

Nova Law Review

Volume 11, Issue 2

1987

Article 18

Major League Baseball and Drugs: Fight the Problem or the Player?

Glenn M. Wong*

Richard J. Ensor†

*

†

Copyright ©1987 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Major League Baseball and Drugs: Fight the Problem or the Player?

Glenn M. Wong and Richard J. Ensor

Abstract

The drug abuse issue is one of the most emotionally charged and important questions facing sports and society today.

KEYWORDS: player, drug, problem

Major League Baseball and Drugs: Fight the Problem or the Player?

Glenn M. Wong* and Richard J. Ensor**

I. Introduction

The drug abuse issue is one of the most emotionally charged and important questions facing sports and society today. It dominates the sports and general news to the extent that it may often push stories about sporting events to the back pages of newspapers and other media coverage. The drug issue does not have easy solutions and the sports industry, as well as society, is struggling to find answers. Any final solution must consider: medical issues; the accuracy of the testing procedures; as well as what type of drugs are to be tested for and how frequently. Should testing include "street drugs," such as marijuana and cocaine, or just performance enhancing drugs, such as steroids?

There are important labor law concerns about drug testing in professional sports. The players and their labor organizations, the players associations, have contractual rights which must be considered. Drug testing in sports may also involve constitutional issues such as the right of athlete-employees to privacy, illegal search and seizure, and confidentiality. Such matters are representative of the many legal questions that are invariably raised as a result of any planned or implemented drug testing plan. Finally, in professional sports you have league and team concerns. Administrators and coaches are concerned about the impact of drugs on the image of professional sports as a whole as well

* Glenn M. Wong is Professor of Sport Law at the University of Massachusetts-Amherst. He is a lawyer and has co-authored a two-volume book entitled *LAW AND BUSINESS OF THE SPORTS INDUSTRIES*. He has published numerous articles on sports law, sports finance and business and sports labor relations. He is a graduate of Brandeis University and Boston College Law School, and is a member of the Massachusetts Bar.

** Richard J. Ensor is on the faculty of the Sports Management Department at the University of Massachusetts-Amherst. He has served as Assistant Athletic Director of Marketing and Promotions at Seton Hall University and has also served as Sports Information Director at Saint Peter's College in Jersey City, New Jersey, and Assistant Athletic Director at St. Louis University. Mr. Ensor is a graduate of Seton Hall University School of Law.

as on the individual players.

This article will discuss the recent history and the current status of the legalities of the drug use and testing issues with regards to Major League Baseball (MLB). It will examine existing and proposed drug testing policies for professional baseball. An attempt will also be made to examine the labor law issues raised by these policies with emphasis placed on the arbitration decisions that have been rendered in this area of sport law. The operation of professional leagues is governed under the labor laws, since a collective bargaining agreement (CBA)¹ has been negotiated between management and the union. Therefore, most of the issues and cases involving drug testing and usage in MLB have been and will be resolved in the internal grievance and arbitration system as stated within the collective bargaining agreement. Pursuant to the National Labor Relations Act,² the National Labor Relations Board (NLRB)³ will hear a dispute upon the filing of an unfair labor practice grievance. The judicial system is likely to serve only as an appellate review of decisions made by an arbitrator or the NLRB and the scope of judicial review will be limited.

II. Collective Bargaining Agreements and Dispute Resolutions in Major League Baseball

The use of arbitration as a dispute resolving mechanism in Major League Baseball initially came about as a provision of baseball's first Collective Bargaining Agreement in 1968 and has been included in the subsequent bargaining agreements in 1970, 1976, 1980, and 1985.

The value of the arbitration process for Major League Baseball is not only in its expedient resolution of grievances for the two parties involved, but the process is also an effective policy-making tool. Arbitration defines problem areas, explores alternatives and often prevents a

1. A collective bargaining agreement is an "[a]greement between an employer and a labor union which regulates terms and conditions of employment." BLACK'S LAW DICTIONARY 239 (5th ed. 1983).

2. The National Labor Relations Act was passed in 1935 as the Wagner Act. It was amended in 1947 (Taft-Hartley Act) and 1959 (Landrum-Griffin Act). It governs most relations between employers and employees in the United States. It established the NLRB. See D. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 9 (1985).

3. The National Labor Relations Board is an independent federal agency established in 1935 by the National Labor Relations Act (Wagner Act). See D. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY, 10 (1985).

repetition of the incident giving rise to the complaint by either establishing precedent or pointing out problem areas which need careful examination or re-working in the next collective bargaining agreement.

Arbitration has had a tremendous impact on professional baseball. The *Messersmith-McNally* arbitration decision, for instance, effectively challenged the reserve system and set the stage for greater player mobility and increased salaries within the sport. While player salary arbitration now dominates the sports pages, in terms of generating both internal controversy and public interest in baseball,⁴ non-salary arbitration proceedings have also had an important role in shaping Major League Baseball and impacting on the relationship between owners and players. Drug testing grievances in Major League Baseball fall within the jurisdiction of non-salary grievance arbitration.

A professional player in Major League Baseball draws his benefits and responsibilities from two documents: 1) The collective bargaining agreement which is negotiated between the MLB Player Relations Committee (representative for the individual Clubs) and the MLB Players Association (MLBPA) (representative of the players), and 2) his individual MLB Uniform Player Contract. Each player, often with the assistance of an agent, separately negotiates the individual player contract with his ballclub.

From 1970 to 1986, there have been five collective bargaining agreements negotiated in Major League Baseball. The most recent was negotiated in August, 1985. Each successive agreement has been modified to a certain extent in an attempt to alleviate problems or discrepancies caused by the previous agreement and address new problems or issues.

The negotiation of the first MLB agreement in 1967 and the inception of the pact in 1968 resulted in a four step grievance procedure:

STEP ONE: Any grievant could bring a verbal complaint to a club representative. Discussions would be held in an attempt to resolve the issue. The club representative delivered a written decision to player and Players Association.

4. See Miller, *Arbitration of Baseball Salaries: Impartial Adjudication in Place of Management Fiat*, ARB. J., Dec. 1983, at 31; and Grebey, *Another Look at Baseball's Salary Arbitration*, ARB. J., Dec. 1983, at 24. For a review of procedures associated with non-salary arbitration in Major League Baseball, see Wong, *A Survey of Grievance Arbitration Cases in Major League Baseball*, ARB. J., Mar. 1986, at 42; and Wong, *Major League Baseball's Grievance Arbitration System: A Comparison With Nonsports Industry*, 12 EMPL. RELATIONS L.J. 464, reprinted in 38 LAB. L.J. 84 (1987).

STEP TWO: Any grievant could appeal step one decision to a representative of the Player Relations Committee. Discussions would be held in an attempt to resolve the issue. The club representative would deliver a written decision to player and Players Association.

STEP THREE: Any grievant could appeal the step two decision to the Club's League President. An informal hearing would thus be held and it is followed by the written decision of the League's President.

STEP FOUR: Any grievant could appeal step three decision to the Commissioner. The Commissioner then would issue a final decision.

Under this grievance policy, MLB Commissioner William Eckert heard only two cases before the National Labor Relations Act of 1969 gave the National Labor Relations Board complete jurisdiction over Major League Baseball. This development effectively usurped the role of the Commissioner in the arbitration process by requiring the use of an impartial arbitrator to settle disputes. This set the stage for the institution of a tripartite arbitration panel which was introduced under the 1970 collective bargaining agreement. The tripartite panel consisted of a management representative, a union representative, and an impartial board member who chaired the panel.

The changes caused by the National Labor Relations Board decision in 1969 did not affect the grievance policy first established in 1968. This was not substantively changed until the 1980 collective bargaining agreement which removed step three in the process: appeal to the league presidents. This change condensed the pre-arbitration grievance procedure to two steps: the initial meeting with club officials and the second meeting with the Player Relations Committee representatives.

III. Major League Baseball's Historical Approach to Handling Drug Use by Players

Perhaps, Major League Baseball's favored status by way of sport lore⁵ has hindered its ability to handle its drug problem. Whatever the cause, MLB has yet to devise a workable solution. Since the late 1970's, there has been a growing awareness of the drug problem in American sports and that "the grand old American game" was not immune from this malaise.⁶ To understand the present controversy sur-

5. See generally R. KAHN, *THE BOYS OF SUMMER* (1972).

6. A 1983 research study compiled by the *New York Times* estimated that in the

rounding the question of drug testing in MLB, a review of some of the drug-related incidents involving major league players in the past decade may help.

One of the first major incidents involving MLB and drugs occurred on August 25, 1980. Ferguson Jenkins, a pitcher for the Texas Rangers, was arrested before a game against the Toronto Blue Jays for possession of small amounts of marijuana, hashish and cocaine.⁷ This occurrence presented then MLB Commissioner Bowie Kuhn, acting under his authority in the MLB constitution to act in the best interests of the game, with his first opportunity to make a ruling on an active major leaguer involved in a drug-related incident.⁸ In a letter dated

period from 1977 to 1983 that at least forty-two professional athletes had sought treatment for either alcohol or drug dependency, of whom twenty-three had been convicted of a related crime. Of this number eighteen were football players, fifteen baseball players and seven basketball players. *42 Pros Sought Treatment*, N.Y. Times, July 25, 1983, at C6, col. 5; see also *Drug Addiction: The Threat to Sports Keeps Growing*, N.Y. Times, July 25, 1983, at C1, 6, col. 2, 1.

7. In the Matter of the Arbitration Between Major League Players Association (Ferguson Jenkins) and Major League Player Relations Committee (Commissioner Bowie Kuhn), Decision No. 41 (1980) [hereinafter *Jenkins and Kuhn Arbitration*]. Jenkins was arrested under the Narcotics Control Act, at that time a separate Canadian federal statute which was not "enacted under the criminal law power." *Id.* at 5. The offense is considered to be "in the least serious category of criminal offense under Canadian Law — comparable to a misdemeanor under criminal law in the United States." *Id.* at 6.

8. Kuhn later explained his decision concerning Jenkins in the following manner: Right away the difficulty this creates is one of public relations for a — for the business of baseball. We have strongly endeavored in baseball to project a very wholesome image for our game. We have the provision in the player contract that the player will pledge to the public and to his club that he will maintain high standards of personal conduct.

... There is, in addition, another facet to this that troubles me. Where you have charges like this, Mr. Chairman, you have to be concerned that drugs may possibly, improper drugs or illegal drugs may possibly be being used not only by Mr. Jenkins but by teammates. [W]e have the further problem of the involvement with criminal elements as illegal drugs are supplied, so far as I know, by people who are involved in criminal violations.

