A CRITICAL PERSPECTIVE OF BASEBALL'S COLLUSION DECISIONS

I. INTRODUCTION

On January 31, 1986, Grievance No. 86-2 (Collusion I) was filed by the Major League Baseball Players Association (Players Association).[1] It charged that twenty-six Major League Clubs (Clubs) violated paragraph H of Article XVIII of the 1985 Basic Agreement.[2] On September 27, 1987, an arbitration panel, chaired by Mr. Thomas T. Roberts, found that the Clubs had violated Article XVIII(H) of the Basic Agreement following the completion of the 1985 championship season by acting in concert with regard to the free agency provisions of Article XVIII.[3] An interim award was given to the

1. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 86-2, Panel Dec. No. 76 (1987) (Roberts, Arb.) [hereinafter Roberts].

2. *Id.* at 1.

3. *Id.* at 15.

139 players harmed by the Clubs' action in the amount of $10,528,086.71.[4] The panel has retained jurisdiction to construct appropriate remedies for further hearings regarding individual claims.[5]

On February 18, 1987, Grievance No. 87-3 (Collusion II) was filed by the Players Association charging that the twenty-six Major League Clubs continued to act in concert with respect to those players who became free agents following the 1986 season.[6] On August 3, 1988, an arbitration panel, chaired by Mr. George Nicolau, found that the Clubs had again violated Article XVIII(H) of the Basic Agreement.[7] On September 17, 1990, an interim award was given to the players harmed by the Clubs' action in the amount of $102.5 million in lost salary for the 1987 and 1988 seasons.[8] The arbitration panel has retained jurisdiction to construct appropriate remedies for other individual claims.[9]

In order to better understand these two arbitral decisions, a brief historical sketch of baseball's free agency system and the events that led to the collusion litigation is necessary. An examination of the arbitrators' rulings will then be presented in light of the facts and arguments alleged.[10] The discussion will conclude with an evaluation of alternate remedies that could be awarded the players beyond mere compensatory damages.

II. The Rise and Fall of Baseball's Free Agency System

A. The Early Free Agency System

In the early history of professional baseball, when just one league existed (the National League), the players enjoyed a completely free labor market.[11] At the end of each season, players typically signed with the club

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4. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 86-2, Panel Dec. No. 1, 30 (1989) [hereinafter *Damages* 86-2].

5. *Id.* at 30.

6. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Panel Dec. No. 79 (1988) (Nicolau, Arb.) [hereinafter Nicolau]. On January 19, 1988, the Players Association filed a third collusion grievance. *See* Major League Baseball Players Ass'n v. The Twenty Six Major League Baseball Clubs, Grievance No. 88-1, Panel Dec. No. 1 (1988). Although the arbitration panel found liability against the Clubs, no decision has yet been made as to damages for the 1989-90 season. The Newark Star Ledger, Dec. 7, 1990, at 69, col. 4. This article will confine its analysis to the first two collusion decisions covering 1985 to 1988.

7. *Id.* at 76.

8. Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Panel Dec. No. 1, 42 (1990) (Nicolau, Arb.) [hereinafter *Damages* 87-3].

9. *Id.* at 42.

10. The arguments regarding the litigants' positions were gleaned from the arbitrators' decisions and the Players Association's briefs. Major League Baseball and its counsel refused to furnish their briefs in spite of numerous requests.

11. J. Dworkin, Owners Versus Players 8-9, 41 (1981).

that offered the most money for the following season.[12] This mobility, previously called "revolving," is currently referred to as free agency.[13]

While the freedom of free agency in the mid-1800's provided the players with higher salaries, it naturally produced some countervailing consequences for the owners.[14] Overall, the owners began to feel that they were losing their control and operation of the players and the sport.[15] As a result, the owners adopted the "reserve rule" which initially permitted each team to insulate five players from raiding by the other clubs.[16] That is, the owners agreed among themselves to honor each other's list of reserved players and not attempt to lure these players away with higher or better offers.[17] Since any one team was unlikely to have more than five bona fide star players, the owners hoped that the rule would effectively hold down player salaries.[18]

By 1887, the reserve rule had been amended to increase the reserve player list to fourteen.[19] Soon after, every player on every professional team was affected by the rule because a reserve clause began to show up in standard player contracts.[20] The effect of this provision was to bind the player to the signing team for the following season as well.[21] Since the following season's contract contained a similar clause, baseball management effectively came to own the players into perpetuity.[22] Because the reserve clause was honored worldwide,[23] and the players were thus denied an alternate market for their services,[24] the reserve rule became an effective tool to artificially depress player salaries.[25]

Following the incorporation of the reserve rule into the standard player contract in the 1880s, professional baseball players joined in a collective ef-

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12. *Id.* at 41.

13. *Id.*

14. *Id.* at 9.

15. *Id.*

16. *Id.* at 10. *See also* M. Cozzillio, *Free Agency Becomes Critical Sports Issue as NFL Strike Ends*, LEGAL TIMES, October 26, 1987 at 1.

17. DWORKIN, *supra* note 11, at 10. *See also* L. LOWENFISH & T. LUPIEN, THE IMPERFECT DIAMOND 18 (1980).

18. DWORKIN, *supra* note 11, at 10.

19. *Id.*

20. *Id.* LOWENFISH, *supra* note 17, at 18.

21. DWORKIN, *supra* note 11, at 10.

22. *Id.*

23. Classen, *Three Strikes and You're Out: An Investigation of Professional Baseball's Antitrust Exemption*, 21 Akron L. Rev. 369, 377 n.72 (1988). Because the reserve clause was worldwide in scope, professional players were unable to sign with major and minor league teams in Mexico, Japan, South America, and the Caribbean unless the American club gave its consent. *Id.*

24. LOWENFISH, *supra* note 17, at 18.

25. DWORKIN, *supra* note 11, at 45.

fort to confront management on issues surrounding the reserve clause, including the loss of player mobility and freedom to contract.[26]

In time, the strengths and weaknesses of the reserve system became apparent.[27] In general, the player's standard contract had little utility as an enforcement vehicle to prevent players from signing with other clubs in violation of their contracts.[28] Courts frequently denied injunctions sought by the clubs when a player tried to sign with a team in the same league.[29] Attempts by the owners to prevent such raiding were unsuccessful principally because of the unreasonableness of negative covenants, which "operated as a perpetually renewing option clause."[30]

In spite of these weaknesses, exercise of the reserve system effectively kept player salaries low and team profits high.[31] Even with the formation of the American League in 1900,[32] the reserve system became firmly entrenched and player mobility remained stifled.[33] In response, some players utilized the courts and challenged the reserve system with arguments grounded in antitrust law.[34]

B. Baseball's Antitrust Exemption

The relationship of organized baseball to federal antitrust law was first considered in *Federal Baseball Club of Baltimore, Inc. v. National League*

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26. DWORKIN, *supra* note 11, at 45. *See also* Cozzillio, *supra* note 16, at 18. John Montgomery Ward, a player in the 19th Century, formed the first player's union, the National Brotherhood of Professional Baseball Players. DWORKIN, *supra* note 11, at 45. Ward referred to the reserve clause as "a fugitive slave law which denied the player a harbor or a livelihood and carried him back, bound and shackled to the club from which he attempted to escape. Once a player's name is attached to a contract, his professional liberty is gone forever." *Id.* (quoting *Organized Baseball: Report of the Subcom. on the Study of Monopoly Power of the House Comm. on the Judiciary*, H.R. REP. No. 2002, 82nd Cong., 2nd Sess. 32 (1952)).

27. Cozzillio, *supra* note 16, at 18.

28. *Id.*

29. *Id.* (citing Metropolitan Exhibition Co. v. Ewing, 42 F. 198 (S.D.N.Y. 1890); Metropolitan Exhibition Co. v. Ward, 9 N.Y.S. 779 (Sup. Ct. 1890); Philadelphia Ball Club v. Hallman, 9 Pa. C 57 (1890); Weegham v. Killefer, 215 F. 168 (W.D. Mich. 1914)).

30. *Id.* According to Professor Cozzillio, other reasons included indefiniteness of promised performance, lack of consideration, and the "unclean hands" of the complaining club. *Id.* (citing Philadelphia Baseball Club v. Lajoie, 10 Pa. D 309 (1901), *rev'd*, 202 Pa. 210, 51 A. 973 (1902)).

31. DWORKIN, *supra* note 11, at 46.

32. *Id.* at 51. In 1900, the Western League changed its name to become the American League. *Id.* Since this new league did not specifically recognize the reserve rule during its first two years in existence, players suddenly had the opportunity to obtain higher salaries by jumping their contracts. *Id.* However, this freedom was short-lived with the signing of the Cincinnati Peace Compact signed by the National and American League which officially recognized the reserved players from both leagues. *Id.* at 52.

33. Cozzillio, *supra* note 16, at 18.

34. *Id.*

of Professional Baseball Clubs.[35] In 1922, professional baseball consisted of three leagues: the American League, the National League, and the Federal League.[36] Plaintiff, a club member of the Federal League, alleged that the defendants, the American and National Leagues, conspired to monopolize organized baseball and destroy the Federal League.[37] This, the plaintiff argued, was in clear violation of the Sherman Act.[38]

In rejecting plaintiff's contentions, the Supreme Court held that organized baseball was not amenable to attack under the federal antitrust laws.[39] While recognizing that the "business of baseball" required players to travel from one state to another, the Court reasoned that baseball games were intrastate affairs and could not be called "trade or commerce [with]in the commonly accepted use of those words."[40] Consequently, since the application of the antitrust laws required that the illegal activity involve interstate commerce, the Court held that plaintiff's suit under the Sherman Act could not be maintained.[41]

In *Gardella v. Chandler*,[42] the reserve clause was specifically challenged as violating the federal antitrust laws.[43] Danny Gardella, an outfielder under contract with the New York Giants, breached the terms of his contract's reserve clause by playing professional baseball in the Mexican League.[44] As a consequence, Gardella was barred from organized baseball in the States for five years.[45] Gardella's antitrust suit was dismissed by the district court under the Supreme Court's decision in *Federal Baseball*.[46] On appeal, however, the Second Circuit reversed and remanded.[47] Significantly, the court of appeals found that organized baseball involved substantial interstate com-

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35. 259 U.S. 200 (1922).

36. *Id.* at 207.

37. *Id.* Specifically, plaintiff contended that the leagues effectuated their conspiracy by buying some of the constituent clubs that comprised the Federal league and induced all of these clubs, except the plaintiff, to leave the Federal league. *Id.*

38. *Id.* at 206. The Sherman Act, 15 U.S.C. §§ 1-2 (1982), provides, in relevant part:

> § 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.
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> § 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.

Id.

39. *Federal Baseball*, 259 U.S. at 208-09.

40. *Id.*

41. *Id.* at 209.

42. 79 F. Supp. 260 (S.D.N.Y 1948), *rev'd*, 172 F.2d 402 (2d Cir. 1949).

43. *Id.* at 262.

44. *Id.*

45. *Id.*

46. *Id.* at 263.

47. Gardella v. Chandler, 172 F.2d 402 (2d Cir. 1949).

merce because the games were transmitted across state lines by radio and television.[48]

Three years later, in *Toolson v. New York Yankees, Inc.*,[49] the United States Supreme Court had an opportunity to scrutinize the *Federal Baseball* decision and to rectify its prior mistake.[50] George Toolson was a pitcher under contract with the Newark International Baseball Club.[51] When his contract was assigned to the New York Yankees Binghamton farm team, Toolson refused to report to the Binghamton club.[52] As a result, he was placed on the "ineligible list" and prevented from playing for any other professional team.[53] Toolson sued and alleged that the New York Yankees, as a member of organized baseball's monopoly, deprived him of his livelihood in violation of the Sherman and Clayton Acts.[54] The district court, however, dismissed the action under the Supreme Court's decision in *Federal Baseball* and the court of appeals affirmed.[55] Without re-examining the underlying issues, the Supreme Court, upon review, once again refused to disturb the *Federal Baseball* decision.[56] Instead, the Court held that organized baseball "has . . . been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."[57]

Most recently, in *Flood v. Kuhn*,[58] the Court again refused to consider the merits of claims that the league's player mobility restraints violated the Sherman Act, holding that matters involving the "business of baseball" were exempt from antitrust review.[59] Curt Flood, a player who had been traded without his previous knowledge or consent, brought suit seeking injunctive

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48. *Id.* at 411. In distinguishing *Federal Baseball*, the court reasoned that this type of interstate activity was not "of the sort . . . considered by the Court in [that case]." *Id.* at 412. An appeal was filed to the Supreme Court but the case was settled out of court for $65,000. Classen, *supra* note 23, at 379. The league apparently did not want to risk the *Federal Baseball* decision being overturned by the Court. *Id.* (citing New York Times, Jan. 25, 1970, at 2, col. 2; New York Times, Jan. 4, 1970, at 5, col. 2.).

49. 346 U.S. 356 (1953).

50. Classen, *supra* note 23, at 379.

51. Toolson v. New York Yankees, Inc., 101 F. Supp. 93, (S.D. Cal. 1951), *cert. granted*, 345 U.S. 963 (1953).

52. *Id.* at 93.

53. *Id.*

54. *Id.* In reiterating the arguments made by Gardella, Toolson contended that the interstate transmission of baseball games via radio and television constituted "commerce" as defined under the federal antitrust laws. *Id.* at 94. In addition, he argued that the facts of his case were clearly distinguishable from *Federal Baseball*. *Id.*

55. Kowalski v. Chandler, 202 F.2d 413, 414 (6th Cir. 1953).

56. Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

57. *Id.* The Court stated that "if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation." *Id.*

58. 407 U.S. 258 (1972).

