A lack of enforceability due to a violation of public policy translates into the decision of some players to opt out of the 2020 season.<sup>114</sup> Unconscionability translates into the unfairness of owners continually asking players to sacrifice huge pay cuts, something players will rely on when refusing to concede on terms come 2021 collective bargaining agreement negotiations.<sup>115</sup> Undue influence translates into the Commissioner’s imposed schedule based on the owners’ last offer as opposed to a compromise, something that reinforces the idea that the owners have “won” the last several agreement negotiations.<sup>116</sup> These doctrines, assessed below in this Section, highlight the negotiation tactics and decisions that the MLBPA will point to in order to negotiate more favorable terms during the 2021 collective bargaining negotiations – something the MLB should have considered prior to forcing a season according to the last offer made by owners.<sup>117</sup>

#### A. Violation of Public Policy

Public policy is an ambiguous and difficult to define term, resulting in varying definitions throughout the years by the judicial

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112. For further discussion of some of the legal doctrines providing relief from unfair contracts, see *infra* notes 118-165 and accompanying text.

113. For further discussion of court’s ability to invalidate a contract to provide equitable relief, see *infra* notes 173-174 and accompanying text.

114. For further discussion of the MLBPA’s argument that the 2020 Agreement violated public policy and how it reflects their likely grievances in 2021 negotiations, see *infra* notes 169-211 and accompanying text.

115. For further discussion of the MLBPA’s argument that the 2020 Agreement violated unconscionability and how it reflects their likely grievances in 2021 negotiations, see *infra* notes 212-250 and accompanying text.

116. For further discussion of the MLBPA’s argument that the 2020 Agreement arose from undue influence and how it reflects their likely grievances in 2021 negotiations, see *infra* notes 251-261 and accompanying text.

117. For further discussion of MLBPA’s dissatisfaction with both the 2020 Agreement and the 2017-2021 CBA, see *infra* notes 275-276 and accompanying text; see also *supra* notes 40-41 and accompanying text.

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system.<sup>118</sup> One of the foremost treatises on contracts defines public policy as “flexible and variable, depending on the precise issue before the court,” a vague definition that reflects the elusiveness of defining public policy in common law.<sup>119</sup> This definition can be seen in court opinions across jurisdictions, such as the Oklahoma Supreme Court’s description of the power to invalidate a contract against public policy as “a very delicate and undefined power” in *Huber v. Culp*.<sup>120</sup>

Another treatise on contracts defines the test to determine whether a contract is against public policy by weighing a contract term’s enforcement against public policy interests.<sup>121</sup> However, this balancing test is rarely used by courts, and the more heavily relied upon definition is the more amorphous one, used in cases such as *Kelley as Trustee for PCI Liquidating Trust v. Boosalis*,<sup>122</sup> in which public policy, to be truly defined, depends upon the exact subject matter of a case.<sup>123</sup> Additionally, courts are hesitant to put too fine a definition on public policy when assessing the validity of a contract,

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118. See Farshad Ghodoosi, *Article: The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements*, 94 NEB. L. REV. 685, 688 (2016) (speculating courts have been unwilling to define public policy because it carries more authority for courts undefined than defined, as public policy is vague and covers vast subject matter).

119. 15 ARTHUR L. CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 79.3 (revised ed. 1983). A scholar analyzed that, while specific in his categorization of 128 “sub-species” of public policy defenses, Corbin’s definition “leaves the impression that the defense is dependent on the minutiae of every conceivable underlying subject matter addressed in a public policy case.” David A. Friedman, *Bringing Order to Contracts Against Public Policy*, 39 FLA. ST. U. L. REV. 563, 572 (2012) (providing systematic analysis of public policy defense case law). Friedman discusses the lack of literature defining public policy beyond Corbin’s vague definition, determining whether the area of public policy in contract law is “unruly.” See *id.* at 565 (citing *Richardson v. Mellish*, 130 Eng. Rep. 294, 303 (Eng. 1824)) (crediting Judge Burrough’s phrasing of public policy as “unruly” as most famous description of public policy in contract law).

120. 149 P. 216, 219 (Okla. 1915) (stating party claiming violation of public policy to invalidate contract will only meet burden when party shows contract term is injurious to public or in violation of settled policy of State).

121. See Friedman, *supra* note 119, at 576 (noting Williston’s approach of balancing test to determine whether contract is against public policy (citing 15 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 12:2 (4th ed. 1993))).

122. 974 F.3d 884 (8th Cir. 2020).

123. See Friedman, *supra* note 119, at 576 (questioning utility of balancing test due to its lack of use in cases analyzed); see, e.g., *Kelley as Trustee for PCI Liquidating Trust*, 974 F.3d 884, 894 (8th Cir. 2020) (defining contracts against public policy in Minnesota as contracts illegal or injurious to public’s interests); *Pyle v. Kernan*, 36 P.2d 580, 583 (Or. 1934) (defining main factor that makes contracts invalid as against public policy as “evil tendencies”). But see *Rogers v. Webb*, 558 N.W.2d 155, 157 (Iowa 1997) (discussing Iowa’s precedential reliance on balancing test from Restatement Second on Contracts).

for fear it will restrict the general authority conferred to courts to apply public policy without a clear definition.<sup>124</sup> More importantly, as stated by the Kentucky Court of Appeals in *Zeitz v. Foley*,<sup>125</sup> courts invalidate contracts against public policy cautiously, because the doctrine is used to ensure contracts are not performed in violation of law or state policy, not to “enable parties to escape their obligations.”<sup>126</sup>

A court may invalidate a contract as against public policy through multiple avenues, though usually they can be understood as one of two – the first and more easily established being when a contract functions to violate statutory language.<sup>127</sup> Second, and much less defined, a party may demonstrate that a contract goes against the “morals” of the public, the morals generally being those of the state in which the dispute occurs as seen in *Baugh v. Novak*.<sup>128</sup> In *Baugh*, the court recognized the traditional path for discerning public policy, in which courts begin by looking to any statutes or regulations in place to determine whether a contract is contrary to public policy, as that is the most clear method for recognizing and applying a state’s public policy.<sup>129</sup> In the event that no such statutes or policies exist, as was the case in *Huber*, courts undertake the vague determination of whether the contract runs contrary to the policy of the state according to indicators such as public morals.<sup>130</sup>

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124. See Ghodoosi, *supra* note 118, at 699 (attributing court’s unwillingness to solidly define public policy in part to belief that defining public policy is at discretion of legislature and would be judicial activism if courts were to do so). *But see* *Black Indus., Inc. v. Bush*, 110 F. Supp. 801, 804 (D. N.J. 1953) (citing court’s historic refusal to “await legislative action” in vague public policy areas). Ghodoosi’s attribution of vague definitions to a deference to the legislature is in addition to Ghodoosi’s analysis that courts are unwilling to limit their own power. See Ghodoosi, *supra* note 118, at 689 (noting clearly delineated public policy doctrine reduces power of judges and arbitrators).

125. 264 S.W.2d 267 (Ky. Ct. App. 1954).

126. See *id.* at 268.

127. See *Hamilton v. Cash*, 91 P.2d 80, 81 (Okla. 1939) (finding contract illegal where consideration in exchange for performance in form of illegal marble machines was contrary to public policy).

128. See *Baugh v. Novak*, 340 S.W.3d 372, 384 (Tenn. 2011) (determining public morals are determined through state’s constitution, statutes enacted by state legislature, common law, and prior decisions); see also *Zerjal v. Daech & Bauer Const., Inc.*, 939 N.E.2d 1067, 1072 (Ill. Ct. App. 2010) (stating contracts are against public policy where they contradict interest of society, interfere with public welfare or safety, or are injurious to public interest).

129. See *Baugh*, 340 S.W.3d at 385 (noting clearest source of public policy for determining contracts unconscionable is prohibition of action by statute or state legislature’s express purposes behind statute).

130. See *Huber v. Culp*, 149 P.2d 216, 218 (Okla. 1915) (relying on state constitution, state laws, and judicial decisions to determine public morals when no law was directly on point).



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However, some courts, such as the Pennsylvania Supreme Court, will only declare a contract against public policy when “there is a virtual unanimity of opinion in regard to [the policy] that the court may constitute itself the voice of the community in so declaring . . . .”<sup>131</sup> Contracts are also void across jurisdictions if the purpose behind the contract or any act required to perform the contract is illegal.<sup>132</sup> The applicable argument against the 2020 Agreement under an affirmative defense of violation of public policy reflects the issues the MLBPA has about player safety and forcing players to sacrifice pay and service time to opt out, which the MLBPA is likely to bring up in negotiations for a new collective bargaining agreement.<sup>133</sup>

### B. Unconscionability

Another potential defense against contractual performance that highlights the MLBPA’s grievances over the 2020 season is the doctrine of unconscionability, in which the terms of a contract are more than unfair – rather they are terms “such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.”<sup>134</sup> In determining whether a contract is such that no person would make or accept it, a court assesses for both procedural and substantive unconscionability.<sup>135</sup> As shown in *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*,<sup>136</sup> both forms of unconscionability are gener-

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131. *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941).

132. *See Zeitz v. Foley*, 264 S.W.2d 267, 268 (Ky. Ct. App. 1954) (stating contracts are invalid when connected to illegal purpose and inseparable from that purpose, but finding contract at issue consistent with public policy where defendant had two businesses, one illegal and one legal, and contract was for sale of assets of legal business).

133. For further discussion of the MLBPA’s potential arguments and likely success of those arguments, see *infra* notes 177-211 and accompanying text.

134. *Sanderson v. Sanderson*, 170 So. 3d 430, 436 (Miss. 2014) (quoting *Terre Haute Cooperage, Inc. v. Branscome*, 35 So. 2d 537 (Miss. 1948)) (holding unconscionability has been expanded by courts from its original application to sales contracts to broad arrays of contracts including arbitration contracts and domestic relations contracts); *see also Ketler v. PFPA, LLC.*, 132 A.3d 746, 748 (Del. 2016) (holding waivers releasing gym from all liability for user’s injury was not unconscionable because plaintiff could walk away from contract and not use gym); *Smith v. Harrison*, 325 N.W.2d 92, 94 (Iowa 1982) (holding unconscionability does not exist merely to rescue parties from bad bargains).

135. *See* 8 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 1993) (differentiating between procedural unconscionability and substantive unconscionability and noting that finding unconscionability generally requires both procedural and substantive unconscionability, despite its original purpose to combat both forms of unfairness).

136. 3 A.3d 535 (N.J. Super. 2010).

ally required to declare a contract unconscionable, though they can be viewed on a sliding scale, so that the stronger one form of unconscionability, the less support is needed for the other.<sup>137</sup>

First, procedural unconscionability refers to circumstances during the formation of the contract that would indicate unfairness extreme enough to remove fair choice from one party.<sup>138</sup> Often, when analyzing negotiations for procedural unconscionability, courts will assess the bargaining power of the parties, as occurred in *Associated Estates LLC v. Bank Atlantic*.<sup>139</sup> Generally, bargaining power is an indicator of unconscionability where one party is less sophisticated and therefore easier to take advantage of, or where the relationship between parties limits one party's power or leverage during negotiations.<sup>140</sup> Another circumstance the court looked to when assessing procedural unconscionability in *Navellier v. Sletten*<sup>141</sup> was the ability of the parties to freely reject the agreement, a factor not unrelated to the parties' bargaining power.<sup>142</sup> This can include the parties' involvement in drafting the agreement, or it can result from unequal bargaining power such that the weaker party feels forced to accept the agreement.<sup>143</sup> Finally, courts will assess whether the terms are surprising to the weaker party due to

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137. *See id.* at 540 (“[U]nconscionability involves two factors: (1) unfairness in the formation of the contract [procedural unconscionability] and (2) excessively disproportionate terms [substantive unconscionability]” (quoting *Sitogum Holdings, Inc. v. Ropes*, 800 A.3d 915, 921 (N.J. Ch. Div. 2002))); *see also* *Chen-Oster v. Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 247 (S.D.N.Y. 2020) (referring to unconscionability factors on sliding scale in which no single factor is determinative).