... I also had to be concerned, if I may just touch on another aspect of this, with the fact that of all the professional sports, all the amateur sports, the one, I think, that has the greatest reputation as a family sport appealing to young children, women, mothers, family groups, is baseball. If you look at the makeup of our audience, both in the park and just

September 8, 1980, Commissioner Kuhn notified Jenkins that he was suspended from further play until Jenkins agreed to be interviewed about the Toronto arrest, and deny or admit his guilt.⁹ Jenkins challenged the Commissioner's authority to suspend him. After hearing arguments about Jenkins' suspension, arbitration panel chairman Raymond Goetz overruled Commissioner Kuhn and ordered that Jenkins be reinstated to active duty with the Rangers.¹⁰

The panel noted that, "The primary reason why the August 25 arrest in Toronto did not provide just cause for Jenkins' suspension is that under controlling principles of United States and Canadian law — as well as fundamental rules of fair play — Jenkins must be presumed innocent until he is proven guilty."¹¹ While the panel acknowledged that Jenkins' arrest caused a public relations problem for MLB, it noted that a suspension based on this reasoning, "well-intentioned as this cautious approach might be, it lacks proper foundation."¹²

The panel was also concerned with Jenkins' constitutional right against self-incrimination.¹³ While noting that the Commissioner's questioning might not technically violate Jenkins' rights it would as "a practical matter . . . jeopardize his defense in court."¹⁴ The panel noted such action "offends the moral values of our society on which the legal privilege against self-incrimination is based."¹⁵ Also, the panel held there was no "compelling reason why the investigation into Jenkins'

outside of the park, we are heavily supported by family groups and that, again has to be a source of very great concern to me when you have a situation like this where serious charges are made by criminal authorities and I can't get answers to questions to find out what the facts really were.

Id. at 8-10.

9. Kuhn noted in his letter that:

While I am, of course, disturbed by the pendency of drug charges against you, I am prepared to defer further proceedings by this office in that regard until they have been concluded. However, since you have also declined to cooperate with this office's investigation and thus perhaps to exonerate yourself, I think it is also fair that you should not be in uniform again until this matter has been disposed of

. . . I would obviously reconsider your status if you were to agree at any time to resume the interview and respond fully to interrogation.

Id. at 1-2.

10. *Id.*

11. *Id.* at 12.

12. *Id.* at 13.

13. *Id.* at 15.

14. *Id.* at 16.

15. *Id.*

activities could not have awaited the outcome of the trial."¹⁶

The next opportunity that Commissioner Kuhn had to deal with the problem of drugs in professional baseball came in 1983. It involved four MLB players: Willie Aikens, Jerry Martin, and Willie Wilson of the Kansas City Royals, and Steve Howe of the Los Angeles Dodgers.¹⁷ The trio of players from the Royals had all plea-bargained and entered guilty pleas to misdemeanor charges of attempting to possess a quantity of cocaine.¹⁸ The three, who had hoped to receive probation for their offenses,¹⁹ instead were surprised when sentenced to three months in jail plus a fine.²⁰ United States Magistrate J. Milton Sullivan in announcing the sentence on Wilson noted that "A factor of defining a sentence is that it will not only deter the defendant but others who are affected by Mr. Wilson as an athletic hero. As a professional athlete, Mr. Wilson occupies a special place in our society."²¹

Steve Howe was not convicted of a crime but was instead a repeat offender of a cocaine drug test which he agreed to undergo as a condition of his continued employment with the Dodgers, who had become aware of the relief pitcher's drug problem in 1982 and had required testing thereafter.²² Howe had just finished a drug rehabilitation treatment when the 1983 season started.²³ During the 1983 season he would be suspended twice by the Dodgers when he failed drug tests.²⁴

On December 15, 1983, MLB Commissioner Kuhn announced that Aikens, Howe,²⁵ Martin and Wilson were all suspended from base-

16. *Id.*

17. *Kuhn Bans Four Players for One Year*, USA Today, Dec. 16, 1983, at C1, col. 2.

18. *Drug Probe Has Created Royal Mess*, USA Today, Oct. 17, 1983, at C1, col. 3.

19. *Kansas City Players to be Sentenced*, USA Today, Nov. 17, 1983, at C1, col. 5.

20. *Jail, Fines for Royals' Trio*, Boston Herald, Nov. 18, 1983, at 47, 64, col. 2, 1.

21. *Players Get Jail in K.C. Cocaine Case*, USA Today, Nov. 18, 1983, at C1, col. 5; *see also 3 From Royals Get 3-Month Terms in Drug Case*, N.Y. Times, Nov. 18, 1983, at A25, col. 2, 1.

22. *Bowie Banishes Coke Quartet*, Boston Herald, Dec. 16, 1983, at 6, 74, col. 1; *see also Howe's Ban Could Be Extended*, Boston Globe, Dec. 16, 1986, at 73, 85, col. 1.

23. *Id.* at 74.

24. *Id.* *See also A Day at a Time Keeps Steve Howe Straight*, Boston Globe, Feb. 26, 1984, at 40, col. 1.

25. In 1986, Steve Howe attempted to make a second comeback in professional

ball without pay for one year for "illegal use of drugs."²⁶ Los Angeles Dodgers President Peter O'Malley approved of Kuhn's decision. He stated, "We respect the Commissioner's decision, and we will abide by it. And quite frankly, I agree with it. Baseball and illegal drugs are not compatible, and we will not tolerate the use of them by any of our employees."²⁷

baseball with the Class A San Jose Bees Club. However, Howe again ran into drug-related problems when in May he disregarded an order by MLB Commissioner Ueberoth not to pitch until a drug test problem was resolved. Howe was subsequently banned from the minor leagues for his actions and other problems with his drug rehabilitation. See *Howe Ignores Ban*, N.Y. Times, May 16, 1986, at A24, col. 1; and *Howe Expelled From Baseball*, Boston Globe, May 16, 1986, at 52, col. 1; and *Drug Test Key Issue in Howe Suspension*, USA Today, May 16, 1986, at C1, col. 1; see also *A Day at a Time Keeps Steve Howe Straight*, *supra* note 24, at 40, col. 1; *Howe Shocked at Word of Imminent Suspension*, Newark Star Ledger, July 16, 1986, at 74, col. 5; *These are Testing Times for Howe*, USA Today, July 17, 1986, at 5C, col. 5.

In June, 1986, Howe was cleared of the accusation he had used cocaine in May. Howe's attorney felt an error had been made in the testing analysis and as Howe noted, "Wouldn't you feel bummed out if you felt that you didn't do anything wrong and you were fired from your job?" See *Howe Reinstated*, N.Y. Times, Jun. 25, 1986, at D24, col. 1. The fact that Howe's test results were made public was a great concern to some players who are worried about the "trust factor" when it comes to MLB officials. As the Dodger player representative Mike Scioscia noted:

If it happens in the minor leagues, who knows what's going to happen in the major league. In the minor leagues, there has never been a worry about confidentiality because, basically, nobody cared. But in the major leagues, you can see what's going to happen in a situation like that.

See *Dodgers Upset About Howe Drug Test Disclosure*, Cape Cod Times (AP Wireservice), May 18, 1986, at 56, col. 1.

26. *Kuhn Bans Four Players for One Year*, *supra* note 17. In his written decision, Kuhn detailed the following:

Following completion of the period of suspension, each of the players will remain in probationary status until the end of the Court-imposed probationary period. Each player's probationary program will be determined by this office in consultation with his Club, his representatives and his physicians, and will contain such reasonable terms as to rehabilitation, after-care, community service, testing procedures and the like, as may be appropriate to the individual case.

See *In the Matter of Arbitration Between Bowie K. Kuhn, Commissioner of Baseball, and Major League Baseball Players Association (Willie Wilson, Jerry Martin)*, Decision No. 54 (Apr. 3, 1984), at 2 (citing Kuhn's written decision involving the players) [hereinafter *Wilson and Martin Arbitration*].

27. *Id.* Ewing M. Kauffman, Chairman of the Board of the Kansas City Royals later commented on what he perceived as the role of professional athletes in society, stating that:

Howe filed a grievance against the Commissioner, but it was settled before it reached arbitration.²⁸ Wilson and Martin also brought a combined grievance against Kuhn because of their suspension,²⁹ which was eventually heard in arbitration. The arbitration panel ruled in favor of Commissioner Kuhn's suspensions, although they modified the penalties levied against Wilson and Martin.³⁰

The panel concluded that, "As a general matter, given the criminal conviction and the acknowledged drug use, one cannot quarrel with a suspension plus probation, with the latter's provisions for testing and aftercare."³¹ The panel reasoned that the Commissioner's decision fell within his powers as outlined in article I, section 2 of the Major League Agreement wherein he may investigate acts suspected to be "not in the best interests of the national game of Baseball," and, "[t]o determine . . . what preventive, remedial or punitive action is appropriate."³²

In modifying the Commissioner's penalty, the panel's only concern was about the vagueness of the wording with regards to the players reinstatement.³³ "Neither the Commissioner's decision nor his testi-

If he accepts the role of royalty, it is his obligation to act as royalty. His behavior is a mirror for imitation. He knows his photograph is on the bedroom wall of millions of young men and women. His photo cards are saved and cherished; the bat bearing his name is an object of special value; his autograph is the precious possession of all ages. To me, it is not difficult to conclude that he has a specific, beyond-the-ordinary duty to the public. Thus, as a role model, he is held to a higher degree of behavior. He must understand and recognize the obligation. He must defer to it and try to organize his life in a way that reflects it. In summary, he has the obligation of honorable and respectable behavior that stems from his place in public affection.

See Kauffman, *What Obligations Do Pro Athletes Have to the Fans?*, N.Y. Times, Dec. 4, 1983, sec. 5, at 2, col. 1.

28. Howe filed his arbitration grievance on July 12, 1983. The issue was whether the Dodgers had just cause for imposing a \$54,000 fine and 36 months probation period. In settling the grievance the Dodgers agreed to remove Howe from the suspended list and place him on the inactive list for the remainder of the 1984 season, to convert a \$41,261.34 loan to salary, and loan Howe up to \$10,000 a month interest free for the rest of the 1984 season as an advance against his 1985 season salary. See *Steve Howe and LA Dodgers* (settled).

29. *Kuhn Is Named in Grievances*, N.Y. Times, Jan. 15, 1984, at 53, col. 1.

30. *Wilson and Martin Arbitration*, *supra* note 26, at 12-13.

31. *Id.* at 10.

32. *Id.* at 3-4. As one general manager noted, the players' actions were a "kick in the organizational groin." *Id.* at 9.

33. *Id.* at 10.

mony provides any guidance as to the standards to be applied or the expectations to be met,"³⁴ declared the panel.