59. *Id.* at 258.

relief and treble damages.[60] Flood's complaint charged the league with violating federal antitrust laws, civil rights statutes, and the thirteenth amendment.[61]

The district court denied Flood a preliminary injunction,[62] and subsequently dismissed Flood's suit under *Federal Baseball* and *Toolson*.[63] Ultimately, the Supreme Court upheld the lower courts' decisions based on the principles of *stare decisis*.[64] Although he candidly labeled the exemption an "aberration,"[65] Justice Blackmun, writing for the majority, reiterated the rationale first stated in *Toolson*, that Congress had had ample opportunity to correct the alleged errors of the Court in *Federal Baseball* but neglected to do so.[66]

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60. *Id.* at 265-66. Specifically, he alleged that the reserve system violated the antitrust laws and constituted "a form of peonage and involuntary servitude contrary to the thirteenth amendment." *Id.*

61. *Id.* The thirteenth amendment of the Constitution provides: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

62. Flood v. Kuhn, 309 F. Supp. 793 (S.D.N.Y. 1970)

63. Flood v. Kuhn, 316 F. Supp. 271, 280 (S.D.N.Y. 1970). Moreover, the district court held that Flood's involuntary servitude claim failed because he failed to show "compulsory servitude." *Id.* at 281-82. On appeal, the Second Circuit affirmed the district court's decision on the basis of the *Federal Baseball* and *Toolson* decisions. Flood v. Kuhn, 443 F.2d 264, 268 (2d Cir. 1971).

64. *Flood*, 407 U.S. at 282. In dissent, Justice Douglas opined:

> If congressional inaction is our guide, we should rely upon the fact that Congress has refused to enact bills broadly exempting professional sports from antitrust regulation . . . I would not ascribe a broader exemption through inaction than Congress has seen fit to grant explicitly. . . . The unbroken silence of Congress should not prevent us from correcting our own mistakes.

Id. at 287-88 (Douglas, J., dissenting).

65. *Id.* at 282.

66. *Id.* at 283-84. History has shown that Congress has been no more willing or able to correct this aberration than has the Court. McCormick, *Baseball's Third Strike: The Triumph of Collective Bargaining in Professional Baseball*, 35 VAND. L. REV. 1131, 1161 (1980). Between 1951 and 1965, more than 60 bills were introduced by Members of Congress addressing the role of antitrust law on professional sports. *Id.* Some bills proposed to exempt all professional sports from the antitrust laws. *Id. See, e.g.*, H.R. REP. No. 5383, 85th Cong., 1st Sess. (1957); H.R. REP. No. 4229, H.R. REP. No. 4230, H.R. REP. No. 4231, 82d Cong., 2d Sess. (1952). Other bills proposed to include baseball within the antitrust laws. McCormick, *supra*, at 1161. *See, e.g.*, H.R. REP. No. 5307, H.R. REP. No. 5319, 85th Cong., 1st Sess. (1957). But Congress refused to adopt all of these proposals. McCormick, *supra*, at 1161.

Most recently, two pieces of legislation were introduced to Congress in 1981. Steinberg, *Application of the Antitrust and Labor Exemptions to Collective Bargaining of the Reserve System in Professional Baseball*, 28 WAYNE L. REV. 1301, 1322 (1982). One bill, entitled the "Sports Franchise Relocation Act," H.R. REP. No. 823, 97th Cong., 1st Sess. (1981), was principally intended to limit the movement of professional sports franchises. Steinberg, *supra*, at 1322. In doing so, the legislation hoped to protect the professional teams' financial interest and spectator appeal in their respective cities. *Id.* at 1323. Baseball was included within the provisions of the bill along with hockey, football, soccer, and basketball. *Id.* Had the bill been

C. The Messersmith/McNally Decision

Following *Toolson*, some may have thought that a viable challenge to organized baseball's reserve rule was futile, barring congressional action.[67] However, baseball history was changed significantly by two events: (1) the Messersmith/McNally arbitration decision,[68] and (2) the 1976 Basic Agreement.[69]

In October of 1975, grievances were filed by the Players Association on behalf of Andy Messersmith of the Los Angeles Dodgers, and Dave McNally of the Montreal Expos.[70] Both pitchers played the 1975 season without contracts.[71] The grievances alleged that under the language of paragraph 10(a) of the Uniform Players Contract, both Messersmith and McNally could no longer be held to a contractual relationship with the former teams at the end of the renewal period.[72] Accordingly, the Players Association argued that both players should be declared free agents and therefore free to negotiate with any team in either league.[73]

In response, the club owners argued that the reserve clause was perpetual in nature.[74] Once signed, a player was bound to his club until he was

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passed, baseball's antitrust exemption would have no longer existed. *Id.* A second bill introduced during the 97th Congress was entitled the "Sports Antitrust Reform Act of 1981." *Id.* at 1324. The purpose of this bill, *inter alia*, was "to repeal baseball's antitrust exemption." *See* H.R. REP. No. 3287, 97th Cong., 1st Sess. (1981). This bill would have amended the antitrust laws by defining as baseball as "trade or commerce." *See id.* § 27(a) at 2. However, neither bill was passed by Congress. Steinberg, *supra*, at 1322. In fact, no legislative history could be found for H.R. 3287.

Congress' refusal to place baseball within antitrust law is difficult to understand. As with the Court, perhaps Congress' reticence reflects baseball's sacrosanct position in the United States. McCormick, *supra*, at 1162.

67. Cozzillio, *supra* note 16, at 18.

68. Professional Baseball Clubs, 66 Lab. Arb. (BNA) 101 (1975) (Seitz, Arb.).

69. *See* Catfish Hunter v. Charles Finley, Panel Dec. No. 23 (1974) (this case represents the first challenge to the reserve clause through a grievance/arbitration procedure agreed to in the 1973 collective bargaining agreement). DWORKIN, *supra* note 11, at 71.

70. DWORKIN, *supra* note 11, at 71. *See generally* Kansas City Royals v. Major League Baseball Players Ass'n., 532 F.2d 615, 618 (8th Cir. 1976).

71. *Royals*, 532 F.2d at 618. *See also* DWORKIN, *supra* note 11, at 72-73.

72. *Professional Baseball Clubs*, 66 Lab. Arb. at 110. Section 10(a) of the Uniform Player's Contract provided, in relevant part: "If [prior to the beginning of the season] the Player and the Club have not agreed upon the terms of [a] contract, . . . the Club shall have the right . . . to renew this contract for the period of one year on the same terms." *Id.*

73. *Id. See also Royals*, 532 F.2d at 618. Moreover, the Association requested that the club owners compensate Messersmith and McNally for losses incurred by the owners' delays in treating them as free agents. *Professional Baseball Clubs*, 66 Lab. Arb. at 110. *See also Royals*, 532 F.2d at 618.

74. *Professional Baseball Clubs*, 66 Lab. Arb. at 102. *See also Royals*, 532 F.2d at 619. In addition, the club owners argued that the players' grievances were not subject to the jurisdiction of the arbitration panel because they fell outside the scope of the grievance procedure. *Professional Baseball Clubs*, 66 Lab. Arb. at 103. *See also Royals*, 532 F.2d at 618.

traded, sold, or released.[75] Alternatively, the owners argued that the Major League Rules allowed them to force players to remain with the signing club "simply by placing their names on the clubs' reserve lists."[76]

In rejecting the clubs' contentions, the arbitrator held that the option provision contained in paragraph 10(a) could be exercised only for one year at most and that the option did not renew itself in perpetuity.[77] Moreover, he concluded that a player could not be reserved simply by placing his name on the club's reserve list unless such player signed under a Uniform Player Contract.[78] After the one-year reserve period had expired, the player would no longer be under contract.[79] Therefore, the arbitrator reasoned that neither Rule 4-A(a) nor Major League Rule 3(g) bound the player to his original team.[80] Consequently, both players were declared free agents.[81]

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75. *Professional Baseball Clubs*, 66 Lab. Arb. at 102. *See also Royals*, 532 F.2d at 619.

76. *Professional Baseball Clubs*, 66 Lab. Arb. at 110. *See also Royals*, 532 F.2d at 618-19. The clubs argued that Major League Rule 4-A(a) granted them exclusive rights for the services of Messersmith and McNally for the 1976 season because their names were listed on the reserve list in 1975. *Professional Baseball Clubs*, 66 Lab. Arb. at 110. Major League Rule 4-A(a) provides, in pertinent part, as follows:

> (a) FILING. On or before November 20 in each year, each Major League Club shall transmit to the Commissioner and to its League President a list of not exceeding forty (40) active and eligible players, whom the club desires to reserve for the ensuing season. . . . On or before November 30 the League President shall transmit all of such lists to the Secretary-Treasurer of the Executive Council, who shall thereupon promulgate same, and thereafter no player on any list shall be eligible to play for or negotiate with any other club until his contract has been assigned or he has been released.

Professional Baseball Clubs, 66 Lab. Arb. at 110-11.

Moreover, the clubs contended that Major League Rule 4-A(a) was supported by Major League Rule 3(g) which dealt with tampering. *Id.* Major League Rule 3(g) provides, in pertinent part, as follows:

> (g) TAMPERING. To preserve discipline and competition and to prevent the enticement of players . . . there shall be no negotiations or dealings respecting employment, either present or prospective between any player . . . and any club other than the club with which he is under contract or acceptance of terms, or by which he is reserved . . . unless the club or league with which he is connected shall have in writing, expressly authorized such negotiations or dealings prior to their commencement.

Id.

77. *Professional Baseball Clubs*, 66 Lab. Arb. at 113-14. *See also Royals*, 532 F.2d at 619. Since no contractual relationship existed between the parties following the 1975 season, the players could not be reserved. *Professional Baseball Clubs*, 66 Lab. Arb. at 114. *See also Royals*, 532 F.2d at 619.

78. *Professional Baseball Clubs*, 66 Lab. Arb. at 115. *See also Royals*, 532 F.2d at 619.

79. *Professional Baseball Clubs*, 66 Lab. Arb. at 116.

80. *Id.* at 115-16.

81. *Id.* at 118. *See also Royals*, 532 F.2d at 618. While the players' damage claims were denied as being premature, the arbitrator retained jurisdiction over matters pertaining to relief. *Professional Baseball Clubs*, 66 Lab. Arb. at 118. *See also Royals*, 532 F.2d at 619. Accordingly, he directed that Messersmith and McNally be removed from the reserve or disqualified lists

The Messersmith/McNally decision reversed a century of baseball history and fundamentally changed the relationship between the owners and the players.[82] By limiting the reserve period to one year, the decision greatly diminished the owners' overwhelming contractual advantage.[83]

D. The 1976 Basic Agreement

Following the Messersmith/McNally decision, the Clubs and Players Association entered into the 1976 Basic Agreement.[84] While the agreement greatly restricted the impact of the Messersmith/McNally decision,[85] it included for the first time in baseball history a provision regarding the reserve system that was promulgated by agreement among the owners and players.[86] This provision, embodied in Article XVII, allowed players with six or more years of major league service to become free agents provided they had no contract for the following year and gave requisite notice of free agency election.[87]

While the 1976 Basic Agreement contained other limitations upon the rights won in Messersmith/McNally, it also contained Article XVII(G), now Article XVIII(H), which was presumably designed to safeguard the vitality of the free agency market:[88]

> *H. Individual Nature of Rights*
> The utilization or non-utilization of rights under this [Article XVIII] is an individual matter to be determined solely by each Player and each

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and that the clubs be allowed to negotiate with them regarding employment. *Professional Baseball Clubs*, 66 Lab. Arb. at 118. *See also Royals*, 532 F.2d at 618.

On appeal, the district court held that the Messersmith/McNally grievances were within the scope of the panel's jurisdiction and that neither the resolution of the merits nor the relief awarded exceeded the arbitrator's authority. Kansas City Royals v. Major League Baseball Players Ass'n, 409 F. Supp. 233, 254 (W.D. Mo. 1976). Subsequently, the Eighth Circuit Court of Appeals affirmed the district court's rulings. *Royals*, 532 F.2d at 632.

82. Note, *Nearly a Century in Reserve: Organized Baseball: Collective Bargaining and the Antitrust Exemption Enter the 80s*, 8 PEPPERDINE L. REV. 313, 338 (1981) [hereinafter *Century*].

83. *Id.* at 338.

84. Brief for Players Ass'n at 2, Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance 86-2, Panel Dec. No. 76 (1987) [hereinafter *Players Brief* 86-2].

85. *Id.* If the effect of the decision had not been modified through negotiation, all players would have been permitted to become free agents every two years unless bound to a longer term through contract. *Id.*

86. *Century*, *supra* note 82, at 341 n.126.

87. *Id.* at 341.

88. *Players Brief* 86-2, *supra* note 84, at 3. Some other limitations included amateur draft compensation and a re-entry "draft" which limited the number of clubs with which a free agent was allowed to contract. *See also* Nicolau, *supra* note 6, at 3.

> Club for his or her own benefit. Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs.[89]

It was the meaning and intent of this provision that became the focal point of the two collusion grievances which will be subsequently discussed.

The birth of free agency in 1976 caused a dramatic rise in players' salaries.[90] Moreover, many free agents were signed to multi-year contracts which contained sophisticated contract provisions previously unheard of.[91] Although not all clubs participated in the free agency market, competition for free agents from 1976 through 1984 was often intense.[92] Many players, having had multiple offers to choose from, moved from their actively bidding former club to another.[93]

The 1985 negotiations led to important changes in the free agency system which were expected to encourage more competition in an already active market.[94] However, the 1985 free agency market proved to be virtually

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89. Basic Agreement between The American and National League Professional Baseball Clubs and Major League Baseball Players Association, Article XVIII(H) at 59-60, effective 1980. [hereinafter *1980 Basic Agreement*]

90. Nicolau, *supra* note 6, at 3. The average salary in 1976, $51,501, rose to $143,756 in 1981, and stood at $329,408 by 1984. *Id.*

91. *Id.* These contractual provisions included, *inter alia*, signing bonuses, incentive bonuses, club options with a "buyout guarantee" to the player in the event the option was not exercised, no-trade provisions, and deferred compensation. Brief for Players Ass'n, Vol. I, at 2, Major League Baseball Players Association v. The Twenty-Six Major League Baseball Clubs, Grievance No. 87-3, Panel Dec. No. 79 (1988) (Nicolau, Arb.) [hereinafter *Players Brief* 87-3, Vol. I].