138. *See* *Newell v. SCI Ala. Funeral Servs.* 233 So. 3d 326, 334 (Ala. 2017) (providing examples of procedural unconscionability, including deception or refusal to bargain, and whether parties were given meaningful choice).

139. 164 A.3d 932, 943 (D.C. Ct. App. 2017) (explaining when assessing whether one party had meaningful choice, courts look to bargaining power, ability to understand contract terms, parties' expertise, and timeframe of negotiations); *Blanchard v. Blanchard*, 148 A.3d 277, 283 (Me. 2016) (including unequal bargaining power and lack of understanding as factors for determining procedural unconscionability (citing *Barrett v. McDonald Invs., Inc.*, 870 A.2d 146 (Me. 2005))).

140. *See* 8 WILLISTON & LORD, *supra* note 135, at § 18:10 (noting further factors of unconscionability include hidden or misleading fine print, extensive legal language, differences in each party's sophistication, and lack of opportunity to ask about contract terms).

141. 262 F.3d 923 (9th Cir. 2001).

142. *See id.* at 940 (finding no unconscionability where plaintiff “freely chose to waive his legal rights in order to preserve the stability of the Fund . . . was well-represented by counsel, and . . . had adequate time to pursue other alternatives”).

143. *See* *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Cal. Ct. App. 2002) (“When the weaker party is presented the clause and told to ‘take it or leave it’ without the opportunity for meaningful negotiation, oppression, and therefore procedural unconscionability, are present.”).

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hidden language drafted by the other party.<sup>144</sup> As can be seen in *Chen-Oster v. Goldman, Sachs & Co.*,<sup>145</sup> courts will undertake a fact specific analysis of the negotiations surrounding the agreement when assessing these factors.<sup>146</sup>

The second form of unconscionability, substantive unconscionability, looks to the terms of a contract to determine whether the substance of the agreement terms is fair for the parties.<sup>147</sup> Courts find a contract substantively unconscionable when the contract is excessively oppressive or includes harsh terms favoring one party.<sup>148</sup> However, as seen in *Toricillas v. Fitness International, LLC*,<sup>149</sup> courts will not find substantive unconscionability without oppression or harshly one-sided terms.<sup>150</sup> When determining whether an agreement is oppressive or harsh towards one party, courts look to the “mores and business practices of the time and place” to determine whether the terms of the agreement are so unreasonable as to be unenforceable.<sup>151</sup> In addition to the comparison courts may make to business practices within the industry in which the contract at issue was made, some courts also assess factors such as fairness of contract terms and the ability to predict future liability.<sup>152</sup> Additionally, courts have clearly stated that in the event of a dispute, substantive unconscionability is judged from the time of the con-

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144. See 8 WILLISTON & LORD, *supra* note 135, at § 18:10 (noting any procedural unconscionability, including surprise, must culminate in substantively unconscionable terms to satisfy both prongs of unconscionability).

145. 449 F. Supp. 3d 216 (S.D.N.Y. 2020).

146. See *Chen-Oster v. Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 247 (S.D.N.Y. 2020) (describing inquiry into procedural unconscionability as flexible, and “intended to be sensitive to the realities and nuances of the bargaining process” (quoting *Bernardino v. Barnes & Noble Booksellers, Inc.*, No.17 Civ. 4570, 2017 WL 730893, at \*11 (S.D.N.Y. 2017)), *report and recommendation adopted*, No. 17 Civ. 4570, 2018 WL 671258 (S.D.N.Y. 2018) (quoting *Gillman v. Chase Manhattan Bank*, 534 N.E.2d 824 (1988))).

147. See WILLISTON & LORD, *supra* note 135, at § 18:10 (noting in context of Uniform Commercial Code, common examples of substantive unconscionability are boilerplate language that alters duties otherwise imposed by law, contracts of adhesion that negate reasonable expectations of non-drafting party, or unexpectedly harsh terms related to central aspect of agreement).

148. See *id.* (noting court will ask whether stronger party overreached and gained “unjust and undeserved advantage”).

149. 266 Cal. Rptr. 3d 181 (Cal. Ct. App. 2020).

150. See *id.* at 188-89 (holding arbitration was not substantively unconscionable where agreement did not shock court’s conscience, was not oppressive, and included standard terms for contract in that industry).

151. *Chen-Oster*, 449 F. Supp. 3d at 250 (citation omitted).

152. See *Eastham v. Chesapeake Appalachia, L.L.C.*, 754 F.3d 356, 366 (6th Cir. 2014) (noting that there are no “bright-line” factors to weigh when assessing substantive unconscionability in Ohio, and that factors courts use vary based on terms of agreement at issue).

tract's formation, not at the time of the dispute.<sup>153</sup> Unconscionability is another contract doctrine that reflects the unfairness the MLBPA will likely highlight in 2021 negotiations.<sup>154</sup>

### C. Undue Influence

A third contract doctrine that reflects the MLBPA's feelings towards the owners conduct during 2020 negotiations, undue influence, is similar to procedural unconscionability in that one party had significant power over the other at the time of the contract's formation.<sup>155</sup> One common definition of undue influence is "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity."<sup>156</sup> However, unlike procedural unconscionability, undue influence has elements which must be met.<sup>157</sup> Generally, as seen in *Miller v. Westwood*,<sup>158</sup> courts look for four factors that the party claiming undue influence must show for the affirmative defense to be successful.<sup>159</sup> The first element of undue influence, as defined by the Nebraska Supreme Court in *Goff v. Weeks*,<sup>160</sup> requires that there be a party subject to influence.<sup>161</sup> Second, also exemplified

153. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 448-49 (D.C. Cir. 1965) (explicitly expanding Uniform Commercial Code provision defining unconscionability at time of contract creation to apply in D.C. common law). The court noted that the Uniform Commercial Code was not made contradictory to common law, and that it therefore does not preclude the court from applying a similar rule in common law. See *id.* (stating without prior authority applying rule in common law, court would still rely on code as persuasive authority).

154. For further discussion of the MLBPA's potential arguments and likely success of those arguments, see *infra* notes 215-250 and accompanying text.

155. See *Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001) (assessing whether party could freely reject agreement as factor of procedural unconscionability); *DIERKER & MEHAN*, *supra* note 93, at § 12.8 (asserting central determination of undue influence is whether contract resulted from force or coercion).

156. 2 ANN TAYLOR SCHWING, CAL. AFF. DEFENSES § 46:1 (2d Ed.) (quoting California Welfare and Institutions Code § 15610.70(a)).

157. See *id.* (defining elements of undue influence in state of California). For further discussion of the factors of procedural unconscionability, including the lack of any "bright-line" factors, see *supra* notes 138-146 and accompanying text.

158. 472 N.W.2d. 903 (Neb. 1991).

159. See *id.* at 912 (defining four elements of undue influence (citing *Pickman v. Pickman*, 505 A.2d 4, 7 (Conn. Ct. App. 1986); *Craig v. Kile*, 392 N.W.2d 340, 344 (Neb. 1983)). But see *Friendly Ice Cream Corp. v. Beckner*, 597 S.E.2d 34, 38 (Va. 2004) (defining Virginia's recognition of undue influence as "weakness of mind and grossly inadequate consideration or suspicious circumstances are shown or when a confidential relationship is established" between the adverse party and the drafter of the instrument).

160. 517 N.W.2d 387, 392 (Neb. 1994).

161. See *id.* at 392 (holding weaker party was susceptible to undue influence because party was hospitalized and needed assistance from stronger party, including granting power of attorney); *Pickman*, 505 A.2d at 7 (determining factors indi-

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in *Goff*, there must be an opportunity to exercise undue influence on the part of the more powerful party.<sup>162</sup> Third, the *Goff* court required that the party claiming undue influence must show that the adverse party had a disposition to exercise undue influence for an improper purpose.<sup>163</sup> Finally, for the doctrine to apply, the result of the first three factors must have an effect of exercised undue influence as was tested in *Miller*.<sup>164</sup> While similar to procedural unconscionability, the MLBPA could rely on the undue influence doctrine to highlight the negotiation tactics during 2020 negotiations that it feels was unfair.<sup>165</sup>

These contract doctrines were created for the express purpose of protecting parties against unfair contracts, and while the 2020 season was successfully played without any attempt by the MLBPA to excuse performance under the contract, the doctrines still reflect serious concerns the players had.<sup>166</sup> Additionally, while it is unlikely a court would have excused performance for the MLBPA under the 2020 Agreement, they represent the same arguments the MLB undervalued during 2020 Agreement negotiations, an oversight that will likely cost the MLB come 2021 negotiations.<sup>167</sup> The following section of this Comment articulates in detail the arguments the MLBPA would make under each of the above-defined doctrines, and Part V outlines the ‘costs’ of the negotiations that gave rise to the MLB’s complaints.<sup>168</sup>

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cating susceptibility to being influenced include physical and mental condition of party alleging it was influenced).

162. *See, e.g., Goff*, 517 N.W.2d at 392 (holding there was opportunity to exercise undue influence as result of stronger party’s power of attorney on behalf of weaker party).

163. *See id.* (suggesting attempts to keep others from discussing issue with weaker party is evidence of intent to exercise undue influence).

164. *See Miller*, 472 N.W.2d. 903, 912 (Neb. 1991) (finding some evidence of influence existed but that it did not have effect of undue influence because weaker party’s action was voluntary).

165. For further discussion of the MLBPA’s potential arguments and likely success of those arguments, see *infra* notes 254-261 and accompanying text.

166. For full discussion of players’ concerns about untrustworthiness of owners, see *supra* notes 11, 34, 79-83 and accompanying text.

167. For full discussion of why the MLBPA’s potential arguments would not excuse performance, see *infra* notes 204-209, 249, 260-261 and accompanying text.

168. For full discussion of the MLBPA’s arguments under a public policy argument, see *infra* notes 180-211 and accompanying text. For full discussion of the MLBPA’s arguments under an unconscionability argument, see *infra* notes 215-250 and accompanying text. For full discussion of the MLBPA’s arguments under an undue influence argument, see *infra* notes 254-261 and accompanying text.

IV. FOUL TIP: HOW THE MLB NARROWLY ESCAPED LEGAL  
DISPUTES THAT WOULD HAVE PUT AN END TO THE 2020  
SEASON

The 2020 MLB season was fraught with hostile negotiations, setbacks in the form of positive tests, and revenue loss from the lack of fans.<sup>169</sup> The terms of the 2020 Agreement seemed unfair to players, because they forced a decision between opting out of a season (and a salary) or accepting a higher risk of contracting coronavirus.<sup>170</sup> It is clear from the hostility between the parties during negotiations and the resulting stalemate that forcing a season will have harsh results come the upcoming collective bargaining negotiations in 2021.<sup>171</sup> However, it has been unclear to this point whether the terms were just unfair, or whether they were so unfair or violative of public policy that they were unenforceable, which would provide the MLB with greater leverage during 2021 negotiations for the new collective bargaining agreements.<sup>172</sup>

The answer to whether the 2020 Agreement was unenforceable is up to courts, which have the ability to declare a contract unenforceable where it is necessary to create equitable relief.<sup>173</sup> For these arguments to succeed, the MLB's conduct when creating the 2020 Agreement would need to have violated one of the contract doctrines that regulate fairness and public policy.<sup>174</sup> The MLBPA's

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169. See Gabe Lacques, *MLB Players Who Have Tested Positive for Coronavirus*, USA TODAY SPORTS (Aug. 18, 2020), <https://www.msn.com/en-us/sports/mlb/mlb-players-who-have-tested-positive-for-coronavirus-list-of-covid-19-cases-in-baseball/ar-BB16us5S> [<https://perma.cc/G9EH-4CTR>] (reporting list of 104 positive cases made public from MLB rosters within three weeks of official start of season on July 23).

170. See, e.g., Perrotto, *supra* note 92 (featuring quotes from players weighing options of giving up annual salary or exposing loved ones to additional risk of contracting coronavirus).