In the same period of time as the above incidents, MLB Commissioner Kuhn also had to resolve a drug-related problem involving Pascual Perez, who was arrested in his native Dominican Republic on January 9, 1984 for possession of half a gram of cocaine with intent to distribute the substance.³⁵ Perez was convicted of a lesser misdemeanor charge of possession. He was released following a three-month imprisonment.³⁶ On April 17, 1984, Commissioner Kuhn ordered that Perez was to be suspended for one month. Kuhn declared, "When players violate the law and baseball's drug rules, discipline must follow."³⁷

Perez filed a grievance against Commissioner Kuhn's decision. On April 27, 1984, the arbitration panel ruled in Perez's favor holding that because of insufficient evidence Kuhn could not support his decision to suspend Perez.³⁸

The panel noted that:

There can be no question that drug involvement by a Major League Ballplayer is not only contrary to established rules and provisions of the Uniform Players Contract, but also constitutes a "serious and immediate threat to the business that is promoted as our National Pastime."³⁹

However, the panel noted that "because the misconduct is taken so seriously (appropriately so) and because the penalties may well be severe, proofs of alleged misconduct must be persuasive."⁴⁰

The panel questioned Kuhn's decision to rely solely on the Dominican Republic legal system in pursuing sanctions against Perez.⁴¹ It noted that the judicial structure and legal rights under that govern-

34. *Id.*

35. *Atlanta's Perez Facing Drug Charges*, USA Today, Jan. 11, 1984, at C1, col. 1.

36. *Court Upholds Perez Decision*, Boston Herald, Apr. 6, 1984, at 72, col. 1.

37. *Braves' Perez Is Suspended Until May*, USA Today, Apr. 18, 1984, at C3, col. 5, and *Names: Perez is Suspended*, Boston Globe, Apr. 18, 1984, at 48, col. 6.

38. *In the Matter of Arbitration Between Major League Baseball Players Association (Pascual Perez) and Bowie K. Kuhn, Commissioner of Baseball*, Decision No. 58 (Apr. 27, 1984); see also *Names: Arbitrator Lifts Perez Suspension*, Boston Globe, Apr. 29, 1984, at 96, col. 1.

39. *Id.* at 2 (quoting panel Decision No. 54).

40. *Id.*

41. *Id.* at 2-3.

ment's justice system differed substantially from the American system of law.⁴² The panel stated further, "fairness requires, at a minimum, a demonstration that it was, in fact, cocaine he was carrying. But in this case there are substantial questions as to just that."⁴³

As a result of the Dominican Republic's system of justice and questions about whether Perez actually possessed cocaine, the panel held that the Commissioner had not met his burden of proof against Perez.⁴⁴ However, the panel strongly stated that it was not holding that the drug use was permissible conduct:

This opinion should not be read as undercutting the earnest attempt by baseball management to deal with a vital problem. That would be misreading . . . But a forceful and effective program must proceed on the foundation of clear and competent evidence. That evidence does not here exist and for these reasons, discipline is found to be lacking just cause.⁴⁵

Commissioner Kuhn faced one final drug-related problem while at MLB which involved Vida Blue, a former pitcher for the Kansas City Royals.⁴⁶ Blue had been convicted of possession of cocaine in a trial related to the Aikens, Martin and Wilson controversy.⁴⁷ He received a one-year sentence which included a three-month imprisonment plus a \$5,000 fine for his conviction.⁴⁸

After his release from prison on March 21, 1984, Blue sought new employment within MLB.⁴⁹ The San Francisco Giants were interested in his services but they were informed by Commissioner Bowie Kuhn that Blue could not be signed until an investigation into his activities was concluded and possible disciplinary sanctions against Blue were considered by Kuhn's office.⁵⁰

The MLBPA filed a grievance on behalf of Blue which alleged that the Commissioner's actions "constituted discipline and considering

42. *Id.* at 2.

43. *Id.*

44. *Id.* at 12.

45. *Id.* at 13.

46. *In the Matter of the Arbitration Between Major League Baseball Players Relations Committee, Inc. and Major League Baseball Players Association, Gr. of Vida Blue*, Decision No. 60 (July 19, 1984) (Interim Decision).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 1-2.

... the amount of time Blue had already been denied access to the game, any continued punitive action must be stopped."⁵¹ The panel ruled in an interim decision in Blue's favor concluding that, "the Commissioner should not be precluded from proceeding with the matter and ... there is no just cause for an order prohibiting the Giants from signing Vida Blue."⁵²

Commissioner Kuhn then suspended Blue through the 1984 season and imposed a two-year probationary period that included mandatory drug testing.⁵³ Another grievance was filed, but in this instance Commissioner Kuhn's decision was upheld by the arbitration panel.⁵⁴ The panel concluded that the punishment levied against Blue was justified because of the role that Blue played in introducing players to Blue's drug supplier. Furthermore, Blue acted as a middleman on many of his teammates' drug buys.⁵⁵

The marked increase of drug-related problems in MLB in 1983-84 caused great concern to all. Ken Moffett, Executive Director of the

51. *Id.* at 2.

52. *Id.* at 3. The panel reasoned that Kuhn should be able to proceed with his investigation and possible sanctions but in the interim period, "flat prohibition against Blue's signing with the Giants is notably severe, as yet unsupported and, therefore, lacking just cause." *Id.* at 3.

53. *In the Matter of the Arbitration Between Major League Baseball Player Relations Committee, Inc. and Major League Baseball Players Association, Gr. of Vida Blue*, Decision No. 61 (July 24, 1984), at 2.

54. *Id.* at 1.

55. *Id.* at 14. The panel noted that Blue:
was vigorously involved in continuous heavy use of cocaine. He served as an active connection between other ballplayers . . . and their supplier. He placed himself . . . as a liaison The Commissioner accurately characterizes Blue as being at the center — the focal point"

Id.

In January 1987 Vida Blue signed a contract for \$300,000 to pitch for the Oakland A's. On February 19, 1987, Blue suddenly announced that he would retire from MLB. In March, 1987 documents filed in the U.S. District Court in San Francisco revealed that Blue had plead guilty on November 19, 1986, to violating his probation from his 1984 cocaine conviction and he was ordered to spend 90 days in a drug after-care program. *Blue Had Drug Tests*, N.Y. Times, Mar. 4, 1987, at A24, col. 1. The court documents further revealed that Blue had tested positive three times during the 1986 MLB season when he was pitching for the San Francisco Giants. *Giants Unaware of Blue's Cocaine Use*, Daily Hampshire Gazette, Mar. 4, 1987, at 30, col. 2 (AP Wireservice). In late March, 1987, Blue announced that he still expected to play professional baseball in either the United States or Japan. *Blue Gets Offer*, N.Y. Times, Apr. 1, 1987, at A26, col. 2.

MLB Players Association, was dismissed in November, 1983 by the MLBPA. His dismissal was in part a result of his willingness to work with MLB executives to develop a drug testing plan for players.⁵⁶ Opposition to Moffett's plans came from some of the players as well as then MLBPA General Counsel Don Fehr. Fehr presently serves as Executive Director of the Association.⁵⁷

Marvin Miller, who had previously served as the MLPBA's Executive Director for almost seventeen years, replaced Moffett on an interim basis and immediately cancelled joint players-owners drug and alcohol committee meetings which had been established by Moffett and American League President Lee McPhail.⁵⁸ Moffett would later state that there was "an awful lot"⁵⁹ of cocaine used in baseball. Although he took a great deal of criticism for his position,⁶⁰ subsequent events would prove his analysis correct.⁶¹

In the spring of 1984, Commissioner Bowie Kuhn, who was then in his last months of his term of office, attempted to institute the first wide-range set of regulations in MLB to deal specifically with drug-related problems.⁶² MLB team owners were very much split on the issue. Some owners wanted random mandatory testing, while other owners were willing to develop a more passive program which was designed with intermediate steps of action and included the involvement of players and the MLBPA.⁶³

56. *Moffett's Background, Stand on Drugs Caused His Ouster*, USA Today, Dec. 5, 1983, at C7, col. 1.

57. *Baseball Meetings on Drugs Cancelled*, N.Y. Times, Nov. 30, 1983, at B13, col. 1.

58. *Id.*

59. *Cocaine Use Called Common By Moffett*, N.Y. Times, Feb. 23, 1984, at B20, col. 5.

60. *Angry Hernandez Threatens to Sue*, N.Y. Daily News, Feb. 24, 1984, at 72, 52, col. 1, 6; *see also Met Hernandez Denies Moffett Drug Story*, N.Y. Daily News, Feb. 23, 1984.

61. The Pittsburgh drug trial would prove that many of the allegations raised by Moffett were true, including drug usage by St. Louis Cardinal/New York Mets first baseman Keith Hernandez. *See Hernandez, Andujar Cited at Trial*, N.Y. Times, Sept. 6, 1985, at B9, 11, col. 3, 1.

62. *See generally Plans in the Works to Deal with Drug Use*, USA Today, Apr. 10, 1984, at C3, col. 2, and *Tentative Drug Treatment Plan is Slightly Watered Down*, USA Today, May 10, 1984, at C9, col. 1.

63. *Owners Split Over Testing*, N.Y. Times, May 27, 1984, sec. 5, at 45, col. 4. Lee McPhail, who had by then been named as president of the owner's Players Relations Committee, noted concerning testing that, "[i]t doesn't look like there's much unity among the clubs." *Id.*

MLB owners eventually approved a joint management-union program for the treatment and punishment of players who used certain types of drugs at a June, 1984, meeting.⁶⁴ Most owners considered the joint program too watered down but Commissioner Kuhn felt otherwise. Kuhn stated that the program was a "dramatic breakthrough in labor relations and sports."⁶⁵ On June 29, 1984 Commissioner Kuhn outlined the following policy:

1. The program excluded marijuana, amphetamines, and alcohol. Players who were found to be abusing these substances would continue to be subject to action by the commissioner, and the union would continue to have the right to file grievances in such cases.
2. A cornerstone of the new agreement was a salary abatement procedure to penalize players who continued to use drugs. A player who asked for help with a drug program would receive full pay for the first 30 days of treatment and half pay for the next 30 days. Beyond 60 days, if kept on the major league roster by the club, the player would be paid at a rate of \$60,000 a year, the minimum salary.⁶⁶
3. A club that suspected a player of drug involvement would ask the person to undergo examination. If the player refused, the evidence would be presented to a review council, a panel that included drug counselors. The members of this council were to be selected by a joint committee of owners and players. If the council recommended that the player undergo testing or treatment and the player refused, he would be subject to disciplinary action by the commissioner.⁶⁷

Despite Kuhn's efforts, the drug testing issue continued to cause labor problems for professional baseball. This was especially true because the collective bargaining agreement then in force for MLB was

64. *Baseball Approves Program on Drugs*, N.Y. Times, June 22, 1984, at A20, col. 4.