Almost 200 players who were not yet eligible to become free agents signed multi-year contracts in the latter part of 1976. *Id.* at 4. Between 1977 and 1980, over 200 players with less than six years of major league service signed multi-year contracts. *Id.*

Of those players, over 50 free agents signed four year contracts. *Id.* at 3. Thirty-five of these players signed contracts lasting at least five seasons. *Id.* In most instances, contracts extended over two seasons. *Id.* In many cases, clubs began to sign players to multi-year contracts well in advance of the time the players could become free agents in order to avoid the possibility of losing the players through free agency. *Id.*

92. Nicolau, *supra* note 6, at 4.

93. *Id.* In its brief, the Players Association offered the following statistics: "During [the] 1977 . . . [through] 1980 off-seasons, 223 players elected free agency under the new procedures established [in] the 1976 Basic Agreement. The former clubs for 96 of these players retained negotiating rights, seeking to secure the players' return. More than three-quarters of these players (73) signed with new clubs." *Players Brief* 87-3, Vol. I, *supra* note 91, at 2.

In 1980, further negotiations were held to discuss the effects of free agency. DWORKIN, *supra* note 11, at 92. *See also* Brief for Players Ass'n, Vol. II, at 6, Major League Baseball Players Ass'n v. The Twenty-Six Major League Baseball Clubs, Grievance 87-3, Panel Dec. No. 79 (1988) (Nicolau, Arb.) [hereinafter *Players Brief* 87-3, Vol. II]. Although the Clubs and Players Association settled on all issues except free agency compensation, the 1980 Basic Agreement did not significantly impinge on players' mobility as free agents. Nicolau, *supra* note 6, at 4-5. *See also Players Brief* 87-3, Vol. II, *supra*, at 6.

94. Nicolau, *supra* note 6, at 4. *See also Players Brief* 86-2, *supra* note 84, at 26. Specifically, the professional player compensation system was eliminated, and the free agent draft, which restricted the ability of clubs to bid upon free agents, was also abolished. Nicolau, *supra*

non-existent.[95] Consequently, the Players Association filed Grievance No. 86-2 on behalf of the players alleging that the Clubs violated Article XVIII(H).[96]

III. Collusion I and II: The Nonexistence of the Free Agency Market

A. Collusion I: Liability under Article XVIII(H) of the 1985 Basic Agreement

Grievance No. 86-2 was filed by the Players Association because it was convinced, based on the statistics stated above, that the Clubs had joined in a "boycott" of the 1985 free agency market.[97] The Association contended that a boycott related to free agency, when undertaken by two or more teams, constituted illegal "concerted action" under Article XVIII(H) so long as the teams' actions exhibited a common purpose or goal.[98] No express

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note 6, at 4. Moreover, to deal with the Association's perceived problem of deference to former clubs regarding free agents, December 7 became the established deadline date. Roberts, *supra* note 1, at 8. Before that date, the former club was required to offer salary arbitration to "its" free agent or lose negotiating rights to that player until the following May 1st. *Id.* If he accepted by December 19, the player was considered signed by the former club; if not, the parties were free to negotiate until January 8. *Id.* If an offer for salary arbitration was not accepted or the player was not signed by January 8, the former club lost its negotiating and signing rights to that player prior to May 1st. *Id.*

95. Roberts, *supra* note 1, at 10. *See also* Nicolau, *supra* note 6, at 7. By the beginning of spring training in 1986, only four of the thirty-two free agents (twenty-nine re-entry and three non-tender) had signed with new clubs. Roberts, *supra* note 1, at 10. Of the twenty-nine re-entry free agents, only Carlton Fisk had received a bona fide offer from a new club during the 1985 season. *Id.* None of the eligible free agents received an offer from another club until his former club declared that it was not interested in his continued services. *Id.* Moreover, none of those free agents were offered salary arbitration received offers from other teams. Nicolau, *supra* note 6, at 7. Consequently, all of them, including Fisk, signed with their former clubs by January 8. *Id.*

96. Roberts, *supra* note 1, at 1. The more notable free agents in 1985 included Kirk Gibson, Phil and Joe Niekro, Carlton Fisk, Butch Wynegar, and Donnie Moore. M. Noble, *Yankees Interested in Gibson; Arbitrator's Decision Makes Him Free Agent*, Newsday, Jan. 23, 1988 at p. 3.

97. *Players Brief* 86-2, *supra* note 84, at 1. According to the Association, the purpose of the boycott was to destroy free agency concept and to implement various measures that the Clubs had failed to attain in the 1985 negotiations. Nicolau, *supra* note 6, at 6. Among other proposals, the owners were unsuccessful in achieving the following: elimination of signing and performance bonuses; a cap on raises and contract lengths, with shorter contract lengths for players 35 and over; a prohibition on voluntary player-club contract renegotiations; and a salary cap with exemptions for clubs that signed their "own free agents" within a specified time. *Id. See also Players Brief* 87-3, Vol II, *supra* note 93, at 6. The Association argued that this boycott was effectuated by a series of meetings held between club owners and general managers from September to December of 1985. *Players Brief* 86-2, *supra* note 84, at 29-31.

98. *Id.* at 2-3. *See supra* note 89 and accompanying text. In construing the plain language of this provision, the Association argued that decisions regarding free agents were required to be " 'individual', and that each club was required to act 'solely' for 'its own benefit.' " *Players*

agreement was required to be proven; circumstantial evidence was sufficient to prove the existence of an agreement.[99]

The Clubs' position was that Article XVIII(H) was drafted very narrowly and only prevented the Clubs from forming small bargaining units to negotiate with free agents.[100] A violation of Article XVIII(H) would occur only if it could be proven that they (the Clubs) expressly agreed to form these bargaining units.[101] Because an express agreement needed to be proven, the Clubs contended that circumstantial evidence of concerted action was not sufficient to prove a violation of Article XVIII(H).[102]

In response to the contention that the "non-existent" 1985 free agency market was caused by management's conspiracy, the Clubs attributed the lack of movement to "individually made rational independent decisions, [based on] the general economic condition of the industry, certain changes in the Basic Agreement, and the least attractive pool of free agents in recent years."[103]

Brief 86-2, *supra* note 84, at 3. The Association contended that the provision precluded the clubs from engaging in "mutual aid or protection." *Id.* Moreover, it precluded each club from considering the impact of its action as to the " 'utilization or non-utilization' of its free agency rights on other clubs or upon baseball as a whole." *Id.* The Association grounded its contentions on the history of the provision. *Id.* Specifically, the words "act in concert" contained with Article XVIII(H) were taken from the labor law concept of "concerted activities for the purpose of . . . mutual aid or protection," as embodied in §7 of the Wagner Act. *Id.* at 2. *See also* Prill v. NLRB, 835 F.2d 1481, 1484 n.2 (D.C. Cir. 1987). From this context, the Association argued that concerted activity did not require a showing of some explicit or formal agreement. *Players Brief* 86-2, *supra* note 84, at 2. Rather, "concerted activity" connoted an understanding on the actor's part that his actions were part and parcel of a common scheme, directed toward a common benefit. *Id.* at 2-3.

99. *Player's Brief* 86-2, *supra* note 84 at 34-37.

100. *Id.* at 34. Barry Rona, counsel to the Player Relation Committee, was quoted as saying:

> Unless there was a directive or rule on free agents that was formally legislated or widely known . . . there is no violation of the collective bargaining agreement. I don't accept all this 'wink-and-nod' stuff. . . . The way the union argues it, players wouldn't be allowed to talk with each other and they certainly wouldn't be allowed to share the same agent.

NATIONAL LAW JOURNAL, June 1, 1987, at 33.

Noting that the collusion clause was initiated by the clubs in remembrance of the 1966 holdout by Sandy Koufax and Don Drysdale, Marvin Miller, retired director of the Players Association, was quoted as saying:

> [The owners] initiated it because of fear that the ballplayers, flushed with their new bargaining power, would seek to enhance it by acting together. . . . It was a legitimate worry. But I only was going to give in if it was a two-way street . . . They yielded almost instantly and it just wasn't a big deal.

Id.

101. *Players Brief* 86-2, *supra* note 84, at 34-35.

102. *Id.* at 35.

103. Roberts, *supra* note 1, at 4. The Clubs contended that these independently made decisions reflected nothing more than the "culmination of a ten-year trend." *Id.*

In tracing the bargaining history of Article XVIII(H), the arbitrator concluded that the provision did not prohibit the exchange of information between Clubs, players, and their respective representatives.[104] "What is prohibited," he said, "is a common scheme involving two or more Clubs and/or two or more players undertaken for the purpose of a common interest as opposed to their individual benefit."[105] The arbitrator held that this prohibited agreement or plan need not be in writing and accompanied by all the formalities of a contract.[106] Rather, it may be inferred from the totality of the surrounding circumstances.[107]

As to the merits, the panel concluded that the Clubs' proffered explanations were insufficient to account for the events that occurred during the winter of 1985-86.[108] Rather, a series of meetings held between the owners and general managers from September, 1985, through December, 1985, established a "common understanding" that violated the provisions of Article XVIII(H).[109] In light of these meetings, the panel concluded that no offers

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104. *Id.* at 5.

105. *Id.*

106. *Id.*

107. Nicolau, *supra* note 6, at 9. As to the Clubs' assertion that there was a "uniform disenchantment" with free agency, the arbitrators found this explanation to be inadequate to justify the static events of 1985. Roberts, *supra* note 1, at 12-13. As to their assertions that the 1985 free agents were unattractive, the panel noted that they were unattractive only to Clubs other than their recent employers. *Id.* at 13. This was so even though it seemed otherwise reasonable that at least some interest would have been shown by other Clubs at the time the players elected free agency. *Id.* Kirk Gibson, probably the best of the 63 free agents in the winter of 1985-86, batted .287 with 29 home runs and 97 RBIs for the Detroit Tigers during the 1985 season. NATIONAL LAW JOURNAL, June 1, 1987, at 32. Yet he received no offers from other Clubs from the time he declared free agency in October until he ultimately went back to the Tigers in January, 1986. *Id.*

108. Roberts, *supra* note 1, at 11-13. *See also* Nicolau, *supra* note 6, at 8.

109. Roberts, *supra* note 1, at 13-15. The most compelling evidence of this common understanding proved to be a memorandum written by Leland MacPhail, then retiring Director of the Player Relation Committee, a follow-up letter signed by then Commissioner Peter Ueberroth, and the personal notes and testimony of general managers Harry Dalton and George Steinbrenner regarding the specifics of the meetings. *Id.* at 14. *See also* Nicolau, *supra* note 6, at 11; *Players Brief* 86-2, *supra* note 84, at 29-31; *Players Brief* 87-3, Vol. II, *supra* note 93, at 11-20.

MacPhail had sent a memorandum to the Club owners a few days prior to the October 22, 1985 meeting. Roberts, *supra* note 1, at 14. The memo strongly urged the Clubs to exercise "self discipline in making operating decisions." *Id.* At the meeting, Commissioner Ueberroth reinforced MacPhail's memo by conducting an "informal poll" to determine which Clubs planned to participate in the upcoming free agent market. *Id.* The Commissioner then sent a letter to owners not present at the meeting advising them that a new procedure regarding the signing of free agents had been discussed, and that "each Club is responsible for its own actions and the effect of its actions on Baseball as a whole." Nicolau, *supra* note 6, at 11-12. At the November 6, 1985 meeting, the Commissioner urged the owners not to sign multi-year contracts because it forced other Clubs to follow suit. Roberts, *supra* note 1, at 15.

The panel found that while the exchange of information between clubs, players, and their respective representatives did not constitute a violation of Article XVIII(H) *per se*, how that

were advanced to any of the free agents because of a "common understanding that no Club [would] bid on the services of a free agent until and unless his former Club no longer desire[d] to sign" him.[110] According to the arbitrators, this was the precise result forbidden by Article XVIII(H).[111] Therefore, the panel held that the Clubs' conduct constituted concerted action prohibited by the Basic Agreement.[112]

B. Collusion II: The Forbidden Action Continues - Liability Under Article XVIII(H) of the 1985 Basic Agreement

The Players Association filed Grievance No. 87-3 on February 18, 1987, on behalf of those players who became free agents following the 1986 season.[113] As in the previous grievance, the Players Association charged that the twenty-six Major League Clubs acted in concert with respect to these players and by so doing violated Article XVIII(H) of the Basic Agreement.[114] At issue for the arbitration panel was whether subsequent actions by the Clubs altered the impetus of the events of 1985, or, whether their momentum continued unabated.[115]

The Association argued that the Clubs' pattern of dealing did not change ostensibly from 1985 to 1986.[116] According to the Association, the evidence suggested that the Clubs' goal in 1986 was the same: that was, "to reduce salaries and length of contractual commitments across the board."[117] Although it argued under the doctrine of "conscious parallelism" that direct proof of the defendants' agreement was not required to raise the inference

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information was thereafter used and for what purpose, was another matter. *Id. See also* Nicolau, *supra* note 6, at 23.

110. Roberts, *supra* note 1, at 8.

111. *Id.* at 12.

112. *Id.* at 15.

113. Nicolau, *supra* note 6, at 1. There were seventy-nine re-entry free agents including such notable players as Jack Morris, Tim Raines, Andre Dawson, Lance Parrish, and Gary Ward. *Id.* at 14. Of those seventy-nine re-entry free agents, twenty-seven received offers for salary arbitration by their former Clubs by the December 7 deadline. *Id.* at 15. Unlike the 1985 season, some of these players declined salary arbitration and did not sign with their former Clubs by the January 8 deadline. *Id.* Instead, they opted to receive offers from other Clubs during the period between January 8 and May 1, at which point the former Club could still sign them if they were still available. *Id. See also Players Brief* 87-3, Vol. II, *supra* note 93, at 21.

114. Nicolau, *supra* note 6, at 16.

115. *Id.* at 22.

116. *Id.* at 16.