171. For a discussion of the expectation that hostility will be visible during 2021 negotiations, see *infra* notes 273-283, 318 and accompanying text.

172. For a discussion of the application of unconscionability to the MLBPA's case, see *infra* notes 215-250 and accompanying text.

173. See RESTATEMENT (SECOND) OF CONTRACTS § 358 (Am. L. Inst. 1981) (giving courts wide flexibility to use remedies at equity to provide full relief for injured party). The federal circuits have drawn from and explicitly relied on the Restatement of Contracts as it often reflects interpretation principles. See Richard L. Revesz, *Restatements and the Federal Common Law*, AM. L. INST. (Sept. 27, 2016), <https://www.ali.org/news/articles/restatements-and-federal-common-law/> [<https://perma.cc/GR6G-ZELB>] (providing several examples across areas of law where courts rely on restatements of law).

174. See WILLISTON & LORD, *supra* note 135, at § 18:1 (framing historical development of unconscionability as protection for parties accused of breach in court against modern use in Uniform Commercial Code and common law contracts). Equitable relief such as public policy or unconscionability usually arise as an affirmative defense in another cause of action, as opposed to creating a distinct

potential arguments and their potential outcomes, laid out by contract doctrine below, provide insight into the arguments players will make when refusing to give in on terms during 2021 negotiations.<sup>175</sup> Part A discusses whether the MLB's decision to play violates public policy, Part B discusses whether the contract terms for the 2020 Agreement were unconscionable, and Part C discusses whether the MLB exercised undue influence.<sup>176</sup>

#### A. Did the MLB's Decision to Play Violate Public Policy?

The first defense available in a contracts dispute that the players could use to highlight owners' unfair negotiating is that the resulting contract was in violation of public policy.<sup>177</sup> The lack of enforceability of contracts contrary to public policy serves to regulate agreements that are against the values of the public.<sup>178</sup> The ability of courts to invalidate contracts that function counter to public policy is longstanding, though unfortunately public policy as a doctrine for invalidating contracts is ill-defined, making it difficult to predict how a court would decide a potential dispute.<sup>179</sup>

##### 1. *Did the Agreement Itself Violate Public Policy?*

In order to determine whether the MLB's continuation of a season during the coronavirus pandemic violates public policy, a court would first need to assess what public policy is in place surrounding the coronavirus pandemic and whether precautions to limit transmission represent such a "virtual unanimity of opinion" that the court may act as the voice of the community.<sup>180</sup> The court

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cause of action under which players could sue. *See id.* (providing case law applying equitable relief as affirmative defense rather than cause of action).

175. For further discussion of a potential lockout during the 2021 collective bargaining agreement due to distrust and animosity between players and owners, see *infra* notes 275-277 and accompanying text.

176. For full discussion of MLBPA's public policy argument, see *infra* notes 177-211 and accompanying text. For full discussion of MLBPA's unconscionability argument, see *infra* notes 215-250 and accompanying text. For full discussion of MLBPA's undue influence argument, see *infra* notes 254-261 and accompanying text.

177. *See, e.g.,* Huber v. Culp, 149 P. 216, 219 (Okla. 1915) (holding clause preventing either party in divorce proceeding from defending divorce action was against public policy).

178. *See* 17A C.J.S. CONTRACTS § 295 (2003) ("A[s] the habits, opinions, and wants of a people vary with the times, so public policy may change with them.").

179. *See* Ghodoosi, *supra* note 118, at 694 (attributing difficulties with defining public policy that invalidates contracts to multidimensional nature of public policy within its own field).

180. Feleccia v. Lackawanna College, 215 A.3d 3, 19 (Pa. 2019) (discussing difficulty of meeting burden in demonstrating public policy because party claiming

would then weigh the MLB's actions under that public policy to conclude whether the players' decision to play under the 2020 Agreement violates that public policy.<sup>181</sup> To do so, the court would look to the federal and state mandates, CDC guidance, and other indicators of public opinion surrounding the coronavirus pandemic.<sup>182</sup> In the case of the pandemic, there have been several policies put in place that indicate a public policy favoring precautions to protect against the spread of coronavirus.<sup>183</sup> The strongest policies surrounding coronavirus were the initial stay-at-home orders, though current mandates under which the court would assess a violation of public policy are the orders imposing mask mandates, limited building capacities, and social distancing in states across the United States.<sup>184</sup>

These government mandates are clear indicators of public policy for the states where they are in place, because the legislatures of each of those states have granted their executive branch the authority to act in a public health emergency and thus, have granted the governors of each of those states the power to implement and enforce coronavirus precautions.<sup>185</sup> The mandates are also indicators of the public morals surrounding wearing masks, because the elected officials of the state have placed high value on the need for citizens to protect each other against the spread of coronavirus.<sup>186</sup> Additionally, general guidance from the CDC, as a part of the De-

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contract is invalid as against public policy must show policy is dominantly held as public policy). For further discussion of the precautions taken at state and federal levels, see *supra* notes 64-69 and accompanying text.

181. For further discussion of the tests the court would use to weigh the MLB's actions, see *supra* notes 127-128 and accompanying text.

182. For further discussion of determining public policy, see *supra* notes 128-131 and accompanying text.

183. See Jennifer Tolbert et al., *State Data and Policy Actions to Address Coronavirus*, KAISER FAM. FOUND. (Sept. 16, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/state-data-and-policy-actions-to-address-coronavirus/> [https://perma.cc/TTJ2-DPVK ] (providing metrics at federal and state level regarding original stay-at-home orders, reopening processes, and states that have backtracked their reopening).

184. For further discussion of state orders regarding coronavirus precautions, see *supra* notes 64-68 and accompanying text.

185. See *supra* note 68 (offering examples of authority state legislatures have granted to state executives to create mandates).

186. See Anne Zimmerman, *At the Intersection of Public and Private Morality*, 6 VOICES IN BIOETHICS 1, 2-4 (Apr. 12, 2020), (discussing variance of private morality as feature of democratic society and noting states without orders are those in which public morals are against restricting freedom to combat coronavirus). *But see* Colleen Walsh, *Why Some Americans Refuse to Social Distance and Wear Masks*, HARV. GAZETTE (Aug. 28, 2020), <https://news.harvard.edu/gazette/story/2020/08/sandel-explores-ethics-of-what-we-owe-each-other-in-a-pandemic/> [https://perma.cc/6FY2-R3RF ] (interviewing Harvard Professor of Government Michael



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partment of Health and Human Services, can be considered policy at the federal level.<sup>187</sup>

However, there is still an issue of whether all of the policies requiring preventative measures are dominant policy, due to the differing opinions among the public at large about how to handle the coronavirus.<sup>188</sup> This raises the question of whether the policy is settled such that a court can act as the voice of the community with confidence, because while a court could ordinarily look to the governors' orders mandating masks, social distancing, and limited business activity to determine that the orders were put in effect pursuant to legislative policy and are therefore representative of the state's policy, nobody would describe the current political debate about mask wearing as "settled."<sup>189</sup>

The variation in mandates across jurisdictions as well as the varying degrees of acceptance of mask mandates and other precautions among the public as a moral requirement only adds further uncertainty as to how a dispute would be resolved by a court, in an area of law that is already somewhat unpredictable.<sup>190</sup> Since courts usually begin to determine a state's public policy by looking to the state's constitution, state laws and judicial decisions, many jurisdictions would consider the governors' orders with mandated coronavirus precautions to be a representation of states' public policies.<sup>191</sup> There are also, however, some states that have not enforced precautions such as mask mandates during the pandemic,

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Sandel who explains that many Americans view mask mandates as violations of individual freedom).

187. See *Government Response to Covid-19*, USAGov (last updated Aug. 26, 2020), <https://www.usa.gov/coronavirus> (defining CDC's health information regarding coronavirus in US response to pandemic).

188. See Bobby Allyn & Barbara Sprunt, *Poll: As Coronavirus Spreads, Fewer Americans See Pandemic as a Real Threat*, NAT'L PUB. RADIO (Mar. 17, 2020), <https://www.npr.org/2020/03/17/816501871/poll-as-coronavirus-spreads-fewer-americans-see-pandemic-as-a-real-threat> [<https://perma.cc/8Y2T-XTPJ>] (reporting about fifty-six percent of Americans "consider the coronavirus a 'real threat'" and growing number of Americans think it is "blown out of proportion").

189. Walsh, *supra* note 186 (noting Harvard Professor of Government Sandel's observation that wearing masks has become part of wider partisan debate in United States, because coronavirus pandemic came at time of high partisanship as result of growing inequality).

190. See Friedman, *supra* note 119, at 572 (asserting descriptive categories provided by scholars such as Corbin and Williston are helpful for categorizing types of contracts against public policy but do little to predict outcome of disputes in which courts must decide whether contract is against public policy).

191. See *Baugh v. Novak*, 340 S.W.3d 372, 385 (Tenn. 2011) (explaining when state's public policy cannot be found directly in state's constitution or statutes, courts look for indirect expressions of public policy through state's constitution, statutes, judicial decision, or preservation of morals).

and for those states it is unlikely those courts would find coronavirus precautions to be considered public policy.<sup>192</sup> Overall, this means that the MLPA's success in establishing coronavirus precautions preventing gatherings, requiring quarantine after traveling across state lines, wearing masks and mandating social distancing as settled public policy vary depending on the state the suit occurred in.<sup>193</sup> However, it is unlikely a court would find the 2020 Agreement to be against public policy regardless of where they litigate, for the reasons discussed below.<sup>194</sup>

## 2. *Did the Performance of the Agreement Violate Public Policy?*

After determining the state's public policy regarding coronavirus, a court would need to assess whether the 2020 Agreement and subsequent actions violate that public policy.<sup>195</sup> The purpose of the 2020 Agreement was to create a workable framework for the 2020 season, in light of the inability to safely follow the 2017-2021 CBA due to the pandemic.<sup>196</sup> Obviously, baseball is neither illegal nor against public policy, but is rather such a valued national sport that it is being played during the pandemic.<sup>197</sup> That means that a court would only invalidate the contract as against public policy if the agreement either could lead to "injury to public interest" in states with less defined public policy tests or could be "out-

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192. See Markowitz, *supra* note 66 (reporting Alaska, Arizona, Florida, Georgia, Idaho, Iowa, Missouri, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, and Utah do not have mask requirements); see also Marples, *supra* note 67 (reporting Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming do not have travel restrictions in place for visitors coming from other states in United States).

193. For further discussion of why courts will not find the 2020 Agreement in violation of public policy, see *infra* notes 195-211 and accompanying text.

194. For further discussion of why courts will not find the 2020 Agreement in violation of public policy, see *infra* notes 195-211 and accompanying text.

195. See *Huber v. Culp*, 149 P. 216, 219 (Okla. 1915) (establishing court can only look to state's constitution, laws, and judicial decisions when determining public policy).

196. For further discussion of the 2020 Agreement, see *supra* notes 75-91 and accompanying text.

197. See Juliette Love, *How Popular is Baseball, Really?*, N.Y. TIMES (Oct. 22, 2019), <https://www.nytimes.com/interactive/2019/10/22/sports/baseball/baseball-popularity-world-series.html> [<https://perma.cc/A2TH-Y9XK>] (analyzing baseball's continually high-ticket sales and home viewers compared to other leagues, attributed in part to sheer number of games in baseball seasons, to demonstrate that baseball is still America's pastime even if it is not America's favorite sport).