65. *Id.*

66. *Kuhn Announces Tough Drug Rules*, USA Today, June 29, 1984, at C9, col. 5; *Kuhn Announces Rules on Drug Crimes*, N.Y. Times, June 29, 1984, at A18, col. 3; *Taking Steps to Solve the Drug Dilemma*, Sports Illustrated, May 28, 1984, at 36-40, col. 1.

67. *Baseball Approves Programs on Drugs*, *supra* note 64, at A20, col. 4. In reference to the drugs excluded from the program Lee McPhail noted that, "At the present time, politically, we are not able to cover all things. We're trying to take this one step at a time. We know this is an area that we might want to expand at a later date." *Id.*

due to expire on December 31, 1984.⁶⁸

A major conflict erupted because the Los Angeles Dodgers' and San Francisco Giants' management mandated that all new player contracts to contain a clause which required team members to submit to drug testing during the playing season.⁶⁹ Negotiations for a new CBA were stalled until the Dodgers and Giants agreed not to include the clauses in any future contracts.⁷⁰ It was also agreed that the drug policy announced by Kuhn would take precedence over any such clause⁷¹ already included in contracts negotiated by the two clubs.⁷²

Kuhn's decision concerning the contract clauses on drug testing would be his last on this issue. It was announced in early 1984 that Kuhn would not seek reappointment as commissioner.⁷³ Kuhn had lost the support of a number of team owners over a variety of issues and he knew a vote for his reappointment would not be successful based on MLB's three-fourths vote requirement.⁷⁴

In reviewing Kuhn's decisions in respect to drug issues they seem reactive — in response to law enforcement charges against individual players. As time progressed, Kuhn realized a need to implement a broad based testing, preventive and educational programs to combat drug use in baseball. After leaving MLB, however, Kuhn's response to the problem was testing and Kuhn has noted that:

68. *Baseball Talks Are Snagged*, N.Y. Times, Jan. 24, 1986, at B7, col. 4.

69. *Dodgers' Decision Defuses a Conflict*, N.Y. Times, Jan. 26, 1985, at 29, col. 5.

70. *Baseball Settles Drug Issue*, N.Y. Times, Jan. 30, 1985, at A16, col. 4.

71. A similar clause used by the Chicago Cubs had earlier in 1984 snagged talks over the joint drug program, but when eliminated allowed the talks to proceed that led to Kuhn's announcement in June, 1984. *Id.*

72. *Id.* "We feel clubs have the right to have the clause in guaranteed long-term contracts, but we feel strongly that we want the joint drug program to work so we will abide by what we agreed to," noted Lee McPhail after the settlement of the drug clause issue was announced. *Id.*

Mandatory drug testing clauses in MLB contracts continues to be an issue. For instance, in January, 1986, four of eight free agent contracts announced in one day contained such drug testing clauses. See *Free Agent Contracts Include Drug Tests*, USA Today, Jan. 10, 1986, at C1, col. 6.

73. *Ueberroth Grand Slams Way Into Baseball's Top Job*, Boston Globe, Mar. 4, 1984, at 39, 45, col. 1.

74. *Id.* During Kuhn's term a commissioner needed three-fourths of all the owners' votes to be re-elected for another seven-year term. Ueberroth insisted before accepting the post that the procedure be changed so that a majority vote was required with a minimum five votes each from the owners of American and National League franchises. *Id.* at 45.

I tried suspensions when I was commissioner and not all of them were successful. I believe Peter (Ueberroth) is trying to do the right thing, to send a message to everyone that testing is the bottom line. The NBA's program is a good one⁷⁵

IV. The Ueberroth Era Begins

Whether because of public relations concerns, or a deepening problem, much time has initially been spent by the MLB's new Commissioner, Peter V. Ueberroth, on solving the league's drug-related issues.⁷⁶ The new commissioner was appointed on March 3, 1984 and assumed office on October 1, 1984.⁷⁷ Prior to the appointment, Ueberroth had been executive director of the Los Angeles Olympic Games, where he had run the highly successful, if very commercial, 1984 Olympic Games.⁷⁸ The soon to be Commissioner noted during the press

75. *Kuhn: Gambling A Great Danger*, Newark Star Ledger, Apr. 12, 1986, at 25, col. 5.

76. Ueberroth's involvement with the subject of drug testing and usage is often far broader than just the problems surrounding MLB. In October, 1986 for instance he noted that:

Some type of action must be taken with the countries that produce this rat poison To me, as a parent, they are more of a terrorist than the one in Tripoli.

A lot of politicians want to get re-elected so they are running against drugs . . . until election day.

Baseball virtually eliminated the problem. If one institution can defeat the problem, others certainly can.

Ueberroth Wants USA to Fight Drugs with Force, USA Today, Oct. 29, 1986, at C11, col. 1.

77. *Ueberroth Grand Slams Way Into Baseball's Top Job*, *supra* note 73, at 39.

78. See *The Games: A Triumph of Capitalism*, USA Today, July 27, 1984, at C1, 2, col. 4, 1; *Private Sponsoring of Games Appears to be Successful*, N.Y. Times, Aug. 6, 1984, at C11, col. 1; *Olympic Group Reports a \$250 Million Surplus*, N.Y. Times, Sept. 12, 1984, at D25, 26, col. 1, 4; *\$7 Million Gesture for the Olympics*, N.Y. Times, Nov. 15, 1984, at B23, col. 1; *LAOOC Forced to Defend a Profit of Almost \$160 Million*, Newark Star Ledger, (AP Wireservice), Dec. 19, 1984, at 97, 100, col. 4.

Ueberroth has stated that his involvement with drug testing began during his tenure with the Los Angeles Olympic Committee, noting that:

Well, at the Olympics, we had to test all the athletes at the games. What I found was that this country did not have a single internationally recognized drug-testing facility. At Lake Placid Winter Olympics, they had to send their samples up to Canada. So we built the first lab in this country

conference announcing his new position that in regards to drugs in MLB, "[b]aseball has a responsibility to fight drugs, not fight players."⁷⁹

However, Ueberroth would not be involved in the first decision concerning drug testing during his tenure. Former Commissioner Kuhn's efforts to initiate and develop the joint drug program between the MLB and the MLBPA were deemed insufficient in October, 1985 by the owners who dropped the program.⁸⁰ Ueberroth did not directly participate in the owners' decision to drop Kuhn's drug program.

Reacting in part to a major federal drug probe in Pittsburgh,⁸¹ Ueberroth subsequently called for a comprehensive mandatory drug-testing program. The program mandated testing for those employed by the commissioner's office, the club's front office staffs and employees, and the umpires, as well as all minor league players.⁸²

On May 15, 1985, Commissioner Ueberroth announced his first set of drug testing guidelines.⁸³ In a subsequent memo sent by Ueber-

at UCLA. So that's where the real interest started.

Cramer, *Citizen Ueberroth*, ESQUIRE, Feb. 1987, at 71.

79. *Ueberroth Grand Slams Way Into Baseball's Top Job*, Boston Globe, Mar. 4, 1984, at 39, 45, col. 1.

80. *Drug Agreement Ended by Owners*, N.Y. Times, Oct. 23, 1985, at B9, B10, col. 1, 6. Players Relations Committee chief counsel Barry Rona stated that the decision to drop the program was made because both sides were unable to make any substantial progress in reaching a drug testing agreement The clubs then examined whether it made any sense to continue the drug program Their feeling was that the program clearly isn't working and there was no sense in keeping it for the sake of keeping it.

Id.

81. *Inquiry Worries Baseball*, N.Y. Times, Apr. 10, 1985, at A21, col. 4. Donald Fehr, the acting director of the MLBPA, commented on the inquiry that:

You have a general concern about anything like this. People can get hurt by it, whether they're involved or not. There's a lot of anguish. But all of the players who have participated have done so at the request of the government and have been acting like good citizens. The players have cooperated.

Id. See also *Pittsburgh Drug Probe Widens*, Boston Globe, Mar. 6, 1985, at 30, col. 1.

82. *Ueberroth Orders Wide Tests for Drug Use in Pro Baseball*, N.Y. Times, May 8, 1985, at A1, B12, col. 1, 3. Ueberroth in announcing the policy noted that, "We will include everyone from the owners on down." *Id.* See also *Drug Test Guidelines Listed*, N.Y. Times, May 16, 1985, at B11, 12, col. 1.

83. In describing his program Ueberroth has noted that, "Somebody has to say, 'Enough is enough,' against drugs. Baseball's going to accomplish this. It's a little tiny segment of society. We're going to remove drugs and be an example." See *The Commissioner Gets Tough*, Sports Illustrated, May 20, 1985, at 32, 22, col. 1. Ueberroth

roth on June 18, 1985, the commissioner outlined the policy as follows:

1. Preparations are complete for the implementation of the testing program.
2. Testing for Minor League players and umpires will commence during the month of July and continue through the end of each League season.
3. Testing for remaining Major and Minor League personnel will begin in August and continue through November 1985.
4. For 1986 and years thereafter, testing will commence in March and continue through October for all affected personnel.

The program will operate under the following guidelines:

- a. Individuals subject to testing include all Minor League umpires and playing personnel; all full-time, year-round administrative and management personnel employed in Minor Leagues and by Major League Baseball; and all Major League managers, coaches, trainers and umpires;
- b. The program will be administered under the direction of Anthony F. Daly, Jr., M.D. of Inglewood, California and Kim Jasper, Pharm. D. of Los Angeles. Dr. Daly has extensive background in providing assistance to amateur and professional athletes. Dr. Daly is a recognized sports medicine authority and former U.S. team physician for the 1976 and 1980 Olympic Games. He was the Director of the Olympic Health Services Program for the 1984 Los Angeles Olympic Games. Dr. Jasper's specialty is pharmacology. She was the director of Doping Control for the Los Angeles Olympic Games;
- c. The tests will be administered by appropriately trained and supervised medical technicians;
- d. The cost for the administration of this program will be borne by the Major Leagues Central Fund;
- e. Samples will be taken at Major and Minor League ballparks and at the administrative offices of Major and Minor League management personnel. Samples will be divided into two containers, one for analysis and the other stored for confirmatory tests, if required. Laboratory analysis will be conducted at a fully competent facility under the supervision of Dr. Daly and Dr. Jasper;
- f. Samples will be tested for the following controlled substances: cocaine, amphetamines, marijuana, heroin and morphine. Amphetamines will not be considered an illegal drug if an individual has a legal prescription;

noted three major concerns, health, reputation and gambling influences. *Id.*

g. Positive test results will be provided to Dr. Daly. He will then authorize a confirmatory analysis. If positive, Dr. Daly (or an appropriate designee) will thereafter contact the individual involved to make arrangements for appropriate evaluation and treatment if necessary;

h. At the time of collection samples will be coded. The results of all tests will be kept confidential;

i. There will be no discipline or penalties for initial positive test results. Test results will not become a part of an employee's permanent employment record;

j. Positive test results will occasion evaluation and rehabilitative treatment if necessary. Wherever appropriate, this will be done in conjunction with our Employee Assistance Programs.⁸⁴

Ueberroth further advised that "Major League players are not covered by the program and will not be participating in it."⁸⁵ In addition, the Commissioner stressed, "Reiterate to all affected personnel that the objectives of this program are *not* punitive. . . . Our objective is to deter drug use, not punish anyone who may be involved with it."⁸⁶ In July, 1985 the first set of drug tests was administered to those MLB personnel who had agreed to the plan.⁸⁷

Ueberroth had been able to get quick agreement and implement testing for all the groups⁸⁸ he wished to test except the players, who

84. Memo from Peter V. Ueberroth, Commissioner, Office of Commissioner, Major League Baseball, to all Major League Clubs, Re: Baseball's Drug Education and Prevention Program, June 18, 1985, at 1-3.