117. *Id.* Specifically, the Association contended that no re-entry free agents received bona fide offers from any team except his own "unless and until [the former] club had declared its lack of interest or became ineligible to sign . . . the player" because the January 8 deadline had passed. *Id.* Moreover, the Association pointed out that no eligible free agent ever had "at any one time two or more offers from two or more clubs." *Id.* The Association contended that a violation of Article XVIII(H) was committed based solely on these findings because they resulted from acts done in furtherance of a "common benefit." *Id.* at 16-17.

of an illegal conspiracy,[118] the Association asserted that the evidence overwhelmingly justified a finding that such an agreement, in fact, existed.[119]

In response, the Clubs asserted that no violation of Article XVIII(H) was committed because there was no such agreement.[120] While conceding that the 1986 free agent market was not particularly active, the Clubs contended that the Basic Agreement did not mandate any particular level of activity.[121] Rather than being evidence of any conspiracy, the Clubs argued that the statistics relating to the meager free agency market were "symptomatic of a sweeping 'cultural change' in baseball that provide[d] a rational underpinning for good faith actions taken for sound and legitimate business reasons."[122]

As to the application of Article XVIII(H), the Clubs maintained that they made independent, uncoerced judgments in response to a competitive marketplace.[123] Accordingly, these independent judgments, albeit similar, constituted proof of nothing under Article XVIII(H).[124]

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118. *Players Brief* 87-3, Vol. II, *supra* note 93, at 141-44.

119. *Id.* at 144. Specifically, the Association pointed to the circumstances surrounding the signing of Jack Morris, Tim Raines, Andre Dawson, and Lance Parrish, among others, to support its position. *Id.* at 22-75.

120. Nicolau, *supra* note 6, at 17. Rather, the Clubs cited Minnesota's discussions with Jack Morris as evidence that there were offers made to free agents by other Clubs before their former clubs announced their lack of interest. *Id.* Moreover, they argued that some players, like Lance Parrish, actually switched Clubs in spite of ongoing interest shown by their former Clubs, and that offers from other Clubs were received by players who then voluntarily returned to their former Clubs. *Id.* According to the Clubs, these factors showed "significant market activity" which was quite different from the pattern found improper by Chairman Roberts in 1985. *Id.*

121. *Id.* Moreover, they argued that the lack of activity was caused by the "importance of Club economics, the . . . 'poor track record' of free agents, and consequent reluctance [of the Clubs] to part with increasingly valuable amateur draft choices." *Id.* at 18.

122. *Id.* Specifically, the Clubs contended that they were losing money due to players salaries. *Id.* Because the books were open during the 1985 litigation, they argued that a league-wide awareness of franchise economic difficulty brought about the imposition of cost control mechanisms. *Id.* These mechanisms included limiting "the length and number of guaranteed contracts" and the hiring of "bottom-line" executives. *Id.* Moreover, the Clubs contended that certain players' agents adopted hard line negotiation strategies, and that the "continuing bitter litigation between the parties" had a "dampening effect" on the market, thus leading to the lessened activity during the 1986-87 free agent market. *Id.* at 19. Finally, they contended that certain free agents simply had limited market appeal due to "age, injury, performance deficiencies, [or] stated reluctance to move." *Id.* at 20. Taken together, the Clubs argued that all these preceding factors better explained the events of 1986 than some "imagined conspiracy." *Id.*

123. *Id.*

124. *Id.* The Clubs argued some "plus factor" was required to be shown which negated the possibility that their conduct constituted legitimate responses based on prevailing market forces. *Id.* In the Clubs' view, the Players Association had to show that "bidding on free agents [was] so evidently in each Club's economic self-interest that only an agreement [not to do so could] account for any 'parallel' behavior in the free agent market." *Id.* at 21.

Before analyzing the evidence in light of the parties' arguments, the arbitration panel construed the meaning of Article XVIII(H).[125] Similar to the analysis of the previous panel, this panel held that the provision would be violated where the presence of a plan or "common scheme for a common benefit" was proved.[126] Such an understanding or agreement did not need to be in writing or even spoken if circumstantial evidence of "sufficient clarity and force" could be shown to demonstrate its existence.[127]

Based on the evidence presented, the arbitrators found that a common understanding existed among the Clubs to destroy the free agency market of 1986.[128] Stated another way, they found that the Clubs' activity was a continuation of their understanding in 1985.[129] The panel concluded that the evidence of free agent activity was "meager" and "simply insufficient to justify any other determination."[130] The circumstances surrounding the signing of Jack Morris, Tim Raines, Andre Dawson, and Lance Parrish, particularly illustrate this result.[131]

The Clubs contended that the activity surrounding the signing of Jack Morris of the Detroit Tigers evidenced a deviation from the 1985 pattern.[132] Specifically, they asserted that the Minnesota Twins made Morris an offer on December 16, 1985, between the time the Tigers made an offer for salary arbitration and Morris' acceptance of the Tiger's offer.[133]

In recounting the facts that prefaced the talks between Morris and Minnesota, the arbitration panel determined that the Twins had, in fact, made no bona fide offer at all on December 16, 1985, and had no intention to engage in serious negotiation.[134]

The Clubs argued that Tim Raines received offers for more than $1 million from the Seattle Mariners, San Diego Padres, and Houston Astros, and

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125. *Id.* at 23-24.

126. *Id.* at 23.

127. *Id.*

128. *Id.* at 24.

129. *Id.*

130. *Id.* Their analysis of the evidence was divided into two time frames: pre-January 8 and post-January 8. *Id.*

131. *See generally id.* at 29-66.

132. *Id.* at 25; *see also id.* at 29 note 1.

133. *Id.* at 25.

134. *Id.* at 41. Specifically, the panel found that Morris initially turned down an offer from Detroit of $1.2 million as being too low, and declared free agency on November 12, 1986. *Id.* at 30. Yet, when he filed for free agency, there were no serious offers awaiting him. *Id.* This was remarkable to the panel given that Morris had a 21-8 record at the conclusion of the 1986 season. *Id.* at 29. When no offers were advanced following January 8, 1987. Morris' agent made six separate proposals to four different teams. *Id.* at 32. All proposals were rejected by all four teams and no counter-proposals were made, except one purported "offer" by the Twins. *Id.* at 33-43. However, this "offer" was never put into a dollar amount. *Id.* at 40. Rather, it was put "in terms of making Morris the highest paid Twin." *Id.* Convinced there would be no other offer from another Club, Morris accepted Detroit's offer to arbitrate. *Id.* at 43.

that the existence of these offers evidenced a deviation from their conduct in 1985.[135]

On the facts, however, the arbitration panel concluded that none of these teams put forth a bona fide offer.[136] Specifically, the Mariners never presented a definitive salary figure.[137] Also, San Diego's offer constituted a $400,000 cut in Raines' existing salary, and, with Raines still unsigned by the end of March, 1986, Houston made him an offer that represented a 37% cut from his prior salary.[138]

Andre Dawson and Lance Parrish were cited by the Clubs as examples of active competition in the 1986 season because both players signed with different clubs "despite the continued interest of their former clubs."[139] While it was true that Dawson's former club, the Montreal Expos, had an interest in signing him after January 8, 1986, the arbitration panel found that the circumstances did not support the Clubs' active competition assertions.[140] Specifically, the arbitrators found that the Chicago Cubs, who eventually signed Dawson, never bid for Dawson's services.[141] Rather, Dawson signed with the reluctant Cubs only after he permitted the club to set his salary unilaterally.[142]

Similarly, the panel found that the circumstances surrounding Lance Parrish were of no aid to the Clubs' contentions.[143] However, the circumstances did lend an interesting twist to what had become a routine set of

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135. *Id.* at 61. Raines was named National League Rookie of the Year in 1981 and earned $1.515 million in 1986. *Id.* During that season, he stole 70 bases for the Montreal Expos and was the National League Batting Champion with a .334 average. *Id.* The panel found that on October 22, 1986, the Expos made Raines a public offer of approximately $1.528 million for three years. *Id.* Raines turned it down as well as the Club's offer of salary arbitration. *Id.* at 62. Subsequently, the January 8, 1987 deadline passed. *Id.*

136. *See generally id.* at 61-66.

137. *Id.* at 62. Rather, the arbitrators concluded that Seattle's owner, George Argyros, had engaged in a "very preliminary discussion . . . with Raines' agent about paying Raines 'something in the million dollar area' if he would come to Seattle." *Id.*

138. *Id.* at 62-64. *See also Players Brief* 87-3, Vol. II, *supra* note 93, at 30. Raines, himself, then made an offer to seven Clubs which represented an 18% pay cut. *Id.* at 31. None accepted. Nicolau, *supra* note 6, at 65. When no other offers were forthcoming, Raines returned to Montreal on May 1, 1986. *Id.*

139. Nicolau, *supra* note 6, at 48. Dawson signed with Chicago on March 20, 1986; Parrish signed with Philadelphia on March 12, 1986. *Id.*

140. *Id.* at 49.

141. *Id.* When Dawson filed for free agency in 1986, he received no offers prior to January 8, 1987. *Players Brief* 87-3, Vol. II, *supra* note 93, at 32. Because he wanted to leave Montreal, he declined the Expos' offer and awaited offers during the interim between January 8, 1987 and May 1, 1987. *Id.* However, no offers from any Clubs were proffered during that time period either. *Id.*

142. Nicolau, *supra* note 6, at 50. The Cubs acquiesced to Dawson's offer by filling in a blank check in the amount of $500,000. *Id.* This figure represented "far less money than Montreal had offered, or he had made, the year before." *Id.*

143. *Id.*

events. Parrish's former team, the Detroit Tigers, made a public announcement, officially communicating to all other clubs, that they wanted to sign Parrish for the 1987 season.[144] While Parrish received no offers prior to January 8, 1987, the arbitrators found that Bill Giles, president of the Philadelphia Phillies, expressed interest in signing Parrish after January 8, 1987.[145] Giles' interest "caused great concern" among the clubs and resulted in him receiving numerous telephone calls.[146] In spite of these calls, Giles finally made a bona fide offer to Parrish.[147] The Clubs argued that Parrish's ultimate signing with Philadelphia demonstrated that there was "no agreement to restrict free-agent movement and that Giles made an independent decision to sign Parrish unencumbered by any agreement or understanding with any other club."[148] The panel disagreed and found that Giles was severely encumbered.[149]

In reviewing the voluminous record, the arbitration panel was convinced that the Clubs' actions constituted "uniform behavior" precisely echoing those of 1985.[150] When the former Club wanted to retain the free agent, no competitive bids were offered by other Clubs.[151] Moreover, unlike the pre-1985 years, no team challenged a former Club's 'right' to the player even though his contract had expired.[152]

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144. *Id.*

145. *Id.* at 51.

146. *Id.* at 51-52. The Tigers owner, Jim Campbell, called to express his discontent over Giles' interest in Parrish, and American League President Brown then called to remind Giles that the Tigers still wanted Parrish. *Id.* at 52. Moreover, Dr. Brown told Giles that he didn't want to lose a star player to the National League. *Id.* Giles was also called by the owners of the Brewers and White Sox. *Id.* The arbitration panel found that these gentlemen urged Giles to "keep his fiscal responsibilities in mind." *Id.*

147. *Id.* at 53. Significantly, the offer contained a waiver that Parrish was required to sign which released the Phillies, all of Major League Baseball (e.g. all other Clubs), including the Player Relation Committee and the Commissioner, from "any claim arising out of any acts or omissions of any of them." *Id.* The Association quickly filed a grievance alleging that the release required by the Phillies violated several provisions of the Basic Agreement. *Id.* at 54. In its brief, the Association alleged that the purported waiver called for the Players Association to agree not to use evidence of the Phillies' conduct regarding Parrish to prove baseball-wide collusion against free agents. *Players Brief* 87-3, Vol. II, *supra* note 93, at 34. After the grievance was filed, Philadelphia settled and agreed to forego the protection they had sought for the league. *Id.* at 35. Ultimately, Parrish agreed to sign a modified waiver that ran only to the Phillies and bound only Parrish, not the Association. Nicolau, *supra* note 6, at 54.

148. Nicolau, *supra* note 6, at 54.

149. *Id.* Specifically, the testimonial evidence indicated that the Phillies owner was well aware that his actions could have led to escalating bids for free agents and thereby undo what the Clubs had sought to accomplish. *Id.* at 55. Contrary to the Clubs' contentions, the arbitrators concluded that Parrish's signing demonstrated that "compacts between sovereigns can come undone." *Id.*

150. *Id.* at 69.

151. *Id.* at 68.

152. *Id.*

While agreeing that Article XVIII(H) did not guarantee any particular level of market activity, the panel found that the period at issue was not one of "declining activity" as the Clubs asserted.[153] Rather, the arbitrators concluded that there was no market at all.[154] The other clubs felt free to offer competitive bids only after the former clubs no longer wanted the free agent.[155]

Contrary to the Clubs' assertions, the panel reasoned that the result of the "no bid, no bargaining" strategy exercised by the Clubs in 1986, which forced the players back to their former teams, occurred because all the participants understood what was to be done and consented to the plan.[156] Similar to Collusion I, the arbitrators found the impetus for that understanding to be the 1986 meetings held between the owners and the general managers.[157]

In sum, the arbitration panel held that the evidence concerning the critical pre-January 8th period overwhelmingly established that the boycott of 1985 was still in force.[158] Consequently, the Clubs' conduct constituted concerted action in violation of Article XVIII(H).[159]

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153. *Id.*

154. *Id.* at 68-69.

155. *Id.* at 69.

156. *Id.*

157. *Id.* at 70. Specifically, the record reflected that in May, 1986, the Commissioner reiterated his disapproval of the "millions still being paid to non-performing players and the inadvisability of long-term contracts." *Id.* at 71. He then reminded the owners of their "financial responsibility" under the "60/40" rule as it applied to Club payroll levels. *Id.*

At the September, 1986, meeting, the evidence revealed that the Commissioner again expressed his "continuing concern" with individual Club finances. *Id.* at 72. He distributed an updated list of those players slated to become free agents at the conclusion of the 1986 season. *Id.* Moreover, he wanted to be told "if any Club had a policy of signing contracts for more than three years." *Id.*

Testimony regarding the general managers meeting in November, 1986, revealed that there was discussion regarding the noted "decline in multi-year contracts and dumb financial decisions" made by the Clubs. *Id.* Moreover, evidence regarding the June, 1986 meeting revealed that the 1987 salaries of the 1986 free agents averaged 16 percent less than the prior year, and that more than 75 percent of the new contracts were for one year. *Id.* at 73. Significantly, it was found that the overwhelming majority of owners and general managers who attended the meetings in 1986 had no memory of what was discussed. *Id.* at 71-72.