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weighed by public policy” in states that use the balancing test for contracts against public policy.<sup>198</sup>

The MLB has taken several precautions in order to practice coronavirus prevention while playing their season, including extensive health and safety protocols to protect players and coaches.<sup>199</sup> Additionally, in a limited reflection of state mandated precautions, the 2020 Agreement also grants Commissioner Manfred:

the right to suspend or cancel the 2020 championship season or postseason, or any games therein, in the event that (i) restrictions on travel throughout the United States are imposed; (ii) there is a material change in circumstances such that the Commissioner determines, after consultation with recognized medical experts and the Players Association, that it poses an unreasonable health and safety risk to players or staff to stage those games, even without fans in attendance; or (iii) the amount of players who are unavailable to perform services due to coronavirus is so great that the competitive integrity of the season is undermined.<sup>200</sup>

These precautions were meant to satisfy safety mandates, but they failed to address one major problem surrounding resumption of professional sports seasons – to safely resume play, athletes are required to frequently complete coronavirus tests, which uses up tests and lab availability at a time when demand is high and labs are constantly pressed to produce results.<sup>201</sup> However, since govern-

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198. See *Hamilton v. Cash*, 91 P.2d 80, 81 (Okla. 1939) (stating contracts are invalid against public policy if they have direct or indirect effect against state’s policies); *Pyle v Kerman*, 36 P.2d 580, 853 (Or. 1934) (stating similar facts in other cases are not helpful in determining whether contract is void against public policy because test is “the evil tendency of the contract and not its actual injury to the public in a particular instance”) (citations omitted). For further discussion of the tests states use when assessing whether public policy invalidates a contract, see *supra* notes 127-128 and accompanying text.

199. For further discussion of details regarding the precautions required by the MLB and the MLBPA, see *supra* notes 84-85 and accompanying text.

200. Mark Townsend, *Report: MLB Season Could Continue Even if Covid Outbreak Forces Teams to Drop Out*, YAHOO! SPORTS, (June 27, 2020) <https://sports.yahoo.com/report-mlb-season-could-continue-even-if-covid-outbreak-forces-teams-to-drop-out-175518718.html> [<https://perma.cc/ZT6X-YV3H>] (citing SNY Television).

201. See Henry Bushnell, *Sports Amid Coronavirus: Are League Testing Protocols Impacting the U.S.’s Pandemic Fight?*, YAHOO! SPORTS (July 15, 2020) <https://sports.yahoo.com/sports-amid-coronavirus-are-league-testing-protocols-impacting-the-u-ss-pandemic-fight-145213814.html> [<https://perma.cc/8ZN2-25WV>] (comparing testing services available to professional sports leagues with lab backups for general population). Bushnell reports that professional sports leagues can receive

ment mandates have not generally been requiring state testing, the issue of how available tests are used is a separate question from states' public health policies surrounding coronavirus, though still an important question morally.<sup>202</sup> Additionally, the precautions the MLB adopted are still not as strict as the precautions required in states with mandates.<sup>203</sup>

Even with the MLB's heavy use of coronavirus tests and lax precautions compared to state mandates, in the event of litigation, courts would likely determine that these precautions satisfy state mandates such that holding a baseball season does not violate public policy.<sup>204</sup> First, there is an inconsistency even within public policy itself because on the one hand states with mandates for coronavirus precautions want their citizens to comply with the precautions (including professional sports players playing in their cities).<sup>205</sup> On the other hand, states have a policy of supporting the sports and entertainment industry, in particular longstanding sports such as baseball, for their positive impact on public morale

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test results in as little as twelve to twenty-four hours, whereas tests distributed at testing centers across the country can take up to five days to deliver results. *See id.* (noting a five-day wait for tests makes tests less useful). Bushnell also notes that tests are available to leagues as needed, whereas there are lines wrapping around testing centers in the United States to try to secure a coronavirus test. *See id.* (noting experts agree that to some extent, sports leagues are absorbing testing capacity).

202. For further discussion of state mandates, including the few states requiring coronavirus tests or allowing them in lieu of a mandatory quarantine, see *supra* notes 66-67 and accompanying text.

203. *See* Tyler Kepner, *M.L.B. Tightens Virus Protocols Again in Wake of Outbreaks*, N.Y. TIMES (Aug. 6, 2020), <https://www.nytimes.com/2020/08/06/sports/baseball/mlb-safety-protocols.html> [<https://perma.cc/LC3A-X5CH>] (noting that MLB has expanded list of areas where players must wear masks but that they still are not required to be worn while players are on field). Players also travel to compete with teams from other states and cities, something that has been discouraged for the general public. *See Travel during the Covid-19 Pandemic*, CTRS. FOR DISEASE CONTROL: COVID-19 (last updated Sept. 11, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Ftravelers%2Ftravel-in-the-us.html](https://www.cdc.gov/coronavirus/2019-ncov/travelers/travel-during-covid19.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Ftravelers%2Ftravel-in-the-us.html) [<https://perma.cc/B6HS-GP8D>] (stating staying home and avoiding travel is best way to avoid spreading coronavirus).

204. *See* *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941) ("There must be a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right. . . . [O]nly in the clearest cases may a court make an alleged public policy the basis of judicial decision."); *see also* *Huber v. Culp*, 149 P. 216, 219 (Okla. 1915) (noting public policy should only be used to invalidate contracts when court is free from doubt regarding policy of state and contract's potential to violate that policy).

205. For further discussion of the precautions and examples of state mandates, see *supra* notes 64-69 and accompanying text.

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and states' revenues.<sup>206</sup> Second, and more importantly, the health and safety protocols included in the 2020 Agreement indicate compliance with public policy to some extent.<sup>207</sup> Since there is at least some level of compliance with the mandates, courts would likely enforce the 2020 Agreement because courts are very unwilling to invalidate contracts against public policy unless it is clearly required to promote justice.<sup>208</sup> It is therefore unlikely that a court would invalidate the 2020 Agreement as against public policy.<sup>209</sup> However, even without finding that the 2020 Agreement is invalid as against public policy, the way the MLB handled the pandemic injured its image in the eyes of its fans, which will likely hurt revenues in the future.<sup>210</sup> This makes it questionable whether the low-revenue 2020 season was worth the ten weeks of unfriendly negotiations and hard feelings between the parties when it will potentially have negative spillover effects for the 2021 collective bargaining negotiations and MLB's future revenues.<sup>211</sup>

#### B. Was Commissioner Manfred's Imposition of a Season Unconscionable?

A second defense against performing a contract, one which highlights the MLBPA's distrust towards owners going into 2021 collective bargaining negotiations, is unconscionability, which allows courts to refuse to enforce a contract because it is unfair.<sup>212</sup>

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206. See John Siegfried & Andrew Zimbalist, *The Economics of Sports Facilities and Their Communities*, 14 J. ECON. PERSPECTIVES 95, 98 (2000) (highlighting "frantic competition" of local and state governments to attract leagues using new stadiums, reduced taxes, and exemption from labor laws). This demonstrates the policy of states across the country to value the industry for its financial success and the added value it brings to the community and the surrounding area because major league sports teams such as those in baseball are essentially a limited commodity. See *id.* at 98-99 (presenting MLB grows fast enough to prevent competition).

207. For further discussion of the MLB's coronavirus health and safety protocols, see *supra* notes 84-85 and accompanying text.

208. See *Zeitz v. Foley*, 264 S.W.2d 267, 268 (Ky. 1954) ("If the legality of the contract can be sustained in whole or in part under any reasonable interpretation of its provisions, courts should not hesitate to decree enforcement.").

209. See *Mamlin*, 17 A.2d at 410 (holding societal opinions regarding term at issue would differ, and no statute was on point, so contract term was not invalid as against public policy).

210. For further discussion of how fans view the MLB and its players following the 2020 negotiations and season, see *infra* notes 279-282, 321 and accompanying text.

211. For further discussion of how fans view the MLB and its players following the 2020 negotiations and season, see *infra* notes 279-282, 321 and accompanying text.

212. See, e.g., *Nw. Acceptance Corp. v. Almont Gravel, Inc.*, 412 N.W.2d 719, 723 (Mich. Ct. App. 1987) (holding contracts were unconscionable where defend-

The 2020 Agreement was described as unconscionable by well-known player's agent Scott Boras.<sup>213</sup> This begs the question of exactly how unfair the 2020 Agreement was, such that MLBPA could have successfully satisfied both the procedural and substantive elements of unconscionability, or whether the terms reflected "ordinary" unfairness – either way, the MLBPA is sure to stand its ground in 2021 based on how unfavorably they viewed the 2020 Agreement.<sup>214</sup>

### 1. *Procedural Unconscionability*

While the court's approach to unconscionability varies by state, generally the party alleging unconscionability must show procedural unconscionability to some extent.<sup>215</sup> In the event that some breach of contract were to occur such that the MLBPA could raise a defense of unconscionability, the court would therefore look to the negotiation process between the players and the owners to determine whether the contract is procedurally unconscionable.<sup>216</sup> However, if issues surrounding the 2020 Agreement were to come

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ants were not given alternative to accepting equipment lease agreements that favored plaintiff); *Sanderson v. Sanderson*, 170 So. 3d 430, 436 (Miss. 2014) (quoting *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1034-35 (Miss. 2010)) (finding no unconscionability where plaintiff overpaid for farmland at request of elderly man later found to be "feeble of mind").

213. See *Passan & McDaniel*, *supra* note 4 ("Agent Scott Boras, a longtime advocate for drafts rights, lashed out, telling The Athletic: 'It's unconscionable the owners in this climate would reduce the collectively bargained money given to drafted players in the top rounds . . . reducing the payments to those players . . . cut[ting] their bonuses in this climate and us[ing] a pandemic situation in our country as a means to do that, I really find it unconscionable.'").

214. See *Moore v. Woman to Woman Obstetrics & Gynecology, L.L.C.*, 3 A.3d 535, 540 (N.J. Super. 2010) (noting both procedural and substantive unconscionability are required to declare contracts unenforceable).

215. See 17A AM. JUR. 2D CONTRACTS § 272 (1960) (defining unconscionability involves demonstrating both prongs of procedural unconscionability and substantive unconscionability). Some states view the two forms of unconscionability on a sliding scale in which the more clearly present one form of unconscionability is, the less important a showing of the other form of unconscionability becomes. See *id.* (noting courts also find unconscionability on substantive unconscionability alone if outrageous enough).

216. See *Chen-Oster v. Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 248 (S.D.N.Y. 2020) (recognizing additional factors relevant to analysis of procedural unconscionability, including use of high-pressure tactics, size of transaction, and commercial setting of negotiations). In a negotiation as unique as the one between the MLB and the MLBPA, the setting of the negotiations would likely play a vital role. See *Rascher & Deschrive*, *supra* note 6, at 204 (analyzing MLBPA's bargaining circumstances are different from non-sports industries because MLBPA's political and economic interest expanded as it became stronger in negotiations and its unique skill, giving it more leverage than a traditional union in negotiations).

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before a court or arbitrator, it is highly unlikely that evidence of procedural unconscionability would be found.<sup>217</sup> Most importantly, the bargaining power between the two parties, while not equal, is not so unequal as to raise suspicion of an unfair advantage.<sup>218</sup> It is clear from cases such as *Chen-Oster*, in which an employee argued an arbitration clause was invalid in a dispute with the employer, that “courts apply the presumption of contractual validity . . . with even greater force where the parties are sophisticated.”<sup>219</sup> In the case of the 2020 Agreement, both parties are highly sophisticated, with legal counsel representing them and experience in negotiations similar to the ones that occurred this past March.<sup>220</sup>

Another fact that indicates equal bargaining power is the length of negotiations – the ten weeks of back and forth between the MLB and the MLBPA indicates bargaining power on both sides.<sup>221</sup> In fact, the MLBPA’s decision to cut off negotiations is

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217. See *Romero v. Allstate Ins. Co.*, 158 F. Supp. 3d 369, 380 (E.D. Pa. 2016) (providing that courts must determine whether contract was procedurally unconscionable by asking whether there was voluntary meeting of minds between parties). The court provides examples of evidence that would support lack of a meeting of the minds, including disparities in age, intelligence, experience, business knowledge, whether the weaker party understood the terms or had them explained, and education. See *id.* at 380-81 (defining impact of meeting of minds on procedural unconscionability (citing *Wisconsin Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 165-66 (Wis. 2006))).