85. *Id.* at 2.

86. *Id.* at 3.

87. *First Drug Tests are Set for Baseball*, N.Y. Times, June 19, 1985, at B11, 13, col. 5.

88. *Baseball Backs Big Drug Plan*, USA Today, May 8, 1985 at C1, col. 2. New York Yankees owner George Steinbrenner commented about that plan that "[i]f ownership and other personnel are willing to participate in a mandatory testing program . . . then players association would certainly look foolish in the public's eyes if they weren't willing to do the same thing." *Id.* See also *Umpires Agree to Tests*, N.Y. Times, May 14, 1985, at A21, 25, col. 4, 1. Richie Phillips, counsel for the Major League Umpires Association noted:

While mandatory testing is an invasion of privacy and an infringement on certain fundamental principles of civil liberties . . . the umpires balanced that infringement against the need that all of baseball remain above reproach and suspicion. It was determined that the program is not punitive, intends no publication or sanctions but rather is a confidential procedure aimed at rehabilitation.

Id. at A21.

rejected his plan.⁸⁹ The decision of the players, announced through the MLBPA,⁹⁰ was made despite mounting evidence that drug abuse had in the near past affected player performances on the field.⁹¹ John McHale, president of the Montreal Expos, in particular blamed cocaine for his franchise's failure to win a close National League pennant race in 1982.⁹² McHale noted, "We felt we should've won in '82. When we all woke up to what was going on, we found there were at least eight players on our club who were into this thing."⁹³ At least one player admitted that on a close play at a base he would dive head first into the bag to avoid being tagged out, but more importantly, to protect the glass container of cocaine in his back pants pocket.⁹⁴

Nothing dramatized the degree of drug involvement more than the Pittsburgh drug trials that were held in September just as the 1985 season entered into the American and National Leagues Championship Series and the World Series.⁹⁵ The trial involved Curtis Strong, a Philadelphia resident accused of selling cocaine to MLB players.⁹⁶ In the first week of Strong's trial, Lonnie Smith of the Kansas City Royals described under a grant of immunity his introduction to cocaine in the major leagues and how the drug was purchased and distributed in

89. *Players Balk at Drug Test*, USA Today, May 9, 1985, at A1, 2, col. 2, 1. Donald Fehr commenting on the plan noted that, "It will take some pretty serious convincing for us to change our minds." *Id.* at A2. The following week a proposed Ueberroth-MLBPA meeting on the subject of drug testing was also rejected by the players' association. *Meeting on Drugs Spurned by Players*, N.Y. Times, May 17, 1985, at A22, col. 5; see also *Ueberroth's Idea OK'd, With a Catch*, USA Today, Sept. 27, 1985, at C1, 2, col. 4, 1.

90. *Id.*

91. See *Baseball and Cocaine: A Deepening Problem*, N.Y. Times, Aug. 19, 1985, at A1, C6, col. 1; *Cocaine Disrupts Baseball from Field to Front Office*, N.Y. Times, Aug. 21, 1985, at A21, 23, col. 1; *Battling Drugs: Approaches Vary*, N.Y. Times, Aug. 22, 1985, at D21, 22, col. 1.

92. *Id.* *Cocaine Disrupts Baseball from Field to Front Office*, N.Y. Times, Aug. 21, 1985, at A1, col. 1.

93. *Id.*

94. *Id.* at B8.

95. See *Drugs Seen as Peril to Game Itself*, N.Y. Times, May 5, 1985, sec. 5, at 1, 7, col. 1; *Players Not Expected to be Indicted for Drugs*, (AP Wireservice) Newark Star Ledger, May 19, 1985, sec. 5, at 9, col. 4; *Players to Testify at Cocaine Trial*, N.Y. Times, Sept. 3, 1985, at D16, col. 5; *It's Baseball vs. Drugs Today*, USA Today, Sept. 4, 1985, at C1, col. 2; *Drug Trial Tarnishes Reputations*, USA Today, Sept. 9, 1985, at C1, 2, col. 3, 1; *Every Man for Himself*, Boston Globe, Sept. 11, 1985, at 59, 62, col. 1.

96. *Jury Is Selected in Drug Trial*, N.Y. Times, Sept. 5, 1985, at D26, col. 4.

MLB.⁹⁷ In a succession of days some of MLB's most well-known players including Keith Hernandez,⁹⁸ Dale Berra,⁹⁹ Enos Cabell,¹⁰⁰ Dave Parker,¹⁰¹ and John Milner¹⁰² also testified under immunity about drug use in baseball.¹⁰³

While no MLB player was charged in the Pittsburgh case, by the time the trial ended in late September¹⁰⁴ and Curtis Strong had been convicted and sentenced to 10 years imprisonment,¹⁰⁵ it seemed to many fans that professional baseball had been judged guilty.¹⁰⁶ Be-

97. *Hernandez, Andujar Cited at Trial, supra*, note 61. James Ross, assistant United States attorney, noted in his opening remarks to the jury that:

These individuals will tell you about their use of cocaine, they will tell you how they began to use cocaine, how they used it afterward and what effect it had on them They will tell you how they purchased cocaine in or around Pittsburgh One of the individuals will tell you he bought cocaine from Curtis Strong in the restroom of the Pittsburgh Pirates locker room.

Id. at B9, col. 1.

98. *Keith Tale Took Guts, Say Yanks*, N.Y. Daily News, Sept. 7, 1985, at 27, col. 6; *Met Pals: He Told Us He Used It*, N.Y. Daily News, Sept. 7, 1985, at 27, col. 1.

99. *Dale Berra Admits to Use of Cocaine*, N.Y. Times, Sept. 10, 1985, at B9, 10, col. 5, 3; *Stargell and Maddock Accused by Berra*, N.Y. Times, Sept. 11, 1985, at B7, 11, col. 1, 3; *Berra Testifies at Another Trial*, N.Y. Times, Sept. 20, 1985, at A21, 24, col. 5; *Dale: Got Pills from Stargell*, N.Y. Daily News, Sept. 11, 1985, at 76, col. 1; *Madlock, Stargell Implicated*, Boston Globe, Sept. 11, 1985, at 62, col. 1.

100. *Baseball Drug Testimony*, Newark Star Ledger, Sept. 10, 1985, at 9, col. 1.

101. *Baseball Player Says Cocaine Joined the Team*, Newark Star Ledger, Sept. 12, 1985, at 6, col. 1; *Parker Admits to Cocaine Use*, N.Y. Times, Sept. 12, 1985, at D35, col. 4.

102. *Milner Testifies in Drug Case*, Boston Globe, Sept. 13, 1985, at 31, col. 1; *Milner Tells Court of Buying Cocaine*, N.Y. Times, Sept. 13, 1985, at B7, 12, col. 5, 1.

103. *Baseball's Drug Scandal*, Time, Sept. 16, 1985, at 25-28; *Players' Testimony Adds Drama to Drug Trial*, N.Y. Times, Sept. 8, 1985, sec. 5, at 5, col. 1.

104. *Defense Ends Testimony in Drug Trial*, N.Y. Times, Sept. 19, 1985, at B26, col. 3.

105. *Baseball's Drug Headache Doesn't End With Trial Verdict*, USA Today, Sept. 23, 1985, at C8, col. 1.

106. *Slap on the Wrist for Baseball*, N.Y. Times, Nov. 3, 1985, at S2, col. 4, 5. U.S. District Court Judge Maurice Cahill, Jr. noted in sentencing Strong that:

[Y]ou are in my judgment, however, only one of the parties who has injured his fellow man in this case. The baseball players to whom you sold your wares have debased themselves, their families, their friends, the laws of this country and the millions of people, particularly young people, who look up to them. Moreover, those who manage baseball teams — especially

cause of this perceived guilt by association, Commissioner Ueberroth decided to take further steps in his attack upon professional baseball's drug abuse problem.

While maintaining the same drug testing procedure that he had implemented in 1985 for all MLB personnel except the players,¹⁰⁷

those who personally managed players on the field — have, through their acts of omission, made it easy for you to violate the laws and impugn the integrity of the game of baseball.

[W]hether the manager's blindness to their players' personal and professional degeneration on the playing field and in the clubhouse was because they weren't looking or because they weren't seeing when they did look is largely immaterial. The damage to the American tradition of professional baseball resulting from this managerial sloth is incalculable. The losses to the youth of this country may be even greater.

It may be presumptuous of me to be suggesting how owners of baseball teams should act or how managers should manage, but I would feel that I have neglected my duty if I didn't say anything. If the ownership and the Player's Association can't agree on a satisfactory drug-detection program, the owners should at least require their managers and coaches to get some professional training in spotting these problems. Such training is available, and if anyone wants to know where, I'll tell them.

In other words, the toleration of drug use among players by the management of baseball helped to create this market. Without such tolerance, you might not be here today, and the enormous public trust granted to professional baseball by the American people might still be intact . . .

Id.

107. Memo from Peter V. Ueberroth, Commissioner, Office of the Commissioner, Major League Baseball, to All Major League Teams, April 4, 1986, at 1-4. Commissioner Ueberroth noted in part that:

In February 1986 I announced that all drug testing in baseball would be done under the direction of my office. I took this action recognizing that many Major League players had agreed in their contracts or had stated their willingness to undergo drug testing and in response to concerns raised about the quality and confidentiality of the individual club testing programs. These are legitimate concerns notwithstanding the good faith effort on the part of players and clubs in reaching these understandings.