On the facts, the meetings were viewed as more than "the mere exchange of information or giving of advice." *Id.* at 73. Rather, the evidence in its totality convinced the panel that the Clubs knew not to bid before January 8 for free agents coveted by their former Clubs. *Id.* at 74. Moreover, other clubs knew not to sign such free agents after January 8. *Id.*

158. *Id.* at 24.

159. *Id.* at 81.

IV. Reaction to Collusion I and II

A. *Analysis of the Liability Decisions*

It is not enough to conclude at the outset that one agrees with result of the arbitrators' decisions in Collusion I and II. Indeed, the overwhelming evidence seems to support their conclusions. However, the veracity of their holdings depends upon whether their construction of Article XVIII(H) is properly grounded in legal doctrine and canons of interpretation.

Initially, it is important to note that an arbitrator's power is grounded in contract.[160] In the context of professional baseball, the arbitrator is commissioned to interpret and apply the collective bargaining agreement.[161] To properly interpret the agreement, he must view it in light of its context, its language, and any other indicia of the parties' intentions.[162] To properly apply the agreement, the Supreme Court has written that the arbitrator "may look for guidance from many sources," including related areas of law.[163]

(1) The Plain Meaning of Article XVIII(H)

Recall that both arbitration panels held that a violation of Article XVIII(H) could be found if circumstantial evidence was shown which revealed a common scheme or plan related to free agency between two or more clubs or two or more players.[164] Based on the definitions of the words "concert"[165] and "concerted action (or plan),"[166] all that appears to be required

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160. *See* M. Hill & A. Sinicropi, Remedies in Arbitration 6 (1981); Weistart & Lowell, The Law of Sports 449 (1979).

161. Professional Baseball Clubs, 66 Lab. Arb. (BNA) 101, 111 (1975) (Seitz, Arb.).

162. Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1969). *See supra* note 98, for a labor law perspective regarding the origin of the phrase "act in concert" within Article XVIII(H). Although a plausible argument could be made that the provision's wording does not require direct proof of an express agreement, the case law interpreting § 7 of the National Labor Relations Act (NLRA) does little to enlighten one's understanding of the drafters' intention in choosing the words "act in concert" when they incorporated Article XVIII into the 1976 Basic Agreement. *See generally*, Interboro Contractors, Inc., 157 NLRB 1295 (1966), *enforced*, 388 F.2d 495 (2d Cir. 1967) (complaints filed by individual employee acting alone in attempt to enforce collective bargaining agreement constituted protected "concerted action" under § 7 of NLRA); Prill v. NLRB, 835 F.2d 1481 (D.C. Cir. 1987) (safety complaints filed by one employee constituted concerted activity protected by § 7 of NLRA).

163. United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597-98 (1960).

164. *See* Roberts, *supra* note 1, at 5; Nicolau, *supra* note 6, at 23. *See supra* note 89 and accompanying text.

165. The word "concert" has been defined as follows:

> A person is deemed to act in concert when he acts with another to bring about some preconceived result. See Accomplice; Conspiracy.

Black's Law Dictionary 262 (5th ed. 1979).

166. "Concerted action (or plan)" has been defined as:

> Action that has been planned, arraigned, adjusted, agreed on and settled between parties acting together pursuant to some design or scheme. See Accomplice; Combination in restraint of trade; Conspiracy.

by the words "act in concert" within Article XVIII(H) is action which is intended to accomplish a common plan or understanding.[167] There is no definitional requirement that an express "agreement" be shown directly in order for a contractual violation to occur under the Basic Agreement.[168] This comports with the arbitrators' decisions. Since the Supreme Court has held that "words are to be taken in their natural and obvious sense and not in any sense unreasonably restricted or enlarged,"[169] the arbitrators' construction appears to be correct.[170] To be thorough, however, the term "concerted action" can also be analyzed within a related area of law; namely, antitrust law.[171]

BLACK'S LAW DICTIONARY 262 (5th ed. 1979).

167. *Players Brief* 87-3, Vol. II, *supra* note 93, at 134.

168. *Id.*

169. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816).

170. Interestingly, although neither arbitrator chose to rule on the matter, the Players Association argued that the plain meaning of the words contained in the first sentence of the provision also regulates the independent action of each team. *Players Brief* 87-3, Vol. II, *supra* note 93, at 134. While the second sentence of Article XVIII(H) clearly prohibits two or more Clubs from acting together, it appears that the plain meaning of the words contained in the first sentence may also preclude the Clubs even from engaging in unilateral conduct that could be deemed other than "pure self-interest." *Id.* In support of this contention, the Association provided the following definitions:

> "Individual": "As an adjective, 'individual' means pertaining or belonging to, or characteristic of, one single person, either in opposition to a firm, association or corporation, or considered in his relation thereto." BLACK'S LAW DICTIONARY 696 (5th ed. 1979).
>
> "Sole:" "single; individual; separate; the opposite of joint; comprising only one person; the opposite of aggregate." BLACK'S LAW DICTIONARY 1248 (5th ed. 1979).
>
> "Solely:" "being, or acting, without another; alone." WEBSTER'S DICTIONARY LIBRARY 300 (1984).

Players Brief 87-3, *supra* note 93, at 135.

By using the words "individual" and "solely" together in the first sentence of Article XVIII(H), the Association argued that the drafters of the provision intended that actions relating to free agency "must be determined only by reason of self-interest, to the exclusion of all other considerations." *Id.* at 135. Consequently, even a Club that acted alone but did so because it benefited other Clubs, or the whole league, would also violate Article XVIII(H). *Id.* As stated above, whether an individual Club can violate the provision in issue was not reached by the arbitrators. *See generally* Roberts, *supra* note 1, at 4-6; Nicolau, *supra* note 6, 21-24. However, the Association seems to have a valid argument. It is enough that the arbitrators' construction appears to comport with the plain meaning of the words contained in the second sentence relating to concerted action.

171. Interestingly, the Players Association implicitly argued antitrust principles in Collusion I even though organized baseball had consistently been held by the courts to be exempt from antitrust law. D. Kaplan, *Baseball Legal Briefs Wear Different Caps; Sweeping Relief Demanded*, THE NATIONAL LAW JOURNAL, Aug. 17, 1987, at 3. *See also supra* notes 35-66 and accompanying text regarding baseball's antitrust exemption. In Collusion II, the Association specifically argued antitrust principles through the doctrine of "conscious parallelism." *See Players Brief* 87-3, Vol. II, *supra* note 93, at 141-44.

(2) Concert of Action and Antitrust Law

A violation of the federal antitrust laws will result if a plaintiff can establish the existence of a "contract, combination, . . . or conspiracy in restraint of trade or commerce among the several states."[172] Given the words chosen by the drafters of Article XVIII(H) (e.g. "concert of action"), it is clear they did not choose such terminology.[173] However, even under antitrust law, an explicit agreement is not required to demonstrate that a violation of the Sherman Act occurred.[174] A tacit understanding as evidenced by circumstantial proof will suffice.[175] The Supreme Court has written: "[I]t has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy . . . certainly not where . . . joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan."[176] For example, in *United States v. American Radiator and Standard Sanitary Corp.*,[177] defendants appealed from their conviction under section one of the Sherman Act for price fixing in the plumbing industry.[178] The defendants argued that the market-price fluctuations resulted from economic forces, not from illegal agreements forged among the competitors.[179]

In upholding the convictions, the court noted that the evidence need only establish that concerted action was contemplated and that the defendants conformed to that arrangement.[180] On the facts, the Third Circuit found the evidence of an illegal conspiracy to be compelling even in the absence of a formal agreement.[181] Significantly, the court concluded that the defendants' behavior resulted from an illegal agreement made during joint meetings, rather than from their independent business decisions.[182] Attend-

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172. 15 U.S.C. § 1; *see supra* note 38 and accompanying text.

173. *Players Brief* 87-3, Vol. II, *supra* note 93, at 138.

174. American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946).

175. *Id.* at 810.

176. United States v. General Motors Corp., 384 U.S. 127, 142-43 (1966).

177. 433 F.2d 174 (3d Cir. 1970).

178. *Id.* at 180.

179. *Id.* at 181.

180. *Id.* at 182.

181. *Id.* The court noted that all defendants published identical prices for plumbing fixtures based on truckload and carload volumes. *Id.* Moreover, when defendant-American Standard announced a seven percent increase in wholesale net prices for plumbing fixtures, the other defendants followed its prices. *Id.* at 183-84. Finally, when American Standard announced its intention to discontinue enamel cast iron fixtures and replace them with more costly acid resistant fixtures, all defendants followed suit within two months. *Id.* at 186.

182. *Id.* at 184. Specifically, defendants' common understanding was implemented by (1) meetings attended by plumbing fixture distributors and wholesalers, and (2) telephone calls, letters, and other contacts between meetings, where defendants confronted one another with reported deviations from agreed upon maximum discounts and published prices of plumbing fixtures. *Id.* at 180-81.

ance at these meetings was sufficient to link each defendant to the conspiracy.[183]

An agreement in violation of the federal antitrust laws can arise even in the absence of verbal communication, and even where the participants expressly deny under oath that a common understanding has been reached.[184] The court espoused this reasoning in *United States v. Foley*,[185] where six corporations and three individuals were charged with conspiracy to fix real estate commissions in violation of section one of the Sherman Act.[186] At a dinner party attended by the other defendants, defendant-Foley announced that his firm was raising its commission from six to seven percent.[187] The court found that within months of Foley's announcement, each defendant adopted a seven percent commission rate.[188]

As to the evidentiary requirements, the court noted that proof of an antitrust conspiracy need not be direct.[189] Rather, a finding of conspiracy is permitted when competitors voluntarily participate in a plan that works to restrain commerce.[190]

While the evidence was sketchy at best, the court upheld the antitrust convictions of the individual defendants because they each "expressed an intention or gave the impression that his firm would adopt a similar change [in the commission rate]."[191] The court concluded that although an express agreement was not found in words or writing, the circumstantial evidence presented was sufficient to permit the jury to find that the defendants engaged in concerted action in violation of the federal antitrust laws.[192]

Since the antitrust case law seems to speak directly to the facts of the baseball collusion cases, the respective principles of law invite application, if not expressly, than by analogy. Specifically, both arbitrators found that each

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183. *Id.* at 188.

184. United States v. Foley, 598 F.2d 1323, 1331-32 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

185. 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980).

186. *Id.* at 1326. All defendants were realtors and belonged to a trade association that operated a multiple listing service. *Id.* at 1327. When a house was listed with one of these realtors, a fixed percentage of the sale price would be divided among the firms involved in the sale. *Id.* The prevailing commission rate was six percent of the sale price. *Id.* The court found that the real estate brokerage business in Montgomery County was experiencing economically difficult times at the time of litigation. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 1331.

190. *Id.*

191. *Id.* at 1332. The court found that in the months preceding the dinner, several defendants contemplated a change in commission rate but were afraid to undertake the move for fear they would be unsuccessful in competing with firms at six percent. *Id.* at 1331. Moreover, there was evidence that telephone calls and letters were exchanged between members of the "conspiracy" to hold their fellows to the "agreement" of September 5. *Id.* at 1332.

192. *Id.* at 1331.

club knew that concerted action was contemplated and invited by their leaders, the Commissioner and the Players Relation Committee.[193] No club dissented.[194] In fact, virtually every club participated with lock-step exactness.[195] The documentary and testimonial evidence produced from the meetings held between the owners and general managers during the winters of 1985-'86 and 1986-'87 made these findings conclusive and correct.[196] Moreover, evidence of the conspiracy was cemented with telephone calls and letters to one of its members the moment he attempted to break ranks.[197] He was "encouraged" to remember his "fiscal responsibilities."[198] If such evidence was sufficient to find conspiracies in *American Radiator* and *Foley*, it was certainly enough in these cases where the activity within the free agency market did not just decrease (as prices might for plumbing fixtures); rather, it completely disappeared.

(3) Concert of Action and Conscious Parallelism

In defense of the Clubs' position, it is possible to argue under the law of conscious parallelism that something more than circumstantial evidence is required to prove concerted action under Article XVIII(H). The Supreme Court has recognized that consciously parallel behavior by business competitors may create an inference of a Sherman Act offense.[199] However, the Court "has never held that proof of parallel business behavior conclusively establishes agreement, or . . . that such behavior itself constitutes a [federal antitrust violation]."[200] That is, market forces alone can sometimes explain conduct that otherwise appears to result from an illegal conspiracy.[201]

In *Theatre Enterprises v. Paramount*,[202] the plaintiff brought suit for treble damages and an injunction under sections four and sixteen of the Clayton Act, alleging that defendant-motion picture producers and distributors violated antitrust laws.[203] The jury returned a verdict in favor of the defendants.[204] On appeal, the defendants argued that they merely adhered to an established policy of restricting "first runs" in Baltimore to the eight

193. *See* Roberts, *supra* note 1, at 15; Nicolau, *supra* note 6, at 69.

194. *See* Roberts, *supra* note 1, at 15; Nicolau, *supra* note 6, at 69.

195. *See* Roberts, *supra* note 1, at 15; Nicolau, *supra* note 6, at 69.

196. *See supra* notes 109, 157 and accompanying text.

197. *See supra* note 146 and accompanying text.

198. *Id.* Even George Steinbrenner, in Collusion I, revoked his "private offer" to Carlton Fisk, following the November meeting in Florida, 1985. Roberts, *supra* note 1, at 11.

199. Theatre Enterprises v. Paramount, 346 U.S. 537, 541 (1954).

200. *Id.* at 541.

201. *Id.*

202. 346 U.S. 537 (1954).

203. *Id.* at 538. Specifically, plaintiff alleged that "defendants conspired to restrict 'first run' pictures to downtown Baltimore theatres, thus confining its suburban theatres to subsequent runs and 'unreasonable clearances'." *Id.*

204. *Id.* at 539.

downtown theatres.[205] The issue before the Court was whether defendants' conduct stemmed from independent decisions or from an agreement, tacit or explicit.[206]

Although the Court found that enough circumstantial evidence existed to allow the conspiracy charge to go to the jury, it stated that proof of parallel business behavior has never been enough, by itself, to constitute a federal antitrust violation.[207]

In light of *Paramount*, courts have generally required plaintiffs to establish conscious parallelism plus some other direct or circumstantial proof to evidence a conspiracy.[208] However, as the following case law illustrates, the additional requirements still do not require direct or explicit proof that an agreement exists between the alleged conspirators. This further supports the arbitrators' decisions as to liability in Collusion I and II.