218. See *Rascher & Deschrive*, *supra* note 6, at 204 (“In other industries, the bargaining power of such a narrow union might be relatively low because of the suitability of similar craft workers in another industry. However, MLB players are highly skilled and unique; therefore, they are very hard to replace without loss of productivity.”); see also Mike Axisa, *MLB Negotiations Winners and Losers: Why Owners and Players Union Show Up on Both Lists*, CBS SPORTS (June 23, 2020) <https://www.cbssports.com/mlb/news/mlb-negotiations-winners-and-losers-why-owners-and-players-union-show-up-on-both-lists/> [https://perma.cc/URQ3-TKH5] (“[P]layers stood up for themselves these last few weeks. They insisted on full prorated pay, which they received, and they’re in a position to file a grievance that could alter the sport’s landscape . . .”).

219. See *Chen-Oster v. Goldman, Sachs & Co.*, 449 F. Supp. 3d 216, 231 (S.D.N.Y. 2020) (noting employees who signed employment agreement with arbitration clause were well-educated and highly compensated).

220. See Eric Prisbell, *Power Struggle: Behind the MLB Labor Talks and the Clash of Personalities that Could Shape the Sport for Years to Come*, SPORTS BUS. J. (June 22, 2020), <https://www.sportsbusinessdaily.com/Journal/Issues/2020/06/22/Leagues-and-Governing-Bodies/MLB.aspx> [https://perma.cc/7Z55-PNSC] (providing background that MLBPA hired Bruce Meyer, who is known by MLB as unwilling to concede on important issues, as their chief negotiator in 2018 to prevent “the league [from] bully[ing] the union anymore”). The MLB is represented by Commissioner Manfred and MLB Deputy Commissioner Dan Halem, and the MLBPA is represented by Executive Director Tony Clark and Lead Negotiator Bruce Meyer in CBA negotiations. See *id.* (reviewing parties’ representatives on both sides of negotiations).

221. For further discussion of MLB owners’ and players’ motives for the number of games played, see *supra* notes 80-83 and accompanying text.

what caused the imposed schedule.<sup>222</sup> Additionally, the MLBPA's and MLB's relationship is co-dependent, which gives both parties leverage when it comes to negotiations, further emphasizing that disparities in bargaining power do not extend so far as to leave one party with no real choice, especially given the historical proof that players in both the MLB and other professional sports leagues in the United States are willing to strike when terms are unfair enough.<sup>223</sup> These factors would hardly persuade an avid sports fan, let alone an arbitrator, that the MLBPA's bargaining position is so disparate from that of the MLB as to remove the ability of the players to freely reject the 2020 Agreement.<sup>224</sup>

Additionally, the MLBPA would be unable to argue that the term of the 2020 Agreement awarding Commissioner Manfred the ability to force a season is a surprise.<sup>225</sup> The parties agreed to the term as a foundational framework for the 2020 season months before it was implemented.<sup>226</sup> Additionally, it was announced by Commissioner Manfred and widely reported across sports news and media outlets.<sup>227</sup> Furthermore, MLBPA Executive Director Tony Clark negotiated the terms of the 2020 Agreement himself.<sup>228</sup> In fact, the ability of Commissioner Manfred to force a season was

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222. See Scott Lauber, *Players' Union Cuts off 'Futile' Negotiations with MLB, Asks Commissioner to Impose Season*, PHILA. INQUIRER (June 13, 2020), <https://www.inquirer.com/phillies/mlb-players-labor-negotiations-tony-clark-rob-manfred-2020-season-20200613.html> [<https://perma.cc/TAG9-Q7PX>] (recognizing MLB's last proposal called for seventy-two game season with seventy percent of prorated pay for players, which disregarded players' position against negotiating another pay reduction).

223. See Rascher & Deschrive, *supra* note 6, at 205 (“[B]oth sides have benefitted financially, with MLB generating in excess of \$7 billion in annual revenue and the average MLB player making over \$3.3 million a year.”).

224. See Axisa, *supra* note 218 (stipulating while fans are generally pro-owner, players currently have more fan support than any other point in baseball history).

225. See *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122 (Cal. Ct. App. 1982) (defining surprise factor of unconscionability as term in dispute being hidden in lengthy text or fine print and drafted by party wanting term enforced).

226. See Joel Sherman, *MLB, Union Reach Deal on Service Time, Other Coronavirus Issues*, N.Y. POST (Mar. 27, 2020), <https://nypost.com/2020/03/27/mlb-union-reach-deal-on-service-time-other-coronavirus-issues/> [<https://perma.cc/RP55-A3E2>] (reporting of MLBPA's large majority vote for final approval of agreement formed in March 2020).

227. See, e.g., Passan & McDaniel, *supra* note 4 (“Major League Baseball and the MLB Players Association struck a deal Friday that outlined how the sport would proceed in the coming months.”); Perry et al., *supra* note 8 (“MLB and the MLBPA also finalize a deal that establishes a potential framework for the 2020 season.”); Silverman, *supra* note 11 (“Two weeks after spring training shut down, the sides forged a March 26 agreement that laid out terms . . .”).

228. See Sheinin, *supra* note 76 (noting MLBPA gave Commissioner Manfred authority to mandate schedule, including number of games).



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granted in exchange for the guarantee that, if the forced season were to occur, the players would receive 100% of their prorated salaries.<sup>229</sup> This not only demonstrates that the agreed upon term allowing Commissioner Rob Manfred to impose a season was not a hidden term of the contract, but also that it was granted in exchange for a term favorable to the MLBPA, further evincing the bargaining power of both parties.<sup>230</sup> Overall, the MLBPA had bargaining power sufficient to negotiate the terms of the 2020 Agreement, they were not so weak as to have no real chance to reject the 2020 Agreement, and the term allowing an imposed schedule was not a surprise.<sup>231</sup> All of these factors weigh heavily against a showing of procedural unconscionability, as they do not indicate a lack of choice or a hidden term.<sup>232</sup>

## 2. *Substantive Unconscionability*

Despite a lack of procedural unconscionability, some courts (or arbitrators applying state law) will still find unconscionability where the terms of the contract are substantively unconscionable.<sup>233</sup> This is due to the purpose of the doctrine of unconscionability – as an equitable remedy, courts look to restore justice, and are comfortable doing so when there is gross unfairness regardless of whether an agreement is procedurally unconscionable, and are uncomfortable doing so even when a contract is procedurally unconscionable where no substantive unfairness exists.<sup>234</sup> In the case of the 2020 Agreement framing this season for the MLB, there is

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229. *See id.* (noting players have not moved from their position that they are to receive full prorated salaries since earning it in 2020 Agreement).

230. *See id.* (referring to prorated player salaries as concession on part of MLB, and one that allowed for rest of negotiations to continue).

231. *See Axisa, supra* note 218 (detailing wins and losses of owners and those of players, and recognizing that while owners ultimately got what they wanted with as few games as possible, both sides won some battles and lost others).

232. *See Romero v. Allstate Ins. Co.*, 158 F. Supp. 3d 369, 381 (E.D. Pa. 2016) (including conspicuousness of disputed term in contract language and oppressiveness of term as evidence of absence of choice).

233. *See Nw. Acceptance Corp. v. Almont Gravel, Inc.*, 412 N.W.2d 719, 723 (Mich. Ct. App. 1987) (stating procedurally unconscionable contracts are enforced if they are substantively conscionable, and if contract provisions are substantively unconscionable, courts may refuse to enforce them without requiring procedural unconscionability).

234. *See WILLISTON & LORD, supra* note 135, at § 18:10 (explaining contract full of “gobbledygook” is not enough to create unconscionability without some substantive unfairness, but noting that line between substantive and procedural unfairness can become blurred).

also little possibility the MLBPA could demonstrate that the terms of the agreement are unconscionable.<sup>235</sup>

First and foremost, as noted by sports analysts at the time of the final announcement that Commissioner Manfred would impose a schedule in accordance with the 2020 Agreement, the terms did not create one winner and one loser.<sup>236</sup> Unlike in *Northwest Acceptance Corp.*, in which a financing agent in charge of drafting terms did so in a way “unreasonably favorable” to the agent’s own interests, the MLB engaged in ten weeks of negotiations and failed to gain all the terms they asked for.<sup>237</sup> Instead, neither players nor owners got what they continually asked for throughout the ten week negotiations.<sup>238</sup> The players could potentially argue that the owners “won” because they got a shorter season as they wished, but this on its own hardly creates the sort of one-sided result courts generally look for when determining the presence of substantive unconscionability.<sup>239</sup> The owners, in their bid for a short season and salary cuts for players, essentially forced a shortened season and missed out on other terms owners sought, including an ex-

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235. See *Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001) (finding no unconscionability where plaintiff was not allocated harsh risks and where plaintiff was well represented by counsel).

236. See Hoynes, *supra* note 83 (“This is a potential deal lined with broken glass and razor blades for both sides.”); see also Axisa, *supra* note 218 (stating it makes sense that players refused to back off of prorated salaries, because it opened doors for owners to reduce salaries further in normal seasons, for example when attendance is down); Tom Verducci, *Everyone Loses in MLB’s 60-Game ‘Season’*, SPORTS ILLUSTRATED (June 22, 2020), <https://www.si.com/mlb/2020/06/23/rob-manfred-baseball-owners-players-dispute> [<https://perma.cc/LM44-AHNJ>] (arguing delay in baseball’s return beyond stay-at-home orders in effect due to coronavirus pandemic, when compared to ability of other sports leagues such as NBA and NFL to return without such conflict, heightens negative view of both parties by public). Every day that negotiations continued and a deal was not made for the 2020 season resulted in thirteen games lost for good – as of June 22, 2020, the total games lost due to the delayed negotiations, the one-month gap between negotiations and the start of the season, one week to test players for coronavirus, and three weeks for spring training equates to 1,495 lost games. See Verducci, *supra* note 236 (stating 2020 season “feels like 1994” again).

237. See *Nw. Acceptance Corp.*, 412 N.W.2d at 723 (recognizing terms requiring defendant to finance \$100,000 of repairs on rented tool before receiving assistance from plaintiff (financing agent) as one-sided).

238. See Axisa, *supra* note 218 (referring to MLB owners as “losers” in deal for terms they did not get in 2020 Agreement, and referring to MLBPA as “losers” in deal because of potential positive terms they gave up to keep prorated salaries).

239. See *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 33 (Or. 2014) (finding no unconscionability despite terms favoring one party because terms were not so unfair as to constitute take it or leave it basis). While *Bagley* discusses unconscionability in the context of contracts of adhesion, it assesses the idea that favorable terms do not constitute oppressively one-sided results per se. See *id.* at 37 (noting court also has not found them to be *per se* enforceable either).

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panded postseason for the 2021 season and universal designated hitters for the 2021 season.<sup>240</sup>

While the players likely think they “lost” the negotiations due to the shortened sixty-game season, they were able to hold the MLB to the prorated salaries promised in the 2020 Agreement despite owners’ attempts to impose further salary cuts.<sup>241</sup> The MLBPA’s position is similar to the plaintiff in *Navellier*, who was well educated and advised by counsel and freely waived a legal right – here, the MLBPA opted into the agreement that allowed a forced season.<sup>242</sup> In fact, the prorated salaries term is the one that players bargained for in exchange for the Commissioner’s right to impose a season.<sup>243</sup> These bargains hardly demonstrate a one-sided result such as the court would look for in a finding of substantive unconscionability.<sup>244</sup> Additionally, separate from the contract terms, the stance of the MLBPA throughout negotiations has been that the players want to play as long a season as possible.<sup>245</sup> While this is not reflective of the vocal minority who thinks it is unfair to expect players to play

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240. See Axisa, *supra* note 218 (arguing in addition to terms owners did not get included in 2020 Agreement, owners had “the less baseball, the better” stance which caused owners to lose support that they had previously enjoyed from fans); see also Hoynes, *supra* note 83 (arguing players turned down great terms without getting much in return, except full pro rata salary term that was already included in 2020 Agreement).

241. See Silverman, *supra* note 11 (highlighting clause in MLB’s 2020 Agreement makes term granting players full prorated salaries conditional on presence of fans, and owners wanted to reopen negotiations on that term following determination that 2020 season would be played without fans).