Set forth below are the details governing the operation of baseball's drug testing program for the 1986 season. This is essentially the same program which was initiated and successfully operated in 1985. I recognize that in certain cases individual player contracts have terms governing drug testing procedures which are different from those I have set forth. Nevertheless, I urge any such player to participate on the terms outlined below in the belief that these procedures will assure the validity of the test and its confidentiality. All Major League Clubs have unequivocally stated their concurrence in the course I have chosen.

I am prepared to approve player/club testing programs which can operate

Commissioner Ueberroth decided to implement the following measures as well in the pre-1986 baseball season: conditional punishment for those players involved in the trial including mandatory testing for continued playing eligibility,¹⁰⁸ and second, a renewed push for voluntary drug testing by all MLB players.¹⁰⁹

Initially, Commissioner Ueberroth had attempted to deal with the Pittsburgh situation in September 1985 by asking all MLB players directly whether they would submit to voluntary testing. This approach bypassed any involvement with the MLBPA.¹¹⁰ The MLBPA remained unconvinced of the Commissioner's intent. The MLBA was especially concerned about how Ueberroth's program would operate.¹¹¹ While Commissioner Ueberroth quickly reconsidered his tactics and decided to seek MLBPA input for his plan,¹¹² it soon became obvious that the plan was stalled.¹¹³ This stall was brought on in part because the

independently. I've already approved the Baltimore program. Any such program submitted for my review will receive prompt consideration.

Our commitment to an effective drug testing program is the strongest, most positive step we can take toward eliminating illegal drug use from baseball. When properly administered, testing will allow us the early opportunity to help those in need, and it is a proven and effective deterrent to drug use.

The principal objective of our drug prevention efforts has been and will remain the health, welfare and safety of those who work in the game. Our other obvious concern is the maintenance of the integrity of baseball. Drug involvement or the suspicion of drug involvement is inconsistent with maintaining these essential goals.

Id. at 1, 2.

108. *11 in Baseball Suspended for Drugs*, Boston Globe, Mar. 1, 1986, at 1, 30, col. 6, 1.

109. *Id.*

110. *Players May Ignore Drug Ballot*, USA Today, Sept. 25, 1985, at C3, col. 1.

111. *Players Decline to Vote*, Boston Globe, Sept. 16, 1985, at 55, col. 1; *Drug Tests Get Stormy Reaction*, USA Today, Sept. 26, 1985, at C1, col. 1; *Players' Union Skeptical*, Boston Globe, Sept. 26, 1985, at 55, col. 1. Eugene Orza, Associate General Counsel to the MLBPA noted that, "We've asked the commissioner for details on at least 10 occasions . . . all we get back is the same thing, there's random testing a number of times. What are the numbers? What is the reliability of the testing? What is the level of drug abuse in the minor leagues?" *Id.*

112. *Ueberroth Agrees to Get Union Input*, N.Y. Times, Sept. 27, 1985, at A21, col. 3. MLBPA's Donald Fehr noted concerning the Commissioner's tactics that he had "orchestrated a campaign to bypass this organization and put pressure on the players." *Id.*

113. *Baseball's Tests for Drugs Stalled*, N.Y. Times, Dec. 1, 1985, sec. 5, at 1, 5, col. 5.

MLBPA reasoned that drug testing by its very nature presumed guilt on the part of players.¹¹⁴ In late December 1985, the plan was rejected outright by the MLBPA.¹¹⁵

Commissioner Ueberroth then instituted his penalties against the players who testified or were implicated at the Pittsburgh drug trials after first holding individual meetings with the players involved during January 1986.¹¹⁶ On February 28, 1986 the Commissioner announced his decision concerning these players:¹¹⁷

1. Seven players were given the choice of either being suspended for one year, or instead donating ten percent of their salaries for one season to a drug prevention program(s) in their hometown, agree to random drug testing for the remainder of their careers, and contribute 100 hours of community service for each of the next two years.¹¹⁸
2. Four players were given the option of a 60-day suspension at the

114. *Fehr Says Drug Tests Presume Players' Guilt*, USA Today, Dec. 4, 1985, at C11, col. 1. MLBPA's Donald Fehr noted that, "The way the clubs are putting it now, they're saying, 'I don't suspect you of anything, but unless you agree to take a test anytime I want, I'm not going to hire you.'" *Id.* At a December, 1985 executive board meeting of the MLBPA, Donald Fehr noted that drug testing was a matter for collective bargaining, and stated that:

There's no proposal on the table from the clubs. The clubs' basic position is they don't want to negotiate with us about anything, so there's nothing for us to do at this point. It was not the consensus or the opinion of the board that we ought to rush out and agree to mandatory testing. Nor are we about to go set up our own testing program.

Union Reaffirms Drug-Test Stance, N.Y. Times, Dec. 7, 1985, at 48, col. 5.

115. *Players Reject Drug Tests. Announce Program for Kids*, USA Today, Dec. 20, 1985, at C1, col. 1. MLBPA's Donald Fehr noted, "This matter (drugs) deserves serious thought with thorough long-term approaches It does not lend itself to quick fixes." *Id.* See also *McPhail: Drug-Education Program for Kids is Not Enough*, USA Today, Dec. 20, 1985, at C11, col. 4.

116. *Ueberroth to See Players in Drug Cases*, N.Y. Times, Nov. 28, 1985, at B11, 14, col. 3, 6; and *Ueberroth Has Delicate Decision to Make*, USA Today, Nov. 28, 1985 at C3, col. 2; and *Ueberroth's Move*, USA Today, Feb. 29, 1986, at C1, col. 4.

117. *11 In Baseball Suspended for Drugs*, *supra* note 108; see also *Baseball Czar Suspends 11 Players for Drugs*, Boston Herald, Mar. 1, 1986, at 1, 50, col. 1; see also *Penalized Players Learn Through Service*, N.Y. Times, Mar. 22, 1987, sec. 5, at 1, 10, col. 2, 1.

118. *11 In Baseball Suspended for Drugs*, *supra* note 108, at 1, col. 6. The players given this punishment included Dave Parker, Keith Hernandez, Joaquin Andujara, Lonnie Smith, Enos Cabell, Jeff Leonard, and Dale Berra. *Id.*

start of the 1986 season, or instead donate five percent of their salary for one year, submit to random drug testing for the rest of their careers, and contribute 50 hours of community service for each of the next two years.¹¹⁹

3. Ten other players were given the option of facing suspension or submitting to drug testing.¹²⁰

Ueberroth stated that he felt he had to make a strong statement and noted:

It's a tough decision because it's complicated and also because it's a risk. But you can't ask any player coming out of high school to not deal with his problem if we don't deal with our problem. We're going to get it out of our game. I'm not orchestrating anything. Drugs are a problem, and I'm just saying we're going to get them out of the game.¹²¹

While reaction to the decision was mixed,¹²² all 21 players did quickly agree to the penalties.¹²³ Haywood Sullivan, owner of the Boston Red Sox said of the Commissioner's decision that:

I think there are some things in there that people could criticize and say, "Why the hell didn't they throw them out of the game?" But I think that was not the purpose of this. The purpose was to help people. All these people have vowed they are no longer involved in any of it. The teeth of it will be that it's up to them to solve these

119. *Id.* at 30, col. 1. The players given this punishment included Al Holland, Larry Sorensen, Lee Lacy, and Claudell Washington. *Id.*

120. *Id.* The players given this option included Dusty Baker, Gary Matthews, Manny Sarmiento, Derrel Thomas, Vida Blue, Dickie Noles, Daryl Sconiers, Rod Scurry, Tim Raines, and Alan Wiggins. *Id.*

121. *Id.* Ueberroth had listed five major concerns prompting his action:

1. Significant use of drugs by players in MLB.
2. Drug trial publicity.
3. Track record of those using drugs in MLB.
4. Testing program seems effective.
5. Player agents poor reactions to drug plans.

Id.

122. See *Ueberroth's Move No Cure*, Boston Globe, Mar. 2, 1986, at 61, col. 1; and *A Fair Ruling by Ueberroth* (editorial), Sporting News, Mar. 10, 1986, at 3, col. 3.

123. *Drug Plan: Ballplayers Knocking Under*, USA Today, Mar. 3, 1986, at C1, col. 3; and *Hernandez Accepts Ueberroth Decision*, Cape Cod Times (AP WireService), Mar. 9, 1986, at 59, col. 1.

problems. Not only to solve the problems, but to serve as a catalyst to others.¹²⁴

New York Yankees owner George Steinbrenner was much more direct in his praise, stating that "anyone who knocks this decision as too tough or too soft should have his head examined."¹²⁵

At least one player representative, Don Baylor of the New York Yankees, thought the decision was fair.¹²⁶ Baylor noted that, "To me severe punishment would've been all of the above—suspension for one year, fine, testing. That's severe. This way he's giving them a second chance. Now, there are guidelines to go by."¹²⁷

Despite the players decisions to go along with Ueberroth, the MLBPA decided to file a grievance on behalf of the association as a whole for arbitration of the Commissioner's decision concerning the players involved with the Pittsburgh trial.¹²⁸ The grievance is still pending at this writing.

In April 1986, Ueberroth again attempted to institute a drug testing program for MLB players.¹²⁹ The MLBPA again rejected the plan while awaiting the outcome of arbitration hearings over the issue of including random testing clauses in guaranteed and non-guaranteed contracts,¹³⁰ as well as the Pittsburgh trial grievance.

124. *11 In Baseball Suspended for Drugs*, *supra* note 117. Sullivan also noted that:

I don't know any fairer way. He has taken a long time, and it's not a spur-of-the-moment decision. If it was tougher, and you just throw everybody out of the game, I don't think you have the opportunity to gain from this decision.

We've got to find a way to convince people that this is the only way that will work. It seems that without fear, nothing works. We need a unified mandatory testing program so that all the innocent ones will be kept innocent.

For a long time, people stuck their heads in the sand and said there wasn't a problem.

Id.

125. *Drug Suspension Reactions Vary*, *Sporting News*, Mar. 10, 1986, at 32, col. 1; *see also Grouping for a Drug Plan That Will Work*, *Sports Illustrated*, Mar. 10, 1986, at 7, 10, col. 1.

126. *Id.*

127. *Id.*

128. *Players to File Grievance in Response to Drug Ruling*, *USA Today*, Mar. 2, 1986, at 61, col. 1.

129. *Testing Plan Sent to Players*, *N.Y. Times*, Apr. 6, 1986, at 58, col. 1.

130. *Showdown Is Coming Up Over Drugs*, *N.Y. Times*, Nov. 24, 1985, sec. 5.