In *Schoenkopf v. Brown & Williamson Tobacco Corp.*,[209] plaintiff brought suit against Brown & Williamson Tobacco Corp. (B & W), among others, alleging, *inter alia*, violations of the Sherman Act.[210] In rejecting plaintiff's contentions, the court, citing *Paramount*, noted that other tribunals had recognized that an inference of an illegal agreement could arise from consciously parallel business conduct that was coupled with other circumstances.[211] In defining what constituted these additional circumstances the court wrote: "a plaintiff must also show (1) that the defendants acted in contradiction of their economic interests, and (2) that the defendants had a motive to enter into an agreement."[212]

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205. *Id.* at 539. Defendants contended that plaintiff's desire to receive 'first runs' would have required them to grant him an exclusive license which would have been economically unsound given his location in a small shopping center. *Id.* at 540. In contrast, the downtown theatres offered greater opportunities for advertisement and exploitation of newly-released films which was essential to maximize returns from the showing of these films. *Id.*

206. *Id.* at 540.

207. *Id.* at 540-41. Since defendants rebutted plaintiff's contentions regarding the alleged conspiracy and there was no direct evidence of an illegal agreement, the denial of a directed verdict for plaintiff was upheld. *Id.* at 541-42.

208. *See generally Players Brief* 87-3, Vol. II, *supra* note 93, at 142.

209. 637 F.2d 205 (3d Cir. 1980).

210. *Id.* at 206. Plaintiff operated as an independent reporting agent for vendor machine owners who owned only a small number of machines. *Id.* at 207. Defendants marketed their product, in part, by sales through vending machines and refused to deal with plaintiff. *Id.* Plaintiff alleged that defendants' refusal to deal with him constituted a conspiracy that violated antitrust principles. *Id.*

211. *Id.* at 208.

212. *Id.* As to the first factor, the court rejected plaintiff's contentions that defendants' refusal to deal with him constituted action in contradiction to their economic interest. *Id.* Specifically, the court found that for defendants to realize benefit from their "promotional allowance program," they depended upon personal contact with their individual vendors. *Id.* Because plaintiff's reporting methods did not allow the required personal contact, the court found that defendants' action promoted, rather than contradicted, their economic self-interest. *Id.* at 208-9.

In the recent collusion suits filed by the Players Association, the arbitrators could have easily found the presence of both "plus factors" given the overwhelming evidence presented.[213] As to the first "plus factor", common sense demanded the conclusion that the Clubs acted in contradiction of their individual self-interest.[214] Were it not for the centrally organized overview orchestrated by their leaders, it is virtually impossible to believe that each and every club individually decided to refrain from acquiring (or even making an offer to) any free agent (irrespective of the player's expertise) purely out of economic self-interest.[215] Yet, the Clubs wanted the world to believe that this is what caused the nonexistence of a free agent market in the two seasons from 1985 through 1987.[216] As to the second "plus factor", documentary and testimonial evidence of the meetings made the motive of the Clubs' concerted action very clear:

> [L]ong-term guaranteed contracts were a drag on profits. Since competition for free agents was obviously the principal cause of long-term guaranteed contracts, it followed that free agency was itself a drag on profits. If the cause could be eliminated, profits would rise. Plainly, if all the clubs refused to deal with free agents, competition would wither, long-term guaranteed contracts could be cut down or eliminated, and all clubs would save money in the long run.[217]

The success of their plan as evidenced by the virtual demise of the free-agent market, clearly supported the Association's reasoning and arbitrators' findings that a conspiracy existed. Other "plus factors" that have been identified by courts to support an inference of conspiracy based on conscious parallelism include proof of interdependence among the alleged competitors.[218]

In *Barry v. Blue Cross of California*,[219] two California physicians alleged that Blue Cross violated federal antitrust laws by participating in price-fixing and a group boycott.[220] Specifically, plaintiffs alleged that be-

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As to the second "plus factor," the court found no evidence to support plaintiff's contention that defendants had a motive to agree among themselves to limit promotional advances that actually served to promote their interests. *Id.* at 209. Rather, the parallel activity complained of was consistent with their interest. *Id.*

213. *Players Brief* 87-3, Vol. II, *supra* note 93, at 142.

214. *Id.*

215. *Id. See also Players Brief* 86-2, *supra* note 84, at 12.

216. *See generally* Roberts, *supra* note 1, at 7-13; Nicolau, *supra* note 6, at 18-21.

217. *Players Brief* 86-2, *supra* note 84, at 12.

218. Barry v. Blue Cross of Cal., 805 F.2d 866, 869 (9th Cir. 1986).

219. 805 F.2d 866 (9th Cir. 1986).

220. *Id.* at 867. Pursuant to California legislation, Blue Cross contracted with doctors and hospitals to provide services at a fixed rate to those who subscribed to the "Prudent Buyer Plan" (the Plan). *Id.* Blue Cross paid ninety percent (90%) of the cost of service if the subscriber received treatment from a participating physician. *Id.* If a nonparticipating physician was consulted, Blue Cross paid only sixty to seventy percent (60-70%) of the physician's fee. *Id.* Only one of the plaintiff-doctors participated in the Plan. *Id.* at 868. However, both argued

cause several thousand physicians all signed identical contracts, a tacit conspiracy among the doctors could be inferred.[221] They contended that under previously established case law each doctor knew that "cooperation was essential to the successful operation of the [P]lan."[222]

In rejecting plaintiffs' contentions, the court held that plaintiffs did not establish that the participating physicians were economically interdependent, a necessary factor for the court to infer any conspiracy from consciously parallel behavior.[223] In defining the test for economic interdependence, the court wrote: "[E]conomic interdependence exists only if an industry has relatively few competitors so that the actions of each has some impact on market prices and thus on the conduct of competitors."[224]

In the present collusion cases, however, the interdependent nature of organized baseball's financial structure was acknowledged by both arbitrators.[225] Contrary to *Barry*, the industry called Major League Baseball is comprised of relatively few competitors. Indeed, as was found by both arbitrators, the Clubs' interdependence was vital to the fulfillment of their objectives; namely, to lower player salaries and shorten the length of contracts.[226] That their interdependence was vital was evidenced by their lockstep behavior.[227] Significantly, evidence of this uniform behavior, effectuated by meetings, correspondence and other communications, has also been deemed a "plus factor" sufficient to warrant the inference of a conspiracy arising from consciously parallel behavior.[228]

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that under Interstate Circuit v. United States, 306 U.S. 208 (1939), the Plan represented a horizontal agreement among competing physicians and was therefore *per se* unlawful under § 1 of the Sherman Act. *Barry*, 805 F.2d at 868. Under the standard established by *Interstate Circuit*, the court in *Barry* stated that a tacit agreement existed under the doctrine of conscious parallelism if the following were shown:

> [1] knowing that concerted action was contemplated and invited, the [physicians] gave their adherence to the scheme and participated in it. [2] Each [physician] was advised that the others were asked to participate; [and 3] each knew that cooperation was essential to successful operation of the plan.

Id. at 869 (quoting Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226 (1939)).

221. *Barry*, 805 F.2d at 868.

222. *Id.* at 869. *See, e.g., Interstate Circuit*, 306 U.S. at 226.

223. *Id.*

224. *Id.* On the facts, the court in *Barry* held that the "doctors offered no evidence to show that an oligopolistic market structure existed among physicians." *Id.* Moreover, there was no evidence that the Plan's benefits would accrue to physicians only if a certain number of member physicians were required. *Id.* at 870. In analyzing the other "plus factors", the court also found that the doctors' participation in the Plan was not contrary to their economic self-interest. *Id.* Rather, it increased their access to more customers. *Id.*

225. *See generally* Roberts, *supra* note 1, at 6-11; Nicolau *supra* note 6, at 3-6; *Players Brief* 87-3, Vol. II, *supra* note 93, at 143.

226. *See* Roberts, *supra* note 1, at 14-15; Nicolau, *supra* note 6, at 69.

227. *See* Roberts, *supra* note 1, at 14-15; Nicolau, *supra* note 6, at 69.

228. Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397 (4th Cir. 1958).

Specifically, in *Pittsburgh Plate Glass Co. v. United States*,[229] Pittsburgh Plate Glass (PPG) appealed from a conviction for conspiracy to fix prices for the sale of plain plate glass mirrors to furniture manufacturers in violation of section one of the Sherman Act.[230] In upholding the conviction on appeal, the court found that PPG and its competitors engaged in identical simultaneous actions by raising prices following an annual meeting held in October, 1954 of the Mirror Manufacturers Association.[231] The court found that this parallel behavior constituted circumstantial evidence that "a common purpose and plan existed" in violation of antitrust principles.[232]

In both collusion cases, the arbitrators specifically found that no team attempted to bid on other teams' free agents following the series of meetings held in the off-seasons between 1985 through 1987.[233] Because no innocent or reasonable explanation was offered by the Clubs to explain these results, the arbitrators correctly found that this uniform behavior constituted concerted action.[234] Moreover, given the overwhelming proof which seemingly evidenced the existence of the requisite "plus factors" for finding a conspiracy under principles of conscious parallelism, the conclusions of the arbitrators' in Collusion I and II are supported by legal doctrine.

B. Analysis of Alternative Remedies

Following the liability decision in Collusion I, the arbitration panel awarded the 139 aggrieved players $10,528,086.71 as compensation for the Clubs' conspiracy against free agents between the 1985-'86 seasons.[235] Moreover, the panel retained jurisdiction to formulate appropriate remedies for individual claims.[236]

The Players Association argued three methods for determining the damage amount.[237] Under the first method of calculation, the Association contended that the players lost approximately $15 million.[238] Under the sec-

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229. 260 F.2d 397 (4th Cir. 1958).

230. *Id.* at 399.

231. *Id.* at 399-400. Telephone calls followed the meeting informing all other competitors that an agreement existed to raise prices on mirrors to seventy-eight percent (78%) off list. *Id.* at 400. Moreover, after PPG sent a form letter to its customers advising them of the price increase, all other participating manufacturers sent similar letters announcing the identical increase. *Id.*

232. *Id.* at 401.

233. *See* Roberts, *supra* note 1, at 15; Nicolau, *supra* note 6, at 71-73.

234. *See* Roberts, *supra* note 1, at 15; Nicolau, *supra* note 6, at 71-73.

235. *Damages* 86-2, *supra* note 4, at 30.

236. *Id.*

237. *Id.* at 7. Each method was designed to establish a range of damages sustained by the free agents. *Id.*

238. *Id.* at 7-10. This method, called the Demand Model, was conceived by Glassman-Oliver Economic Consultants, Inc. (Glassman-Oliver). *Id.* at 7-8. This model, which used regression equations linking "non-network" revenues to player salaries, sought to predict what level salaries would have reached in 1986 absent concerted activity by the Clubs. *Id.* at 8. The theory

ond method, the amount was approximately $20 million.[239] The third method used to establish 1986 aggregate salary shortfall computed damages of approximately $7.5 million.[240]

The Clubs contended that the methods used by the Association were faulty and produced inflated figures.[241] The Clubs argued that the players lost no more than $2-4.4 million.[242]The arbitration panel's damage award represented only salary losses to the players.[243] Outstanding claims that may still be submitted by the players include losses of multi-year contracts, signing bonuses, bonus clauses, and no-trade clauses.[244]

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for this model was that the growing popularity of the sport would increase club revenues which, in turn, would result in the owners paying higher salaries to their players. *Id.* Damage estimates based on this revenue-salary relationship were computed for players with two to five years of services (2-5 players), and those with six or more years of service (6+ players). *Id.* at 9. The total for both groups was $15,047,202.00. *Id.* at 10.

239. *Id.* at 12. The second econometric method was a Marginal Revenue Product model also designed by Glassman-Oliver. *Id.* This model linked player performance and a club's winning percentage, with non-network revenues and expected player salary increases. *Id.* The theory of this model was that since improved player performance in a competitive market would force non-network revenues to increase, players would be given higher salaries the following year. *Id.* Aggregate salary shortfall computed for 6+ players was calculated to be $20,130,778.00. *Id.* at 14.

240. *Id.* at 15-20. The third method, conceived by Doyle Pryor, Esq., as a computer analysis of new contracts signed by players with two or more years of service from 1981 through 1986. *Id.* at 15-16. This analysis compared the average first year salaries of contracts that began in a particular year with the average starting salaries of similar players in earlier years. *Id.* at 16. These figures were then averaged for each group and percentage increases or decreases were computed for successive years. *Id.* at 17. Salary shortfall constituted the difference between the percentages before the Clubs concerted action and during their collusive activity. *Id.* Because the percentage increase of average annual salaries for the 6+ players fluctuated from 8.7% to 51.2%, the Association computed the 1986 salary shortfall from $3,921,743.00 to $15,321,974.00. *Id.* Based on a 27% midpoint, the shortfall was said to be $7,306,488.00. *Id.*

241. *Id.* at 12-17. *See also* The Washington Times, Sept. 1, 1986, at D6, col. 1.

242. The Washington Times, Sept. 1, 1986, at D6, col. 1. As to the Demand Model, the Clubs contended that there was no correlation between changes in average salaries and non-network revenues. *Damages* 86-2, *supra* note 4, at 10. Even if a correlation existed, the Clubs argued that a portion of the $15,047,202.00 should have been discounted to reflect actual increases in the percent of average player salary from 1982 through 1985. *Id.* at 11.