242. See *Navellier v. Sletten*, 262 F.3d 923, 940 (9th Cir. 2001) (noting when sophisticated party waives legal right, party also waives its claim that contract, without waived right, is unenforceable).

243. See Perry, *supra* note 74 (viewing both 2020 Agreement allowing Commissioner Manfred to force season and subsequent negotiations as true bargained for terms); see also Mike Axisa, *Rob Manfred ‘Not Confident’ There Will Be a 2020 MLB Season, Says It’s ‘Just a Disaster for Our Game’*, CBS SPORTS (June 15, 2020), <https://www.cbssports.com/mlb/news/rob-manfred-not-confident-there-will-be-a-2020-mlb-season-says-its-just-a-disaster-for-our-game/> [<https://perma.cc/98JW-JKMY>] (arguing that initial bargain for imposed season at full pro rata pay turned into main sticking point because owners wanted to continue to cut salaries).

244. See *Carbajal v. CWPC, Inc.*, 199 Cal. Rptr. 3d 322, 350-51 (2016) (finding arbitration provision unconscionable where plaintiff was required to arbitrate all disputes, but allowed defendant to obtain injunction stopping plaintiff from exercising exclusive use provisions); *Walnut Producers of California v. Diamond Foods, Inc.*, 114 Cal. Rptr. 3d 449, 460 (2010) (finding no substantive unconscionability where plaintiff waived class action and only effective remedy against defendant was in form of class action).

245. See Hoynes, *supra* note 83 (“‘Players want to play,’ said Tony Clark, the executive director of the MLBPA. ‘That’s what they do. And being able to get back on the field and being able to play, even if that means their fans are watching at home, is something they’ve all expressed a desire and interest to do and to do as soon as possible.’”).

when it poses an increased health risk, it demonstrates the stance of the majority of players and of the MLBPA on the players' behalf that the MLBPA wanted game play to begin as soon as possible.<sup>246</sup>

Finally, in light of the fact that substantive factors and procedural factors can sometimes be blurred, some of the strongest evidence against substantive unconscionability comes from the procedural formation of the agreement through which the ability to force a season arose.<sup>247</sup> As mentioned above, the negotiation giving Commissioner Manfred the power to impose a season was the result of a bargain – players were comfortable giving Manfred that power so long as they were guaranteed fully prorated salaries in the event he exercised it.<sup>248</sup> The players' willingness to make this bargain exemplifies their disposition to perform the agreement according to its terms, and given their position as a sophisticated party, a court or arbitrator would be hesitant to find the term unenforceable.<sup>249</sup> Despite the likelihood that a court would not find the 2020 Agreement or its negotiations unconscionable, the MLB's actions that even make unconscionability a potential argument (namely the owners' continued attempts to pay players as little as possible both through pay cuts and by reducing the number of games and therefore the pro rata salaries of players) will come back to haunt owners come 2021 collective bargaining agreement negotiations – something the owners should have thought of before

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246. See Bob Nightengale, *Baseball Union Chief Tony Clark: "We Would Play as Long as we Possibly Could"*, USA TODAY (Mar. 27, 2020), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2020/03/27/coronavirus-tony-clark-baseball-union-return-play-conditions/2931734001/> [https://perma.cc/X7BT-KPNS ] (“‘We would play as long as we possibly could,’ Clark said. ‘Obviously, the weather becomes a challenge the later you get in the calendar year, but we would do our best to play as many as possible regardless of when we start.’”).

247. For further discussion of the initial terms of the 2020 Agreement, see *supra* notes 10-12, 55-74 and accompanying text.

248. See Hannah Keyser, *Who Has the Leverage? As MLB, Players Negotiate Baseball's Return, Experts Assess Pay Cut Question*, YAHOO! SPORTS (May 12, 2020), <https://sports.yahoo.com/who-has-the-leverage-as-mlb-players-negotiate-baseballs-return-experts-assess-pay-cut-question-153216387.html> [https://perma.cc/E9NF-SDAF ] (analyzing players earned right to deny any pay cuts in 2020 Agreement, just as Commissioner Manfred earned right to impose season).

249. See Bob Nightengale, *Players' Union Done Negotiating, Tells MLB to Simply Tell the Players When to Show Up for Work*, USA TODAY (June 13, 2020), <https://www.usatoday.com/story/sports/mlb/2020/06/13/mlb-players-association-reject-league-offer-expect-short-season/3185398001/> [https://perma.cc/82BV-6PET ] (reporting players are done negotiating with owners and waiting for Manfred to exercise his right to impose 2020 season under 2020 Agreement).

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pushing for salary cuts for players consistently during 2020 negotiations.<sup>250</sup>

### C. Alternative Remedies: Undue Influence

There are additional equitable doctrines of contract law that function similar to unconscionability in excusing a party's performance under a contract that the MLBPA could potentially rely on to excuse their performance.<sup>251</sup> Among them are undue influence, fraud, misrepresentation, void as against public policy, mistake, frustration of purpose, impossibility, and violation of good faith and fair dealing.<sup>252</sup> While not all of these doctrines would apply to the 2020 Agreement, undue influence is potentially applicable and can be analyzed to determine whether they could provide relief to the MLBPA under the 2020 Agreement.<sup>253</sup>

Although it is a separate doctrine and defense, undue influence is related to procedural unconscionability.<sup>254</sup> However, similar to the analysis of procedural unconscionability above, any influence exercised by the dominant party (the MLB) over the weaker party (the MLBPA) in the MLB 2020 season negotiations is unlikely to meet the elements required to be considered undue in-

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250. For further discussion of a potential lockout during the 2021 collective bargaining agreement due to distrust and animosity between players and owners, see *infra* notes 275-277 and accompanying text.

251. See *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 266 (Sup. Ct. 1969) (referring to development of unconscionability from doctrine of fraud as "legal armor" to protect buyers from harsh terms set by sellers); see also *Friendly Ice Cream Corp. v. Beckner*, 597 S.E.2d 34, 38 (Va. 2004) ("A court of equity will not set aside a contract because it is 'rash, improvident or [a] hard bargain' but equity will act if the circumstances raise the inference that the contract was the result of imposition, deception or undue influence.").

252. See *DIERKER & MEHAN*, *supra* note 93, § 12:8 (referring to each of these doctrines as defenses to breach of contract claim rather than independent causes of action).

253. See *id.* (defining each doctrine, including burdens of proof for party alleging defense). Fraud requires an assertion that documents were forged. See *id.* (noting fraud can be asserted as a counterclaim). Misrepresentation requires an assertion that the basis of the contract was fraudulent. See *id.* (explaining party claiming fraudulent misrepresentation must show reliance on fraudulent fact when entering into contract). Illegality requires that the conduct provided for in the contract is against the law. See *id.* (detailing some contracts are illegal by statute). Impossibility requires an act of God, the law, or another party that makes performance impossible (not just expensive). See *id.* (clarifying impossibility also includes commercial frustration). To date, the author of this Comment has found no evidence which would implicate these doctrines.

254. See *Eberle v. Eberle*, 766 N.W.2d 447, 484 (N.D. 2009) (differentiating between undue influence and unconscionability because agreements can be free from undue influence and still be procedurally unconscionable, but noting they are similar enough to consider together in opinion).

fluence.<sup>255</sup> To show that the owners exercised undue influence, the MLBPA would need to demonstrate all four elements of undue influence.<sup>256</sup> To start, players are unlikely to demonstrate the first element of undue influence, susceptibility to influence by the MLB, because of the players' bargaining strength throughout negotiations, which enabled them to protect their pro rata salaries.<sup>257</sup> Additionally, the presence of lawyers in the negotiations on behalf of the MLBPA strongly negates any susceptibility to undue influence.<sup>258</sup>

Furthermore, the MLBPA would have difficulty demonstrating the fourth element of undue influence, that there was an effect of undue influence in the contract, because the players wanted to play very badly throughout negotiations.<sup>259</sup> The fact that a majority of players wanted a season indicates that the ability of Commissioner Manfred to impose a season, while potentially unfair to players who wanted to opt out from the season but who could not afford to, was not the result of undue influence because there was no lack of willingness to play prior to the imposition of a schedule.<sup>260</sup> Overall, while an undue influence argument would not succeed for the MLBPA because they were willing to play prior to the imposed season and they were well represented by counsel throughout, the viability of a claim of undue influence represents a lot of the distrust between the MLBPA and the owners.<sup>261</sup>

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255. For further full discussion of the MLBPA's ability to freely reject the 2020 Agreement, see *supra* notes 220-224 and accompanying text.

256. See *supra* note 159 (providing example of jurisdiction that does not use four elements of undue influence to assess its presence in contract formation).

257. See Nightengale, *supra* note 249 (noting players rejected MLB's request for more concessions on salary in exchange for a longer regular season as players wanted).

258. See *Pickman v. Pickman*, 505 A.2d 4, 7 (Conn. Ct. App. 1986) (holding party claiming undue influence was "accorded every opportunity to consult with his counsel prior to signing the agreement" and therefore failed to meet burden of proof to establish undue influence).

259. For further discussion on recognition that players wanted to play, see *supra* notes 245-246 and accompanying text.

260. See *Miller v. Westwood*, 472 N.W.2d 903, 912 (Neb. 1991) (citation omitted) (stating when determining whether a party exercised undue influence, court is only determining whether weaker party's act was voluntary, not whether it was right).

261. See Prisbell, *supra* note 220 (identifying Bruce Meyer, MLBPA's lead negotiator, as unwilling to give in on important issues during negotiations).

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V. THE HIGHLIGHTS: MLB'S LESSONS (HOPEFULLY) LEARNED  
FROM THE 2020 SEASON

The doctrines laid out above create a roadmap of the MLBPA's most salient complaints about the MLB's negotiation tactics during the 2020 Agreement negotiations.<sup>262</sup> While the MLBPA clearly has not breached the 2020 Agreement to necessitate the implementation of those doctrines, those same arguments are likely to be costly for the MLB for the reasons laid out below.<sup>263</sup> Part A of this section lays out the costs the MLB is likely to face come 2021.<sup>264</sup> Part B suggests tools the MLB can use to avoid messy negotiations such as those that occurred this past season, should another unforeseeable event make the 2017-2021 CBA unworkable.<sup>265</sup>

A. The Cost of Hostile Negotiations

The MLB's costs can be understood from several perspectives, the most easily visible being the loss of revenue come 2021 negotiations that is likely to occur due to a predicted labor stoppage.<sup>266</sup> From more of a technical perspective, it is not yet clear how the shortened 2020 season will impact salary arbitration or players' salaries long term.<sup>267</sup> Finally, and most important for internal MLBPA-MLB relations, the forced season will cost the MLB lost leverage in future negotiations with the MLBPA.<sup>268</sup>

1. *Loss of Fans, Revenue, and Peace Between Owners and Players*

The various doctrines the MLBPA could rely on to excuse performance of the 2020 Agreement offer limited support for the 2020 Agreement's unenforceability.<sup>269</sup> While the MLB seemed to contain coronavirus transmission by the end of the 2020 season, the

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262. For full discussion of the legal doctrines that highlight the MLBPA's complaints heading into the 2021 collective bargaining agreement negotiation, see *supra* notes 113-117 and accompanying text.

263. For description of the completion of the World Series and of the 2020 season, see *supra* notes 104-107 and accompanying text.

264. For further discussion of the MLB's likely costs of forcing the 2020 season, see *infra* notes 269-301 and accompanying text.

265. For full discussion of how the MLB can avoid similarly ugly negotiations, see *infra* notes 306-312 and accompanying text.

266. For further discussion of predicted labor stoppage and resulting revenue loss, see *infra* notes 272-278 and accompanying text.

267. For full discussion of the 2020 season's impact on salary arbitration, see *infra* notes 284-295 and accompanying text.

268. For full discussion of how the MLB lost leverage against MLBPA by forcing a season, see *infra* notes 296-301 and accompanying text.