V. The Robert's Drug Clause Arbitration Decision

The first major drug testing related issue to be decided utilizing arbitration under Commissioner Ueberroth involved mandatory drug testing clauses in guaranteed and non-guaranteed MLB player contracts. The controversy had begun in November 1985 when the owner's Player Relations Committee again¹³¹ suggested adding one of two clauses¹³² to individual player's contract which would have required mandatory random drug testing.¹³³ The MLBPA filed their grievance on January 6, 1986¹³⁴ and it was heard the following April before baseball's new impartial arbitrator Thomas T. Roberts.¹³⁵

Initially, Roberts had to decide a grievance filed on behalf of Joel Youngblood of the San Francisco Giants.¹³⁶ Youngblood had negotiated a guaranteed contract with the Giants and then refused to sign it when a mandatory drug testing clause was added. He subsequently re-

at 11, col. 1.

131. The owners had attempted to include similar clauses before in late 1984 and early 1985. *Supra* notes 68-70.

132. The two types of clauses as noted by Roberts in his decision were:

In the main, the clauses found in guaranteed contracts are framed as follows:

Player agrees to submit to any test or examination for drug use when requested by the Club and the failure to do so shall make the guarantee set forth in (the balance of the guarantee provision) null and void.

In the case of non-guaranteed contracts, the drug testing provision typically states:

Player is of the opinion that it is vitally important to him and his professional career that his image not be tarnished by the specter of drugs.

Therefore, player voluntarily agrees to submit to any test or examination for drug use when requested by the Club.

In The Matter of the Arbitration Between Major League Baseball Player Relations Committee and Major League Baseball Players Association, Decision No. 69, Gr. Mo. 86-1, July 30, 1986, at 3 [hereinafter *Player Relations Arbitration*] (This is a draft of decision No. 69; the wording may be altered in the final published decision).

133. *Id.*

134. *Id.* at 1. MLBPA assistant counsel Eugene Orza commented on the clauses that:

Certain subjects are for collective bargaining, and this is one of them. They (owners) have adopted a new rule that they apply to everybody. It's applicable across the board, but you say you're going to implement it on an individual basis. You can't do that.

Id.

135. *Supra* note 132.

136. *Grievance To Youngblood*, N.Y. Times, Mar. 21, 1986, at A29, col. 1.

considered and agreed to sign.¹³⁷ However, by that time the Giants claimed that they had withdrawn their offer.¹³⁸ Youngblood sought to have the Giants honor the offer and filed a grievance.¹³⁹

In a March 1986 decision, Roberts ruled in favor of Youngblood.¹⁴⁰ Roberts held that the Giants had to honor the offer but the drug testing clauses also were valid until the grievance that he was about to hear on the wider issue of drug testing clauses made Youngblood's provisions for such, "null and void as a consequence of a decision"¹⁴¹ All parties to the arbitration agreed that the decision would not be precedent setting.

It thus remained for Roberts to resolve the larger issue. In a much delayed¹⁴² July 1986 decision, Roberts ruled in favor of the MLBPA stating that, "The drug testing clauses . . . are in violation of Article II of the Basic Agreement."¹⁴³ He stated further that, "Any such clauses must be negotiated with the Players Association."¹⁴⁴ Soon after rendering his decision, Roberts was fired by the owners' Player Relations Committee as baseball's impartial arbitrator.¹⁴⁵

Roberts' decision focused on Article II of MLB's collective bargaining agreement.¹⁴⁶ Article II states that the MLBPA is "the sole and exclusive collective bargaining agent for all Major League Players . . . with regard to all terms and conditions of employment."¹⁴⁷ Except-

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* The MLBPA's Donald Fehr commented shortly before the decision that: The fact of the matter is that it will all be over in 30 days or less If we are right, none of the drug testing language will be enforceable at all. It will be just as if they didn't exist.

See *Fehr Faces Test on Drug Issues*, Boston Globe, Mar. 11, 1986, at 74, col. 2.

142. See *Fehr: Drug-Testing Challenge Delayed*, USA Today, Apr. 7, 1986, at 5C, col. 3, and *Baseball Drug Talks Dragging Along*, USA Today, May 8, 1986, at 8C, col. 1.

143. *Player Relations Arbitration*, *supra* note 132, at 9.

144. *Id.*

145. *PRC Fires Arbitrator Over Drug-Testing Flap*, Newark Star Ledger, Aug. 6, 1986, at 49, col. 1. MLB's collective bargaining agreement allows either management or labor to dismiss the arbitrator at any time. Roberts commented that, "It happens with some frequency." *Id.* See also *Grievance Hearing Set*, N.Y. Times, Aug. 21, 1986, at B11, col. 3. George Nicolau was named as Roberts' successor in September, 1986, *Arbitrator Selected*, N.Y. Times, Sept. 9 1986, at A22, col. 4.

146. *Player Relations Arbitration*, *supra* note 132, at 2.

147. *Id.*

tions to this general rule are allowed only for special covenants between the player and his club that "provide benefits beyond those found in the Uniform Player's Contract."¹⁴⁸ The issue thus centered on whether drug testing was an additional benefit to the player.¹⁴⁹ As Roberts summarized:

The Clubs take the position that the drug testing clauses are not only consistent with the Basic Agreement but further provide actual or potential benefits to the player. The Players Association views the introduction of these special covenants as an effort to secure drug testing throughout the major leagues without compliance with the bargaining constraints of Article II. The Players Association states the drug testing clauses represent a potential detriment to the individual player rather than an additional benefit.¹⁵⁰

The owners based their right to test players for drugs on Article XX of baseball's CBA that states, "Nothing in this agreement shall be construed to restrict the rights of the Clubs to manage and direct their operations . . . except as specifically limited by the terms of the Agreement."¹⁵¹ The owners reasoned that since drug testing was not discussed in baseball's CBA and since there was no prohibition concerning drug testing in the CBA that they should be allowed to utilize drug testing clauses as special covenants to the players contracts. This was especially valid because physicals were already required within the CBA.¹⁵²

In his decision, Roberts pointed out that past attempts to institute non-drug testing related special covenants in players contracts had been deemed violations of the CBA where the purpose was to bypass the

148. *Id.*

149. *Id.*

150. *Id.* at 2-3. Roberts sought to distinguish his decision from the general question over whether drug testing was good for baseball, pointing out in it that:

It is important to note that the matter placed at issue . . . is not whether drug testing would advance the interests of baseball but rather whether the Club may institute drug testing in the absence of an agreement negotiated with the Players Association sanctioning such an understanding [T]he charge of the Arbitration Panel is one of contractual interpretation

Id.

151. *Id.* at 4.

152. *Id.*

MLBPA as the players' exclusive bargaining agent.¹⁵³ Roberts noted that such actions would be inconsistent with the provisions of baseball's CBA, since:

Article II on its face prohibits the individual negotiation of special covenants uniform in nature and applicable to substantially all players who desire to negotiate a new contract so long as those special covenants provide no actual or potential additional benefits to the player. A unilaterally imposed condition of employment may not be sanctioned if it is inconsistent with the provisions of the Basic Agreement or does not provide "additional benefits" to the player within the meaning of that phrase as it appears in Article II.¹⁵⁴

Roberts found that the clauses had been imposed unilaterally by the owners and were not voluntary.¹⁵⁵ Roberts stated, "While it is unquestionably true that many players find the testing obligation onerous, the reach of the testing language to more than five hundred Uniform Player's Contracts in a single winter of individual player negotiations makes it clear that a term and condition of employment is being defined."¹⁵⁶

Reviewing the nature of both the guaranteed and non-guaranteed contracts, Roberts noted that in the case of the later, whether voluntary or not, the inclusion of the language in the contract created a previously non-existent affirmative duty to be tested until the "player repudiates his stated agreement to submit to testing . . ."¹⁵⁷ A similar duty is created in guaranteed contracts, Roberts held, because even though such contracts traditionally prohibited certain conduct, never before had they sought to "create an affirmative duty such as that called for here, i.e., the production of urine samples for analysis in the absence of cause."¹⁵⁸ As such, Roberts held that non-guaranteed contracts drug testing clauses "are prohibited by Article II of the Basic Agreement unless first negotiated with the Players Association."¹⁵⁹ In guaranteed

153. *Id.* at 5 (citing Panel Decision No. 44, *In the Matter of the Arbitration Between: Major League Baseball Players Association (Richard Tidrow) and Major League Baseball Player Relations Committee, Inc.* (Jan. 17, 1981)).

154. *Id.*

155. *Id.* at 6.

156. *Id.*

157. *Id.* at 7.

158. *Id.*

159. *Id.*

contracts, Roberts held that the clauses are prohibited because "drug testing clauses may not be brought into compliance with Article II through the device of relating them to other clauses that do in fact afford a benefit."¹⁶⁰

VI. Conclusion

Commissioner Ueberroth has indicated that he believes he has defeated the problem of drugs in MLB, noting in 1986 that:

As for baseball, for the past five or seven years, there's been a major drug scandal every year. There won't be one this year. There won't be one next year. Why not? Because we're minding the store. There's enough testing, enough concern, a huge increase in education and cooperation with law enforcement."¹⁶¹

The key to any success in eradicating drugs in sports according to Ueberroth is to show the users that they will be helped with their problem, not punished (at least initially).¹⁶² Ueberroth during testimony in May, 1986 before the House Select Committee on Narcotics Abuse and Control noted:

If someone gave me unlimited power to throw people out of baseball, I'd refuse it. Nobody should be given the power of life and death.

If you want the unions and management to agree (to expel drug abusing players), fine, but it will not stop drugs in baseball. . . . My responsibility to baseball players is to get drugs out of baseball and it's (being) done. The message is clear: it's not tolerated anymore¹⁶³

It remains to be seen if Ueberroth will be any more successful than his predecessor Bowie Kuhn in eradicating drugs in Major League Base-

160. *Id.* at 8.

161. *Id.* Over 500 players had such contract clauses in April, 1986. *Id.*; see also Fehr: *Drug-Testing Challenge Delayed*, USA Today, Apr. 7, 1986, at C5, col. 3; and *Baseball Drug Talks Dragging Along*, USA Today, May 8, 1986, at C8, col. 1.

162. Cosell, *The Terrorism of Drugs*, N.Y. Daily News, May 11, 1986, at 51, col. 1; see also Ueberroth: *USA Must Escalate War On Drugs*, USA Today, May 8, 1986, at C1, col. 5.