As to the second method of calculation, the Clubs contended that the players' assigned contribution to average non-network revenues exceeded actual figures. *Id.* at 15. Given that, the model did not accurately reflect "marginal" revenue product at all. *Id.*

The arbitration panel made no mention of the Clubs' contentions regarding the Association's damage claim under the Pryor computer based analysis. *Id.*

243. In arriving at the $10.5 million figure, the panel employed all three methods but made significant modifications to each of them. *See generally Damages* 86-2, *supra* note 4, at 12-20. The $15,047,202.00 damage amount under the Demand Model became $11,285,401.50. *Id.* at 12. The Marginal Revenue Product model's amount of $20,130,778.00 became $13,033,562.00. *Id.* at 15. The $7,306,488.00 under the Pryor computer based analysis was reduced to $7,265,295.63. *Id.* at 20. The panel then added these adjusted figures, averaged them, and held that the aggregate salary shortfall for 1986 was $10,528,086.71. *Id.*

244. *Id.* at 28-29.

Similarly, as compensation for lost salary during the 1987 and 1988 seasons, the second arbitration panel recently awarded the aggrieved players $102.5 million for violating the Basic Agreement.[245]

Along with the three methodologies argued in the 1985-'86 collusion case, the Players Association presented a fourth method to establish the aggregate salary shortfall for the 1987-'88 seasons.[246] Under the first method of calculation, the Association contended that the players lost approximately $50 million for 1987 and $80 million for 1988.[247] Under the second method, the salary shortfall was approximately $54 million for 1987 and $80 million for 1988.[248] While the third method offered no estimate for salary losses for 1988, the 1987 shortfall range was calculated to be from $37 to $80 million.[249] Under the fourth method, the Association contended that the shortfall was approximately $54 million for 1987 and $89 million for 1988.[250]

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245. *Damages* 87-3, *supra* note 8, at 42. *See also* N.Y. Times, Sept. 18, 1990, at D25, col. 2.

246. *Damages* 87-3, *supra* note 8, at 6.

247. *Id.* at 14. These damage estimates were based on the shortfall produced by the Demand Model (*See supra* note 238 and accompanying text). Calculations for 1987 were computed for players with three to five years of experience (3-5 players) and those with six or more years of service (6+ players). *Damages* 87-3, *supra* note 8, at 14. For the 3-5 players, this model estimated the range of 1987 damages to be $48.8 to $50.7 million and $78.4 to $80.9 million for 1988. *Id.* For 6+ players, the 1987 salary shortfall was said to be $31.3 and $47.0 million for 1988. *Id.*

248. *Id.* at 14. Using the Marginal Revenue Product model (MRP) (*See supra* note 239 and accompanying text), the Association specifically contended that the 1987 shortfall for 6+ players was $26.9 million and $34.2 million for 1988. *Id.* In addition, 3-5 players lost between $25.3 to $28.4 million in 1987 and $45.7 to $48.5 million in 1988 salary shortfall. *Id.* at 14-15. Combined, this model produced a salary loss range of $52.2 to $55.4 million for 1987 and $79.9 to 82.7 million for 1988. *Id.* at 15.

249. *Id.* at 15. Under the Pryor data basis analysis (*See supra* note 240 and accompanying text), estimated salary shortfall for 1987 was calculated by applying three different percentage increases to the average salaries of new contracts. *Id.* Applying a "minimum/average/maximum format," the 1987 aggregate shortfall was estimated to be from $37.8 to $59.1 to $80.1 million. *Id.*

250. *Id.* at 15. This method was called the Marginal Revenue Product-Indexed Player model (MRPI). *Id.* at 6. The theory of the MRPI and the MRP were exactly the same. *See supra* note 239. While the MRP model purportedly determined marginal revenue product and salaries of different player groups, the MRPI model was designed to calculate the salaries and marginal revenue product of the individual players who signed during a given year. *Damages* 87-3, *supra* note 8, at 7-8. Under the MRPI model, aggregate salary shortfall for 6+ players was estimated to be $30.3 million for 1987 and $42.5 million for 1988. *Id.* at 15. For 3-5 players, the shortfall was said to be $23.6 million in 1987 and $47.3 million in 1988. *Id.* The total for both groups was $53.9 million in 1987 and $88.8 million in 1988. *Id.*

Once again, the Clubs contended that the Association's methods produced flawed and inflated figures.[251] The Clubs argued that players lost no more than $25 million in 1987 and $42 million in 1988.[252]

Because the second arbitration panel's damage award represented only salary losses to players, the panel retained jurisdiction to hear individual claims regarding losses of multi-year contracts, special covenants, and the amount of damages in seasons subsequent to 1988.[253]

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251. *Damages* 87-3, *supra* note 8 at 16. As to the Demand Model, the Clubs argued that the calculations for 6+ players were over-estimated due to the "structural shift in baseball's salary/revenue relationship" following the 1981 players strike. *Id.* By ignoring this factor, the Clubs contended that equal weight was improperly given to the 1978-1985 years. *Id.* Moreover, the Demand Model improperly ignored national network revenues and incorrectly used lagged revenues rather than current revenues. *Id.* at 16-17. Since the 6+ calculations were over-estimated, the Clubs contended that the 3-5 players' estimates were inflated by definition. *Id.* at 17. Finally, the model produced inaccurate results in the Clubs' view because it treated 3-5 players as a homogenous group rather than taking into account the different skill level of each class. *Id.*

In labeling the MRP and MRPI models as "ill-conceived," the Clubs argued that the models' dependence on three regression equations made them unreliable as forecasting tools. *Id.* at 17-18. Moreover, the models added nothing to the explanation of player salaries beyond that offered by the Demand Model. *Id.* at 17.

As to the Pryor computer analysis, the Clubs asserted that the estimates improperly ignored "old contracts then in existence." *Id.* at 18. By ignoring the downward trend in percentage increases, the Clubs contended that the model inflated the salary shortfall estimates. *Id.*

252. *Id.* at 18-19. Specifically, the Clubs' estimates for the salary losses of 6+ players in 1987 ranged from $18 million to $23.9 million. *Id.* at 18. Under a "common group" analysis, the 3-5 players were not injured either in 1987 or 1988. *Id.* at 19. Instead, the Clubs contended that players with 4 to 5 years of service (4-5 players) suffered salary losses ranging from $17.5 to $28.4 million in 1987. *Id.* For 1988, the Clubs shortfall estimates for 6+ players was between $17.9 million to $35.6 million, and the shortfall for 4-5 players was $31.4 to $49.6 million. *Id.*

253. *Id.* at 42. Before arriving at the $102.5 million figure, the arbitrators first examined the efficacy of each model to determine its usefulness in predicting salary shortfall. *Id.* at 20. While the Pryor data base model was rejected as an independent predictor of salary levels, the panel concluded that it could be used to check the econometric evidence presented. *Id.* at 21. The two marginal revenue product models were also rejected as being "too simple and too complicated" to be useful. *Id.* at 22. The models were too simple because they measured player performance based only on two criteria and improperly tied increased revenues solely to improved performance and winning. *Id.* According to the panel, the models should have accounted for the effects of increased television and radio revenue, as well as rising ticket prices, in calculating increased revenue amounts. *Id.* Moreover, the models were too complicated because their results depended on three regression equations, each of which contained forecasting errors. *Id.*

Instead, the arbitration panel relied specifically on the Demand Model. *Id.* at 26. In the panel's view, the relative simplicity and direct relationship to revenue made it a more reliable methodology than the others presented. *Id.* Based on the data, the panel determined that salary shortfall for 6+ players was $25 million for 1987 and $39 million for 1988. *Id.* at 35. In concluding that the Association overstated the 3-5 player damages by $1.5 million per year, the panel reduced the shortfall amount for 3-5 players to $13 million for 1987 and $25.5 million for 1988. *Id.* at 40. The aggregate salary loss was $38 million in 1987 and $64.5 million in 1988. *Id.* These figures, expressed in September 1987 dollars, included the pro-rata share of lost signing

Since additional remedies will be warranted based on the Clubs' collusive behavior from 1985 through 1987, a question arises as to whether compensatory damages alone are enough to remedy the wrongs committed by the Clubs, or whether punitive-type remedies should be formulated to prevent future occurrences of concerted behavior.

(1) The Arbitrator's Power

An award of damages in labor arbitration is generally limited to that amount which will make the injured employee whole.[254] However, it is axiomatic that compensatory damages may not be the appropriate remedy in all situations. Accordingly, the Supreme Court has concluded that an arbitrator must be given flexibility and latitude in formulating remedies in order to function effectively in a labor relations setting.[255]

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bonuses and earned bonuses. *Id.* The figures did not include "loss of free agency" or amounts lost under special contract covenants. *Id.* at 40-41.

With further hearings scheduled, the Players Association has purportedly requested that the panel grant its request for interest on the compensatory award. N.Y. Times, Sept. 19, 1990, at D27, col. 5.

254. HILL & SINICROPI, *supra* note 160, at 184. *See also* Note, *Punitive Damages in Arbitration: The Search for a Workable Rule*, 63 CORNELL L. REV. 272 (1978); Note, *Power of Arbitrators to Award Punitive Damages in Particular Types of Arbitration*, 83 A.L.R.3d 1038.

255. HILL & SINICROPI, *supra* note 160, at 20. Specifically, the Supreme Court has written that when arbitrators interpret and apply the collective bargaining agreement, they must use their expertise and judgment in formulating remedies in order to solve the problem at issue. Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 597 (1960). Flexibility is required since the collective bargaining agreement may not provide specific remedies for all possible contingencies. *Id.* at 597. The *Enterprise* Court noted that while the arbitrator "may look for guidance from many sources," in fashioning the appropriate remedy, "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *Id.* at 596-97.

Given an arbitrator's flexibility to issue remedies, it can be argued that the first arbitration panel should have bolstered its damage award with a cease-and-desist order. Kaplan, *supra* note 171, at 3. The briefs regarding liability filed by the Players Association laid the foundation necessary to request such relief. *Id.* Had a cease-and-desist order been issued by the first arbitration panel, the Clubs' continued violation of the order in 1986-'87 may have served as the basis for an enforcement proceeding in federal court. HILL & SINICROPI, *supra* note 160, at 174.

However, while it is apparent under current case law that the panel could have ordered the Clubs to stop violating the agreement, commentators have questioned whether this "remedy" is more shadow than substance. *Id.* at 173. When an injunction is ordered requiring a party to cease-and-desist from certain behavior, the court has the power to compel compliance through issuance of a contempt citation. *Id.* An arbitrator, however, does not possess the same contempt power and cannot therefore rely solely on the cease-and-desist order to prevent subsequent violations by the offender. *Id.* In these instances, it is perhaps better for the arbitrator to redress the violations by augmenting the effectiveness of a cease-and-desist order with other punitive-type remedies. *Id.* (citing L. Crane, "The Use and Abuse of Arbitral Power," in *Labor Arbitration at the Quarter Century Mark*, NAT'L ACAD. OF ARB. 73-73 (1976)).

(2) Punitive Damages

The briefs regarding liability filed by the Players Association laid the foundation necessary to request punitive damages.[256] The first arbitration panel, however, did not include a finding that the Clubs' concerted behavior constituted an intentional breach of the collective bargaining agreement.[257] This may explain why the panel chose not to award punitive damages for Clubs' collusive action during the 1985-'86 season.[258] However, this failure to do so might also have derived from a common arbitral view that (1) punitive damages are not an appropriate award in arbitration, and (2) such an award exceeds the arbitrator's authority.[259]

Commentators have traced the traditional unavailability of punitive damages in arbitration "to the common law notion that punitive damages are not available in the standard breach of contract action, unless a tort is in some way associated with the wrongdoing."[260] While some arbitrators have even seriously questioned whether punitive-type remedies have any place in the arbitration process,[261] others have endorsed the use of punitive-type sanctions in labor arbitration settings.[262]

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256. Kaplan, *supra* note 171, at 3. The Association specifically asked the arbitrators to find that the Clubs' conduct constituted an intentional and material breach of the Basic Agreement. *Players Brief* 86-2, *supra* note 84, at 49-52. *See also Players Brief* 87-3, Vol. II, *supra* note 93, at 150.

257. *See generally* Roberts, *supra* note 1, at 1-16.

258. *See generally Damages* 86-2, *supra* note 4, at 30.

259. HILL & SINICROPI, *supra* note 160, at 184-192. *See generally* WEISTART & LOWELL, *supra* note 160, at 447-451.

260. HILL & SINICROPI, *supra* note 160, at 184. *See also* Sullivan, *Punitive Damages in the Law of Contract: The Reality and Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977).

261. HILL & SINICROPI, *supra* note 160, at 184. It has been written that:

> Where the contracting parties have solemnly concluded a prior agreement through the process of negotiation, it must necessarily follow that a breach of its terms will require such relief as will reasonably approximate restitution to the injured party. The guiding principle in such cases is that the person deprived of a contract benefit should be made whole for his loss. Such persons are therefore entitled to compensatory 'damages' to the extent required, no more, and no less. An award in such form is designed to make the employee whole to the extent practicable, it is not intended as a penalty, or as a deterrent to discourage future violations. The concept of a punitive award is inconsistent with the underlying philosophy of the arbitration process.

Id. (quoting Aetna Portland Cement Co., 41 Lab. Arb. (BNA) 219, 222-23 (1963) (Dworkin, Arb.)). Similarly, others, in reference to the propriety of punitive awards, have stated: "It seems . . . that such blood-letting and sword-wielding might better be done in other tribunals and authorities than by arbitrators." *Id.* at 185 (quoting Publishers Association of New York City, 37 Lab. Arb. (BNA) 509, 520 (1961) (Seitz, Arb.)).

262. *Id.* at 189. For example, one such arbitrator wrote:

> Where repetitive violations of a collective bargaining agreement are shown to have occurred and 'damages' were only nominal, there is some arbitral authority for imposing a money 'penalty', as a deterrent to recurrent violations, on the theory that a mere arbitral 'cease-and-desist' directive . . . would be ineffectual.