269. For further discussion of the contract doctrines that highlight the MLBPA's grievances, see *supra* notes 169-261 and accompanying text.

potential fallouts of the decision to play the 2020 season can be seen in the consistent tension between the MLBPA and MLB owners.<sup>270</sup> Additionally, the decision of the MLB to complete a 2020 season could be seen as unwise as the decision was made at the cost of future games and revenue due to a potential labor stoppage in 2021.<sup>271</sup> Even more unwisely, those future games are ones that fans will likely be able to attend again in the 2022 season following the 2021 collective bargaining agreement, equating to an additional loss of revenue from games in 2022 in which fans will be able to attend beyond the revenue lost during the pandemic.<sup>272</sup>

The interruption to the MLB's 2020 season due to the coronavirus pandemic also disrupted a long streak of peaceful negotiations between the MLB and the MLBPA.<sup>273</sup> Since the notoriously ugly strike during the 1995-96 season, the MLB has had peaceful negotiations with each new collective bargaining negotiation.<sup>274</sup> Tensions between the MLB owners and the players were already on the rise, as many players were unhappy with the 2017-2021 CBA currently in effect.<sup>275</sup> During the 2020 negotiations, the accusations of bad faith on both sides, owners' refusal to provide data backing up their claims that they could not afford to pay players during negotiations, and the refusal of either side to budge at the end of negotiations all combine to highlight the same issues

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270. See Associated Press, *MLB players Extend Streak of No Covid Positives to 47 Days*, FOX 40 (Oct. 16, 2020), <https://fox40.com/sports/baseball/mlb-players-extend-streak-of-no-covid-positives-to-47-days/> [<https://perma.cc/8EWU-UW93>] (attributing most of MLB's streak of negative coronavirus tests to MLB's postseason bubble).

271. For further discussion of how the 2020 negotiations caused hostility that will cost future fan attendance, and therefore future revenue, see *infra* notes 279-282 and accompanying text.

272. See, e.g., Matt Traub, *The Latest on Sports and Covid-19: No Cancelling Wimbledon in 2021, Club says*, SPORTS TRAVEL MAGAZINE (Oct. 20, 2020), <https://www.sportstravelmagazine.com/sports-canceled-covid-nba-nhl-nfl-ncaa-nascar-soccer-league-season-tournament/> [<https://perma.cc/N3H2-ZVUU>] ("There are 15 teams in the National Football League allowing fans . . ."). College football has also allowed fans in stadiums, as have some tennis events. See *id.* (noting large venue capacities allow for socially distanced seating). For further discussion on the impact of playing without fans, see *supra* notes 54, 210 and accompanying text. For further discussion on potential future revenue loss, see *infra* notes 275-277 and accompanying text.

273. For further discussion of peace between the MLB and the MLBPA following the 1995 strike, see *supra* notes 52-54 and accompanying text.

274. For further discussion of previous labor stoppages in MLB negotiations, see *supra* notes 43-54 and accompanying text.

275. See Lacques, *supra* note 40 (noting Commissioner Manfred has led owners to "winning streak" for past two collective bargaining agreements, with owners earning gains in revenue and salary caps and players running out of terms to give in on).



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that have been contested in collective bargaining negotiations for years.<sup>276</sup> This only serves to exacerbate players' unhappiness with the 2017-2021 CBA and foreshadows potential labor interruptions due to difficult negotiations when the 2021 collective bargaining negotiations begin.<sup>277</sup> The players' animosity towards the MLB can be seen following the 2020 World Series, when Dodgers third baseman Justin Turner stated that "[a]t this point, the only thing devaluing [the World Series Championship] trophy . . . is that it says 'Commissioner' on it."<sup>278</sup>

MLB's 2020 season not only resonated poorly with the players, but the entire sport of baseball took a massive hit in the eyes of the fans.<sup>279</sup> While both the MLB and the MLBPA were aware of revenue losses from stopping the baseball season, the 2020 negotiations carried an additional cost as the public was attuned to the difficult negotiations during a time when many Americans were stuck at home, struggling to make ends meet financially, or caring for a sick relative.<sup>280</sup> The fact that owners and players spent ten weeks arguing about money during the pandemic reflects poorly on them.<sup>281</sup> This is only exacerbated when compared to other professional sports leagues, whose negotiations did not carry the same volatility.<sup>282</sup> Additionally, the MLB's coronavirus tests came back positive

276. For further discussion of consistent issues across several collective bargaining agreements and 2020 Agreement negotiations, see *supra* notes 40-42 and accompanying text.

277. For further discussion of consistent issues across collective bargaining negotiations, see *supra* notes 40-42 and accompanying text.

278. See Passan, *supra* note 105 (reporting Turner's statement as response to Commissioner Manfred's description of World Series Trophy as "a piece of metal").

279. See Axisa, *supra* note 218 (stating fans are generally pro-owner, as was true during 1994-1995 labor strikes, but that players now have more support than ever from fans).

280. See Perry et al., *supra* note 8 (tracking negotiations from 2020 Agreement to Commissioner Manfred's imposition of season schedule on June 23); see also Mervosh et al., *supra* note 64 (showing implementation of statewide and local quarantine orders taking effect between March 9 and March 30, with most taking effect towards end of March into early April). For further discussion of previous labor stoppages in MLB negotiations, see *supra* notes 43-54 and accompanying text.

281. See Bob Nightengale, *Time Running Out: MLB Commissioner Could Implement Shortened Season Even Without Players' Approval*, USA TODAY (June 9, 2020), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2020/06/09/mlb-rob-manfred-shortened-baseball-season-no-agreement-players/5331170002/> [<https://perma.cc/846W-SZB8>] ("Fans, so disgusted by the negotiations during the pandemic with more than 40 million Americans filing for unemployment the last three months, could turn their back on the sport and stay away for good. Even if ballparks are completely open in 2021, they may stay away out of spite.").

282. See Bradford Doolittle, *MLB is Having a Tougher Time Returning than NBA, NHL. What's Baseball's Problem?*, ESPN (June 1, 2020), <https://www.espn.com/mlb/>

in higher numbers than the NBA and the National Hockey League (“NHL”), both of which initiated a strict “bubble” to minimize risk of contracting the virus.<sup>283</sup>

## 2. *The 2020 Season’s Impact on Salary Arbitration*

Another cost of playing the 2020 season is the impact the shortened 2020 season will have on salary arbitration between a player and his team and on free agency.<sup>284</sup> Both salary arbitration and free agency status are dictated by service time – a player who has three or more years of service in the MLB, but less than six, becomes eligible for salary arbitration and can arbitrate his salary each year.<sup>285</sup> In order to be eligible for arbitration, a player must be offered a contract, or “tendered,” by the player’s team.<sup>286</sup> If the player is offered a contract or tendered, such player is considered “under the control” of the club until the player gains six years of service time.<sup>287</sup> Once a player accumulates six years of service time,

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story/\_/id/29248967/mlb-having-tougher-returning-nba-nhl-baseball-problem [https://perma.cc/43S4-A4TP ] (comparing MLB’s difficulties in negotiating 2020 season during coronavirus pandemic to relatively smooth negotiations in NBA and NFL, attributing difficulties to differences in calendar, economic structure, nature of league competition, nature of on-field competition, sources of revenue, minor league differences, timing of collective bargaining agreements across leagues, relationships between labor and management, and public perception of leagues). Doolittle attributed the MLB’s difficulties to the calendar, because baseball had to start at the beginning of a season, whereas the NBA and the NFL both had enough games in the regular season completed that they could start back up in the postseason. *See id.* (noting both NBA and NHL have salary caps, whereas MLB does not, and since salary caps are tied to revenue, economic aspect of negotiations – including revenue sharing – was easier for NBA and NHL to determine than it was for MLB).

283. *See* Stephanie Apstein & Michael Rosenberg, *SI Survey: Doctors Say They’d Play in the NBA and NHL, but not NFL and MBA*, SPORTS ILLUSTRATED (Aug. 24, 2020), <https://www.si.com/nfl/2020/08/24/doctor-covid-survey-daily-cover> [https://perma.cc/8PVU-GBUY ] (interviewing doctors to determine what leagues they would consider safe enough to play in, with overwhelming results showing presence of bubble versus no bubble is difference between doctors’ theoretical willingness or unwillingness to play).

284. *See* Bob Nightengale, *These 17 Arbitration-Eligible Players Could Soon Join Full and Frozen Free Agent Market*, USA TODAY (Dec. 1, 2020), <https://www.usatoday.com/story/sports/mlb/columnist/bob-nightengale/2020/12/01/mlb-rumors-these-17-arbitration-eligible-players-could-free-agents/6474590002/> [https://perma.cc/EL6K-NPNA ] (comparing differences in amount spent since start of free agency in 2020 to amount spent at same time in 2019).

285. *See Salary Arbitration*, MLB, <https://www.mlb.com/glossary/transactions/salary-arbitration> [https://perma.cc/9F6W-28FA] (last visited Dec. 3, 2020) (explaining MLB’s salary arbitration system under 2017-2021 CBA).

286. *See id.* (“Once a player becomes eligible for salary arbitration, he is eligible each offseason (assuming he is tendered a contract) . . .”).

287. *See id.* (noting players and clubs can settle on salary, or attend hearing before arbitration panel to determine salary of player); *see also Free Agency*, MLB,

the player is considered a free agent and can join any club that the player agrees with on negotiated terms.<sup>288</sup> However, if a player is not offered a contract, or is “non-tendered,” the player becomes a free agent ahead of the scheduled six year service time requirement set out in the collective bargaining agreement, though that free agent still must participate in salary arbitration with the new team if a salary is not settled prior to the arbitration deadline.<sup>289</sup>

While the MLB addressed service time in the 2020 Agreement, ensuring that players who are active throughout the 2020 season will get a full year of service time regardless of the length of the season, it did not address the fallout of determining salary arbitration numbers.<sup>290</sup> Specifically, a player’s performance is evaluated based on statistics in salary arbitration, and the MLB has not yet decided how the 2020 sixty-game season’s statistics should be viewed.<sup>291</sup> This is a problem this year because teams and agents often base salary figures on comparable players – a task that is much more difficult to do when nobody knows how the statistics from the sixty-game season should be treated.<sup>292</sup> The deadline for teams and players eligible for arbitration to submit salary figures was January 15, 2021, which means that teams and players were “in the dark” in a unique way as they determined what starting salary figures should be for arbitration without an official policy for extrapolating season statistics from a shortened season.<sup>293</sup> This is likely

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<http://m.mlb.com/glossary/transactions/free-agency> [<https://perma.cc/KYU7-W4AF>] (last visited Dec. 3, 2020) (providing examples of free agency).

288. See *Free Agency*, MLB, <http://m.mlb.com/glossary/transactions/free-agency> [<https://perma.cc/RMN6-2NZB>] (last visited Dec. 3, 2020) (explaining free agents may negotiate with any club).

289. See R.J. Anderson, *MLB’s 10 Most Intriguing Non-Tendered Players*, CBS SPORTS (Dec. 3, 2020, 10:07 AM), <https://www.cbssports.com/mlb/news/mlbs-10-most-intriguing-non-tendered-players-archie-bradley-kyle-schwarber-more-enter-free-agency/> [<https://perma.cc/9PST-YMF8>] (providing background on MLB service time schedule before discussing 2020 free agents).

290. See Craig Calcaterra, *Report: Players To Get a Full Year of Service Time for Games Played in 2020*, NBC SPORTS (Mar. 25, 2020), <https://mlb.nbcsports.com/2020/03/25/report-players-to-get-a-full-year-of-service-time-for-games-played-in-2020/> [<https://perma.cc/EKS7-6NJ7>] (discussing negotiations between clubs and players, highlighting agreed term for service time).

291. See Nightengale, *supra* note 284 (noting MLBPA wants 2020 statistics to be multiplied by 2.7 to equal full 162-game season, but MLB does not think it should be that simple).

292. See Tim Dierkes, *Projected Arbitration Salaries for Fall 2021*, MLB TRADE RUMORS (Oct. 15, 2020, 10:59 PM), <https://www.mlbrumors.com/2020/10/projected-arbitration-salaries-for-2021.html> [<https://perma.cc/4RYB-NLJF>] (discussing impact of 2020 statistics on salary arbitration).