163. "UBIE" *Power to Ban Not Beat Drug Rx*, N.Y. Daily News, May 8, 1986, at 81, Col. 1.

ball.¹⁶⁴ Some critics claim that his only successes are in public relations coups and grand gestures, not in substantive results.¹⁶⁵

In the meantime at least one MLB club is attempting to block deferred payments on a contract of a player who used cocaine while employed by the club.¹⁶⁶ Dave Parker, a former player for the Pittsburgh Pirates, was sued based on a fraud in the inducement theory by his former employer which is seeking to have \$5.3 million in deferred payments to Parker stopped in a potentially precedent setting case.¹⁶⁷ Parker's agent, Thomas Reich, has stated that if the suit comes to trial, it will make the 1985 Pittsburgh trial "look like a marble shoot."¹⁶⁸

Some speculate that in order for the Pirates to win, they would have to prove a direct relationship between Parker's use of cocaine and his dwindling statistics. The defense is likely to point out that Parker's

164. *Id.* One of Commissioner Ueberroth's greatest concerns is that drug use will lead to a betting scandal, and he has noted that "Baseball cannot afford and will not have a Tulane type of scandal." See *Players Innocent, Claims Ueberroth*, Newark Star Ledger, May 10, 1985, at 73, col. 2. For further information on gambling and sports, see *Gambling: America's National Pasttime?*, Sports Illustrated, Special Report, Mar. 10, 1986, at 30-82; II R. BERRY TO G. WONG, LAW AND BUSINESS OF THE SPORTS INDUSTRIES § 5.70 (section on "Common Issues in Amateur and Professional Sports," Gambling).

165. See *The Score After One: Some Hits, Some Errors*, Sports Illustrated, Dec. 16, 1985, at 38-43, col. 1.

166. See *Pirates Sue Parker Over Cocaine Use*, Daily Hampshire Gazette (AP Wireservice), Apr. 22, 1986, at 20, col. 1.

The Pittsburgh Pirates filed its civil suit in April, 1986 in the Allegheny County Common Pleas Court, charging that former Pirates player Dave Parker entered into a multi-year contract on fraudulent pretenses because he withheld information that he was using drugs, and that he failed to live up to the contract by not keeping himself in top shape. The Pirates maintain that, during the years 1979-1982, Parker's performance was far below that in his two seasons prior to signing a \$7.4 million, five-year contract. The potential landmark case drew a wealth of criticism. Eugene Orza, counsel for the Players Association, said that the case is "bordering on the frivolous" in that it attempts to bypass the grievance procedure in the CBA. *Pirates May Have A Landmark Suit*, Newsday, Apr. 22, 1986. See also *Ugly Undertone To Pirate's Suit*, Sporting News, May 5, 1986; *Parker Lawyers Look to Union for Support*, Pittsburgh News, Apr. 22, 1986; *Prine Out to Avenge 'Crimes' Against Pittsburgh*, Pittsburgh Press, Apr. 22, 1986; *Drug Suit Against Athlete Breaks New Legal Ground*, Baltimore Sun, May 12, 1986, at A1; *Pirates Have a Case Against Parker*, Philadelphia Inquirer, Apr. 28, 1986.

167. *Id.* See also *Pirates Really Struck Out With Suit Against Parker*, USA Today, May 23, 1986, at C3, col. 4, and, *Tanner Comes to Parker's Defense Over Pirates' Lawsuit*, Boston Globe, Apr. 23, 1986, at 70, col. 1.

168. *Marble Shoot*, USA Today, Sept. 9, 1986, at C1, col. 1.

two best seasons (batting title in 1977, MVP Award in 1978) came after he began using drugs and that injuries such as a broken jaw and torn tendon in his thumb robbed him of his skills over the seasons in question. The defense can also argue that the money in question *has already been earned* (it was only deferred).

In the foreseeable future it seems, then, that a stalemate may exist over mandatory drug testing in MLB in light of the *Roberts* decision and the Players Association's refusal to agree to any mandatory plan. Eugene Orza, associate general counsel for the MLBPA, has stated that, "it's pretty clear that if there's not going to be random, non-cause testing, they're [MLB] not interested in any program."¹⁶⁹ Before MLB's 1986 winter meetings Commissioner Ueberroth echoed similar thoughts as to the possibility of a drug testing program, stating that, "I will encourage the owners, who cancelled the joint drug agreement last year, to reconsider and work toward an agreement with the Players Association. However, in this era of grievances and that type of thing, I don't hold out much hope."¹⁷⁰ In the interim, Ueberroth has extended the existing drug testing plan for MLB personnel and minor league players to the Winter Leagues held in Puerto Rico, Mexico, and the Dominican Republic.¹⁷¹ In announcing the program in January 1987 Rodrigo Otero Suro, president of the Puerto Rican league stated that, "We'll be testing three times during the season. Random testing. . . . The players won't know when."¹⁷²

However, in the past Commissioner Ueberroth, in an interview on ABC-TV's "This Week With David Brinkley," has voiced his conditional opposition to spot drug testing of ballplayers.¹⁷³ His remarks were based on a 1986 season that, despite a resurfacing of drug-related episodes involving Steve Howe and Lamarr Hoyt,¹⁷⁴ passed without any

169. *No Sense of Urgency in Anti-Drug Talks*, N.Y. Times, Dec. 7, 1986, sec. 5, at 7, col. 1.

170. *Id.*

171. *Winter Drug Test: Uebie's End Run*, SPORT, Jan. 1987, at 18, col. 1.

172. *Id.* Reacting to the plan, MLBPA's Donald Fehr stated, "It doesn't change anything as far as we're concerned. It's a very difficult thing, going around and testing everyone to see who's guilty and who's not. It doesn't change what's right and what's wrong. It's wrong." *Id.*

173. *This Week with David Brinkley* (ABC television broadcast, Apr. 6, 1986). See also *Ueberroth Opposes Spot Drug Tests*, Baltimore Sun, Apr. 7, 1986.

174. In 1986, San Diego Padres pitcher LaMarr Hoyt was involved in three drug related incidents in a ten month period, the last of which saw the 1982 Cy Young award winner arrested by U.S. Customs agents on October 28, 1986, when he at-

significant drug-related scandal.

"We had to work on education of players, work on penalties because there needs to be penalties, and we're doing some testing," said Ueberroth. "Testing is not a cure-all," continued Ueberroth. "I think it's only a tool you can use from time to time if you have a problem. If there's no problem, you don't use it. Basically, we've surrounded the problem, and I don't think you're going to see any baseball players have a problem this year."¹⁷⁵

There remains the question then over what the future holds for Commissioner Ueberroth's approach to the drug issue in MLB? Observers of MLB will be closely monitoring the situation and will be looking for answers to some of the following questions:

- 1) Will there be any future drug problems or incidents in MLB?
- 2) If no further problems arise will Commissioner Ueberroth continue to press for further controls, education or testing concerning

tempted to cross from Mexico into the United States with 500 valium and qualude tablets concealed on his body. *Hoyt Faces Five Years In Federal Drug Case*, USA Today, Oct. 30, 1986, at 1C, col. 6; *More Trouble For Hoyt*, N.Y. Times, Oct. 30, 1986, at D30, col. 1. On November 13, 1986, Hoyt plead guilty to two misdemeanor drug charges as part of a plea bargain. *Hoyt Faces Jail Sentence*, USA Today, Nov. 14, 1986, at 1C, col. 5. On December 16, 1986, Hoyt was sentenced to 45 days in prison, fined \$10,000, placed on probation for five years, and forfeited his \$33,000 1986 Porsche which was confiscated when he was arrested at the border. *Hoyt Given 45-Day Jail Sentence*, USA Today, Dec. 17, 1986, at 1C, col. 3. Hoyt stated at sentencing, "I'd like to apologize. I've let a lot of people down. For the first time, I'm beginning to understand my problem." *Id.* See also *Hoyt Is Sentenced*, N.Y. Times, Dec. 17, 1986, at D26, col. 1; *Hoyt Surrenders*, N.Y. Times, Jan. 8, 1987, at D23, col. 6. Padres General Manager Jack McKeon noted about Hoyt's waivers that, "Our organization has been consistent in these matters. LaMarr was aware of the club's policy and had been previously warned about the situation. We hope LaMarr will be able to find a solution to his ongoing problem. We wish him the best in the future." *Id.* On February 25, 1987, Hoyt was barred from participation in MLB by commissioner Peter Ueberroth for the 1987 season. Ueberroth stated that, "While our first priority is to provide help to those who need it, we will impose discipline where appropriate. Given these circumstances, I have determined to make LaMarr Hoyt ineligible to participate in professional baseball for the 1987 season." *Hoyt Barred for Year for Drug Involvement*, Newark Star Ledger, Feb. 26, 1987, at 6, col. 3. MLBPA executive director Donald Fehr stated about Hoyt's suspension that, "The saddest part is that everybody is lining up to throw darts at this guy. I used to think the worst thing that could happen to you in America was to get fired from your job. Now they've fired this guy and said he can't even work any place else." *Hoyt Barred for Season*, N.Y. Times, Feb. 26, 1987, at B8, col. 1.

175. See *supra* note 173 and accompanying text.

drugs in MLB?

3) If there are continuing drug problems, will there again be a push for a joint agreement with the MLBPA? (A joint agreement would be necessary because the next CBA is not until 1989).

In addition, MLB will itself be monitoring the drug testing policies in other sport organizations like the National Basketball Association, the National Football League, and the National Collegiate Athletic Association. MLB will gauge the success of these organizations' policies and any arbitration or court decisions involving those organizations' policies. Finally, MLB will be looking at the non-sports workplace and society in general to see whether drug testing gains acceptance and if the courts uphold drug testing programs in non-sports settings and industries.¹⁷⁶

176. In April 1987, New York Mets pitcher Dwight Gooden agreed to enter a drug treatment center after it was disclosed that he failed a voluntary drug test. The 1985 Cy Young Award winner entered the drug treatment center rather than be suspended from baseball by Commissioner Peter Ueberroth. *Gooden Agrees to Treatment After a Test Shows Drug Use*, N.Y. Times, Apr. 2, 1987, at A1, col. 5. Commissioner Ueberroth stated that,

Baseball has made a great deal of progress in the area of fighting drug abuse. However, we expect sporadic skirmishes, and this is one of them. Our policy is simple. If the player is willing to help himself, he gets one chance. If he is unwilling to cooperate or if a problem occurs a second time, then we will take the penalty route.

Id. at B14, col. 2. New York Mets teammate Keith Hernandez noted, "We're in the public eye, and it all comes out. Nobody gives a rap about Joe Blow or a neurosurgeon. Drug Testing? I still say you have individual rights. This is America, not Russia." *Mets Shocked but Pledge Support for Gooden*, N.Y. Times, Apr. 2, 1987, at B13, col. 5.