In *Belmont Smelting & Refining Works, Inc.*,[263] the company sought compensatory and punitive damages following a mass employee walkout which violated a no-strike provision in the labor agreement.[264] Despite holding that the wildcat strike and work stoppage clearly violated the contract provision, the arbitrator denied without prejudice both punitive and compensatory damages sought by the Company.[265] However, the finality of his damages decision was specifically conditioned on the absence of a second employee work stoppage.[266]

In *Dana Corp.*,[267] suit was filed by the United Auto Workers union following its unsuccessful attempt to organize employees at facilities owned by the defendant-employer.[268] Although the employer pledged to remain neutral regarding the union's organizational efforts, the arbitrator held that the employer violated its neutrality pledge by derogating the union in communications to its employees.[269] The arbitrator awarded $10,000 to the union as "compensation" since its efforts were rendered useless by the employer's wrongdoing.[270] However, since his award was fashioned in light of his conclusion that it "[was] impossible to measure the degree of damage," com-

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Id. (emphasis omitted)(quoting Acme Paper Co., 47 Lab. Arb. (BNA) 238, 242 n.2 (1966) (Hilpert, Arb.)).

263. 50 Lab. Arb. (BNA) 691 (1968) (Turkus, Arb.).

264. *Id.* at 694-95. Specifically, a security guard, who was under contract to the Company, became involved in a fight with an employee of Belmont Smelting and Refining Works, Inc. *Id.* at 694. When the employee was discharged for striking the guard, the Union, Local 5919, advised management that all employees would walk out if the employee was suspended. *Id.* Following the mass employee walkout, the Company sought compensatory and punitive damages. *Id.* at 694-95.

265. *Id.* at 696.

266. *Id.* Specifically, the arbitrator warned that another strike or work stoppage would subject the Union to punitive and compensatory damages for past and future violations of the labor agreement. *Id.* The arbitrator stated that the purpose and intent of the award was "to have the memory of August 15, 1967, like Banquo's Ghost, long persist - so that it just doesn't happen again." *Id.*

267. 76 Lab. Arb. (BNA) 125 (1981) (Mittenthal, Arb.).

268. *Id.* at 126.

269. *Id.* at 130. Specifically, the president of one of Dana's wholly-owned subsidiaries declared, through letters and speeches, that the union representatives "[were] in business to make money, that their real concern [was] extracting large sums out of [the employees'] pockets, and that they would do . . . or say anything to get [the employees] into their clutches." *Id.* The arbitrator noted that the president spoke of the union as "vultures [out] to get their pound of flesh, as a group feeding off their fellow workers' hides, [and] as a pathway to serious trouble." *Id.*

Given these statements, the arbitrator found that Dana "maligned the UAW, its integrity and its purposes, and threatened employees with a loss of jobs and job security in the event of a UAW victory." *Id.* at 132. Moreover, he concluded that Dana breached its neutrality pledge by conducting a "blatantly anti-UAW campaign which . . . made a fair election impossible and thus undermined several months of intensive UAW organizing work." *Id.*

270. *Id.* at 132. *See also* HILL & SINICROPI, *supra* note 160, at 191.

mentators have subsequently characterized the award as partly punitive in nature.[271]

The behavior found objectional in *Belmont Smelting* and *Dana Corp.* is not unlike the Clubs' behavior in the 1987-'88 collusion case (Collusion II). Accordingly, the rationale which may have prompted the punitive-like awards in those cases should similarly be applied by the second arbitration panel in Collusion II.

Significantly, the second arbitration panel found that the Clubs' "conduct with respect to the 1986 free agents was in *deliberate contravention* of [their] obligations as embodied in Article XVIII(H), for which an appropriate remedy is fully justified."[272] Given that the Clubs' behavior represented a repetitive and deliberate violation of the agreement, arbitral decisions and case law suggests that compensatory damages alone would be ineffectual.[273] Consequently, an award of punitive damages for concerted behavior might help deter future occurrences of what has, up until now, apparently been deemed by the Clubs to be a cost-effective mode of operation.[274] Moreover, if the second arbitration panel does award punitive damages in subsequent

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271. HILL & SINICROPI, *supra* note 160, at 191.

272. Nicolau, *supra* note 6, at 80 (emphasis supplied). Based on the Clubs' intentional violation of the contract, it has been suggested that the Association could attempt to have the Agreement thrown out. THE NATIONAL LAW JOURNAL, June 1, 1987, at 33. According to Professor Weistart: "The argument would be that the contract was carefully designed to preserve the integrity of the free-agent process and that the owners entered into the contract with every intention of violating it, so the contract is thereby null and void." *Id.* However, given the absence of a provision specifying this result under the 1985 Basic Agreement, the success of this argument is questionable in light of the Supreme Court's directive that arbitrators operate "within the flexible procedures of arbitration" and fashion solutions "which would avoid disturbing labor relations." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 551-52 n.5 (1964). *See also* HILL & SINICROPI, *supra* note 160, at 21. Interestingly, the 1990 Basic Agreement allows a player injured by the Clubs' collusive activity to terminate his contract at his option following the finding of concerted action by the arbitration panel. *See* Basic Agreement between The American League of Professional Baseball Clubs and The National League of Professional Baseball Clubs and Major League Players Association, Article XX(F)(6) at 59-60, effective January 1, 1990 [hereinafter *1990 Basic Agreement*].

273. *See generally* Belmont Smelting & Refining Works, Inc., 50 Lab. Arb. (BNA) 691 (Turkus, Arb.); Dana Corp., 76 Lab. Arb. (BNA) 125 (1981) (Mittenthal, Arb.). Even if the compensatory damage award were coupled with a cease and desist order, this remedy would still fall short of providing proper relief since such injunctive relief is not self-enforcing under the 1985 Basic Agreement. *See supra* note 255 and accompanying text.

274. Although it can be argued that the treble damage provision contained in 1990 Basic Agreement will help deter future occurrences of collusive activity, the provision will not necessarily render concerted action too expensive to engage in if salaries can still be kept low enough to make it cost-effective. *See 1990 Basic Agreement, supra* note 272, Article XX(F)(2) at 59. Ordering punitive damages on top of the compensatory award for the collusive behavior in 1987-88 would presumably impose a financial bite that would be remembered by the Clubs well into the future. This is important given that the new provisions in the 1990 Agreement only allow for compensatory damages and "injunctive relief," such as cease-and-desist orders. *See id.*, Article XX(F)(9) at 60.

remedial hearings, it would allow the players to realize and rely upon the bargain they presumably struck in 1985 as to free agency.

However, even if the panel does in fact award punitive damages, the last issue that arises is whether such an award would hold up to judicial review by a federal court.

(3) Judicial Review of Arbitral Decisions

In general, the lower courts are split as to the propriety of an arbitral award of punitive damages.[275] Some courts have vacated punitive-like awards on the grounds that they are outside the arbitrator's authority. For example, in *Baltimore Reg. Joint Bd. v. Webster Clothes*,[276] a clothes manufacturer appealed an arbitrator's award of $80,000 given to laid-off union employees.[277] Because the record did not support a compensatory award of that size, and there was no proof of willful or wanton conduct, the court recharacterized the award as punitive damages.[278] Since there was no provision for punitive awards in the bargaining agreement, the Fourth Circuit held that the arbitrator exceeded his authority.[279]

In contrast, however, other courts have upheld the arbitrator's power to award punitive damages. In *Sheet Metal Workers, Local 416 v. Helgesteel Corp.*,[280] the labor union sued to enforce an arbitration award of punitive damages.[281] The defendant-employer argued that the award of $10,000 "violated clear law that punitive damages [should] not be awarded in [an arbitration] proceeding."[282]

In upholding the award of punitive damages, the court noted that an arbitration award is immune from attack so long as it draws its essence from the labor agreement.[283] In the absence of specific provisions regarding remedies, the arbitrator may exercise his or her discretion.[284] Accordingly, on ap-

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275. HILL & SINICROPI, *supra* note 160, at 185.

276. 596 F.2d 95 (4th Cir. 1979).

277. *Id.* at 96. The award, which represented payroll losses, was based on the arbitrator's finding that the manufacturer breached the collective bargaining agreement when it subcontracted work without obtaining the union's prior consent. *Id.* at 97.

278. *Id.* at 98.

279. *Id.* Similarly, New York courts have traditionally been reluctant to enforce punitive damage awards, even if authorized in the parties' agreement. *See Publishers Ass'n v. Newspaper & Mail Deliverers' Union*, 280 App. Div. 500, 114 N.Y.S. 2d 410 (1952); N. Y. L. J., Dec. 19, 1989, at 1.

280. 335 F. Supp. 812 (D. Wis. 1971).

281. *Id.* at 814.

282. *Id.*

283. *Id.* at 816 (citing *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596-97 (1960)).

284. *Id.* The court further noted that an award of punitive damages is not *per se* illegal. *Id.* at 815. Moreover, it noted that arbitrators have never been specifically barred by the Supreme Court from granting a punitive award. *Id.* at 815-16.

peal, the standard of review should simply be whether the award was reasonable in light of the arbitrator's findings.[285]

In support of the *Helgesteel* rationale, the Supreme Court has held that arbitral decisions are subject only to the most limited form of review and are given a presumption of validity and finality.[286] Moreover, arbitral awards should be enforced so long as they fall within the scope of the labor agreement and the award is formulated based on the arbitrator's construction of the agreement.[287]

Given the presumption of validity and finality afforded arbitral decisions under the Supreme Court's analysis, the rationale of *Helgesteel* may indeed prevail on appeal if punitive damages were awarded by the second arbitration panel. That the arbitrators specifically found deliberate and repetitive violations of the collective bargaining agreement further supports this conclusion.

Although the Clubs would argue that such an award was outside the arbitrator's power,[288] the better position supports the view that a punitive award "draws its essence from the contract" given the conduct of the Clubs in Collusion II. Moreover, since the Basic Agreement does not contain a specific directive or mandate with respect to remedies (it merely empowers the arbitrator to interpret and apply the agreement), the rationale of *Helgesteel* would make an award of punitive damages "reasonable in light of the findings" of the arbitrator.

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285. *Id.* at 816.

286. *See* Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); *See also* HILL & SINICROPI, *supra* note 160, at 20. The Court in *American Mfg. Co.* wrote:

> The function of the court is very limited when the parties have agreed to submit all questions of a contract interpretation to the arbitrator. It is [then] confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that he bargained for.

American Mfg. Co., 363 U.S. at 567-68.

Justice Douglas further stated that "the courts have no business weighing the merits of the grievance, [or] considering whether there is equity in a particular claim." *Id.*

287. *See* Steelworkers v. Enterprise Wheel, 363 U.S. 593, 595-96 (1960). *See also* HILL & SINICROPI, *supra* note 160, at 18. In upholding the specific enforcement of the agreement's provisions and the arbitrator's award of back pay, the Court wrote: "[T]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the award." *Enterprise Wheel*, 363 U.S. at 596.

288. *See* Baltimore Reg. Joint Bd. v. Webster Clothes, 596 F.2d 95, 98 (4th Cir. 1979); Warehousemen v. Standard Brands, Inc., 579 F.2d 1287, 1292 n.8 (5th Cir. 1978) ("[a]n award may be vacated where it is shown that there was fraud, partiality or other misconduct on the part of the arbitrator").

V. Conclusion

It took nearly a century for the players to supplant the reserve system that kept them bound to their clubs in virtual perpetuity. The birth of free agency in 1976 fundamentally changed the relationship between owners and players and resulted in a frenzied competition between clubs that resembled an auction for the crown jewels.

After the 1985 season, however, all that changed. None of the bidding wars remotely resembling the previous nine years came to pass. In fact, the free agency market disappeared in 1985 and again in 1986 due to the collusive activity of the twenty-six Major League Baseball Clubs.

In response to the grievances filed by the Players Association, two arbitrators found the owners guilty of collusion in violation of the non-conspiracy clause (Article XVIII(H)) of the collective bargaining agreement. This provision precluded concerted activity between two or more clubs or two or more players. In their construction of Article XVIII(H), both arbitrators held that the provision would be violated where the presence of a plan or "common scheme for a common benefit" was proved. Such an understanding did not need to be in writing or even spoken if circumstantial evidence of sufficient clarity and force could be shown to demonstrate its existence.

The overwhelming evidence supported their findings that a common understanding existed among the Clubs to destroy the free agency markets from 1985 through 1988. Interestingly, in reaching their conclusions, the arbitrators embraced, albeit impliedly, the application of antitrust principles to the facts in both cases. Given the Clubs' behavior and the effect it had on the free agency market, the application of antitrust principles by analogy was appropriate, and the findings of liability in both cases were grounded in legal doctrine and canons of interpretation.

While an award of compensatory damages might have been justified on the facts of Collusion I, an award of compensatory damages will not go far enough to make the aggrieved players whole in Collusion II. Given the Club's deliberate and repetitive contravention of the Basic Agreement, an award of punitive damages is appropriate and necessary. By making such an award, the second arbitration panel would go a long way in deterring future occurrences of what has, up until now, been deemed by the Clubs to be a cost-effective mode of operation. Moreover, it would effectuate the intention of the parties and help ensure that the free agency market becomes and remains "free" in perpetuity.

Although the incorporation of the treble damage provision into the 1990 Basic Agreement strengthens the players' hand in light of baseball's exemption from federal antitrust law, an award of punitive damages for the Clubs that committed wrongs would help ensure that the Clubs' refrain in future seasons from behavior that jeopardizes the integrity of the game.

Through their collusive activity, the owners sought institutional protection from themselves and their own avarice. As a result, they delivered an

abrupt and thunderous message of disregard for the free agency status of numerous professional players in 1985 and 1986. In return, an emphatic and unambiguous message needs to be communicated that collusive activity will not be tolerated in the game of baseball. The memory of the their actions must persist so that it "just doesn't happen again."

VI. ADDENDUM

Subsequent to the writing of this article, the Players Association unanimously approved a $280 million settlement offer from the Club owners.[289] If the settlement offer is finalized, it will presumably preclude further damage awards for individual claims and for the 1989-90 season. Moreover, a finalized settlement would also preclude the possible assessment of punitive damages. Although the Clubs have previously maintained that the arbitration process does not authorize punitive damages, the $280 million settlement offer suggests that the owners are unwilling to take the risk.[290]

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289. The Newark Star Ledger, Dec. 7, 1990, at 69, col. 4.

290. Sports Industry News, Oct. 5, 1990, at 305.

* Periodically, the Seton Hall Journal of Sport Law publishes quality legal articles written by Seton Hall Law students who are not members of the Seton Hall Journal of Sport Law. Mr. Willis submitted this article to fulfill the requirements of a course entitled Sports Law.