293. See R.J. Anderson & Mike Axisa, *MLB Offseason Key Dates 2020-21: Non-Tender Deadline, Winter Meetings, Opening Day 2021, More*, CBS SPORTS (Dec. 2, 2020), <https://www.cbssports.com/mlb/news/mlbs-10-most-intriguing-non-ten->

to impact the amount of money players and teams negotiate for, as 2020's abbreviated statistics are not easily comparable to other years.<sup>294</sup> While the 2020 Agreement includes a term that 2020-21 arbitration salaries will not directly impact future salary classes in arbitration, it is still unlikely that the potentially low 2021 salaries as a result of the lost revenue will be ignored when considering players' salaries in future seasons.<sup>295</sup>

### 3. *MLB's Lost Leverage*

Another potential consequence of the MLB's forced 2020 season is an increase in the willingness of the MLBPA to stand their ground on collective bargaining terms.<sup>296</sup> As noted earlier, the MLBPA has acquiesced to owners' terms in several of the last collective bargaining negotiations, to the point that the MLBPA is running out of terms to give in on.<sup>297</sup> Such concessions, combined with the unfair treatment players received during 2020 season negotiations, will only further fuel players' incentives to negotiate hard during 2021 negotiations.<sup>298</sup> That, combined with the drop in the public opinion of owners, will leave the MLB in a difficult place come 2021, when the owners will likely have to make large concessions or face the first labor stoppage in twenty-five years.<sup>299</sup> Finally, regardless of whether the MLBPA's potential legal arguments would have won, the legal strength of those arguments give credence to the players' grievances that the MLBPA will rely on to

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dered-players-archie-bradley-kyle-schwarber-more-enter-free-agency/ [https://perma.cc/FA6B-5R2G ] (discussing off-season dates and deadlines for contracting with players to form teams for 2021 season).

294. See Tim Dierkes, *The Looming Arbitration Battle*, MLB TRADE RUMORS (Oct. 13, 2020), <https://www.mlbraderumors.com/2020/10/the-looming-arbitration-battle.html> [https://perma.cc/RQ3Q-R89M ] (discussing how arbitration usually results in players and clubs "meet[ing] in the middle" which will impact amount of money clubs and players should be prepared to pay and receive).

295. See *id.* (noting past salaries are usually considered when players move through arbitration system).

296. For further discussion of players' increased willingness to stand up for themselves, see *supra* notes 218-220 and accompanying text.

297. See *supra* note 275 (discussing "winning streak" owners have had over past two collective bargaining agreements).

298. See Lacques, *supra* note 40 (noting players are "increasingly prepared to walk away in order to take back the power").

299. See *id.* (reporting Phillies reliever Pat Neshek's statement that "[o]wners have a lot more to lose than us, I think. The players have been talking for the last couple of years, putting money aside and I think we're going to be ready for a fight.").

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ask for more favorable terms in 2021 negotiations.<sup>300</sup> All of this compounds in lost leverage for the MLB, making a stoppage during 2021 negotiations more likely unless the owners are willing to concede.<sup>301</sup>

#### B. What to Include in the 2021 Collective Bargaining Agreement

It is clear in hindsight that the MLB should plan accordingly so a similar situation does not reoccur.<sup>302</sup> In fairness to the MLB, logistical obstacles arose that other major sports leagues did not have to face, including the predominance of the coronavirus pandemic at the start of spring training as opposed to the other major sports leagues who had already played most of their seasons, and the sheer number of MLB games required to be played between teams which made forming a bubble challenging.<sup>303</sup> However, that said, the MLB and the players have the opportunity to act accordingly when negotiating the new 2021 collective bargaining agreement so the same problems that stalled gameplay for weeks are not an obstacle the next time – whether it be another pandemic, or a future labor stoppage the next time owners and players disagree strongly enough to bring baseball to a halt.<sup>304</sup> Knowing what went wrong this past season, the MLB and the MLBPA should take steps to document a plan, albeit in broad strokes, that would satisfy the need for a shortened or flexible season in the future.<sup>305</sup>

In doing so, the MLB and the MLBPA should create a new section in the collective bargaining agreement, whether embedded in the agreement or as an appendix, designing a more flexible version of the traditional baseball season that would accommodate

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300. For further discussion of how the legal arguments the MLBPA could have made reflect players' grievances, see *supra* notes 113-117 and accompanying text.

301. See Lacques, *supra* note 40 (“[Players are] willing to go multiple years and I don’t know if [owners] are willing to sacrifice.”).

302. For further discussion of what the MLB’s 2020 season cost the MLB, see *supra* notes 269-295 and accompanying text.

303. For further discussion of the MLB’s obstacles differing from other leagues, see *supra* notes 282-283 and accompanying text.

304. See generally 2017-2021 CBA, *supra* note 7 (including Article XV with separate rules for roster, game play, and team formation for All-Star Game, and including fifty-six attachments and three appendices for additional terms related to active collective bargaining agreement terms).

305. For further discussion on the delay in game play beyond coronavirus restrictions caused by extended negotiations, see *supra* notes 71-74 and accompanying text.

schedules when a full season is not workable.<sup>306</sup> Such a section would need to address the areas that prevented the MLB and the players from quickly negotiating a workable season.<sup>307</sup> This means that the most important term to include would be a formula for players' salaries and revenue-sharing, since those were the main sticking points that caused this past year's negotiations to drag on for ten weeks.<sup>308</sup>

Additionally, by the time the parties are ready to negotiate the new collective bargaining agreement, the MLB and the players will have a fuller idea of the impact the shortened season has on off-season activities such as salary arbitration.<sup>309</sup> Based on this understanding, the MLB and the MLBPA should put in writing a formula or system for understanding statistics from a shortened season, whether that be just relying on the bare numbers or extrapolating the shortened game statistics to reflect what they would have looked like over a full season.<sup>310</sup> The parties could even include a written schedule for when travel is not possible, such as regional competition among teams as occurred in the 2020 season.<sup>311</sup> Perhaps the one open question they would be unable to include is the specific number of games that would be played, as it would depend heavily on the reason for a more flexible schedule, although it is likely to be less of an issue in the future if players' salaries are addressed in other parts of the agreement rather than tied to the number of games as they were in 2020.<sup>312</sup>

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306. For further discussion of terms of the 2017-2021 CBA that were not workable for 2020, see *supra* notes 35-39 and accompanying text.

307. For further discussion of the negotiations between the MLB and the MLBPA, see *supra* notes 75-83 and accompanying text.

308. For further discussion of compensation as central to the 2020 negotiations, see *supra* notes 80-83 and accompanying text.

309. For further discussion of the issues caused by a shortened season in calculating game statistics for salary arbitration, see *supra* notes 291-292 and accompanying text.

310. For further discussion of different methods the MLB could use when evaluating statistics for a shortened 2020 season, see *supra* note 291-292 and accompanying text.

311. See Matt Snyder, *MLBPA on Board with League's Plan for Regional Schedule in 2020 Season, per Report*, CBS SPORTS (June 2, 2020), <https://www.cbssports.com/mlb/news/mlbpa-on-board-with-leagues-plan-for-regional-schedule-in-2020-season-per-report/#:~:text=the%20union%20%22embraced%22%20the%20proposal,and%20from%20the%20interleague%20counterpart> [<https://perma.cc/U2GH-F8F5>] (detailing games only played regionally to limit travel in 2020 as much as possible).

312. For further discussion of compensation as the main issue in 2020 negotiations, see *supra* notes 80-83 and accompanying text.

VI. THE CLOSER: WHY THE 2020 SEASON WILL CONTINUE TO  
IMPACT THE MLB

Legally, the various arguments the MLBPA could bring against the MLB did not come to bear – the reason players are upset is not because the season was forced, but because players are upset with negotiation tactics of the owners.<sup>313</sup> Even if the MLBPA had sued, it is unlikely that a court would find the agreement against public policy, because the terms of the 2020 Agreement do not include a purpose that violates public policy and the effect of playing baseball during 2020 is not so injurious to the public as to render the contract unenforceable.<sup>314</sup> Courts also would not find the contract unconscionable, because the parties both have sufficient bargaining power to understand and accept or reject the agreed upon terms of the 2020 Agreement, which is what gave the Commissioner the ability to force a season (not to mention that the dispute would likely be settled in arbitration).<sup>315</sup> Additionally, the alternative doctrines that would invalidate the contract would also be largely unsuccessful.<sup>316</sup>

However, the impact of the forced season was never likely to play out in the court.<sup>317</sup> Rather, it is expected to be visible through-out negotiations for a new collective bargaining agreement for the Players Association, because the 2017-2021 CBA is set to expire in 2021.<sup>318</sup> Initially, the idea of missing the 2020 baseball season seemed like the worst-case scenario, both economically for owners and players, and in terms of morale for the country.<sup>319</sup> However,

313. For further discussion on an assessment of the success of each contract doctrine, see *supra* notes 208-209, 249, 260-261 and accompanying text.

314. For further discussion of the 2020 Agreement as invalid against public policy, see *supra* notes 177-209 and accompanying text.

315. For further discussion of the 2020 Agreement as unconscionable, see *supra* notes 212-250 and accompanying text.

316. For further discussion of the 2020 Agreement analyzed under alternative contract doctrines, see *supra* notes 251-261 and accompanying text.

317. See 2017-2021 CBA, *supra* note 7, at art. XI (providing MLB grievance procedure through arbitration panel).

318. See Silverman, *supra* note 11 (predicting failure to reach successful 2020 negotiation “does not bode well” for renegotiation before MLB’s 2022 season); see also Hoynes, *supra* note 83 (“What happened over the last three months was a skirmish compared to what awaits both sides in a little more than a year.”); Mike Oz, *MLB Commissioner Will Impose 2020 Season After Failing to Strike Deal with Union*, YAHOO! SPORTS (June 22, 2020), <https://sports.yahoo.com/mlb-commissioner-will-impose-2020-season-after-failing-to-strike-deal-with-union-004357208.html> [https://perma.cc/A2PU-V43U ] (predicting work stoppage after 2017-2021 CBA expires due to increased tensions from negotiations and potential grievance players may file against owners for failure to negotiate in good faith).

319. See Nick Ashooh, *What is the Worst Case Scenario for Major League Baseball?*, NBC SPORTS (May 27, 2020), <https://www.nbcsports.com/washington/nationals/>

the mess that was made of the negotiations beyond the March 26 framework has caused such a disruption to the relationship between the parties that it is likely additional revenue will be lost in the future anyway due to a labor stoppage.<sup>320</sup> This, in combination with the dropping public opinion of owners in the eyes of fans and the seeming inability of the MLB to stop coronavirus from continuing to crop up has painted the MLB in poor light.<sup>321</sup> It casts doubt on whether the worst case scenario really was no baseball in 2020, because it promises continued discord, fan frustration, and loss of revenue in the future.<sup>322</sup>

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whats-worst-case-scenario-major-league-baseball [<https://perma.cc/E79L-3LYL>] (writing MLB is running out of time to avoid worst-case scenario of missed season); Bill Shanks, *What if There is No Baseball?*, SPORTS ILLUSTRATED (May 6, 2020), <https://www.si.com/mlb/braves/news/what-if-there-is-no-baseball-in-2020> [<https://perma.cc/77D9-A9MR>] (writing during negotiations that there “is reason to worry about the worst-case scenario” of no 2020 season).

320. For further discussion of concerns about a lockout come negotiations for the 2021 collective bargaining agreement, see *supra* notes 31-34, 275-277 and accompanying text.

321. For further discussion of the impact lockouts have on revenue in the MLB, see *supra* notes 52-54 and accompanying text.

322. See Nightengale, *supra* note 281 (noting it took four years after 1994-1995 lockout for attendance to recover to prelockout numbers).

\* J.D. Candidate, May 2022, Villanova University Charles Widger School of Law; Thank you to my parents, whose support has been unconditional and extraordinary, and to my family, friends, and mentors for their encouragement in all my endeavors.