

## The Hidden Ball Trick; Major League Baseball's Collective Bargaining Agreement Attempts to Hide Tobacco Use by Players

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### MAJOR LEAGUE BASEBALL PLAYERS' ASSOCIATION (MLBPA) HISTORY

Unionization has played a significant role in professional baseball since 1885.<sup>1</sup> At that time, John Montgomery Ward and eight other players formed the Brotherhood of Professional Baseball Players.<sup>2</sup> Attempts to unionize continued; in 1900, the Players' Protective Association was formed.<sup>3</sup> In 1912, the players union was known as The Fraternity of Professional Baseball Players of America and, in 1946, was called the American Baseball Guild.<sup>4</sup> These early attempts at unionization failed to end the "reserve clause," which contractually bound players to their respective clubs indefinitely.<sup>5</sup>

In 1965, another attempt to unionize brought about the involvement of Marvin Miller, an economist for The United Steelworkers of America.<sup>6</sup> By 1968, Miller had formed the players into a legitimate labor union and negotiated the first Collective Bargaining Agreement (CBA) in professional sports.<sup>7</sup> The 1968

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<sup>1</sup> Major League Baseball Players Assoc., *History of the Major League Baseball Players Assoc.*, <http://mlb.mlb.com/pa/info/history.jsp>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*; JAMES B. DWORKIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING, 63 (1981). (Though the reserve clause had been amended slightly at times, the language presented is from the 1973 collective bargaining agreement:

"On or before December 20 (or if a Sunday, then the next preceding business day) in the year of the last playing season covered by the contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. *If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player as said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80 percent of the rate stipulated for the next preceding year and at a rate not less than 70 percent of the rate stipulated for the year immediately prior to the next preceding game.*" (emphasis added).

That is to say, if the player attempted to shop options with other teams, his most recent team could bind him for another year without the consideration of the player).

<sup>6</sup> MLBPA, *supra* note 1.

<sup>7</sup> *Id.*

CBA increased the minimum salary from \$6,000 to \$10,000 and by 1970 the players had negotiated for a right to arbitration for the purpose of settling grievances.<sup>8</sup> Perhaps the biggest achievement from the Miller era was the invention of a free agency right; giving the players the ability to shop around for the best employment opportunity.<sup>9</sup> As unionization of baseball has progressed, the players have, generally, continued to gain rights and advantages while the league and team owners have continued to lose power.

The formation of a players' union is responsible for many of the advancements in Major League Baseball's relationship between owners and players. However, the two sides have yet to do away with tobacco in baseball, which gives rise to the issue of whether the solution lies outside of the CBA.

### TOBACCO USE IN THE UNITED STATES

Tobacco use can begin early among Americans.<sup>10</sup> In 2014, 2.4% of middle school students use smokeless tobacco and the number increases to 8% for high school students.<sup>11</sup> In 2014, approximately 10.8% of high school tobacco users were White and 5.3% were Hispanic, the two highest used rates among any races.<sup>12</sup> Not only are White and Hispanic populations the most common smokeless tobacco users, they are also the most prevalent races in Major League Baseball.<sup>13</sup>

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<sup>8</sup> *Id.* \$6,000 in 1968 is the equivalent of just over \$40,000 in today's money. (Inflation Calculator at <http://data.bls.gov/cgi-bin/cpicalc.pl?cost1=6%2C000&year1=1968&year2=2015>.) The current minimum salary for Major League Baseball is \$507,500. See MLBPA, *Frequently Asked Questions*, <http://mlb.mlb.com/pa/info/faq.jsp#minimum>.

<sup>9</sup> MLBPA, *supra* note 1.

<sup>10</sup> It should be noted that Major League Baseball Players are not all United States citizens; therefore, the statistics regarding tobacco use among young American's is not ideal but it is the best information available for these purposes. On opening day in 2014, 26.1% of players were born outside of the United States. The all-time high was 29.2% on opening day in 2005. Richard Lapchick, *The 2014 Racial and Gender Report Card: Major League Baseball*, THE INSTITUTE OF DIVERSITY AND ETHICS IN SPORT 4 (May 7, 2014), <http://www.tidesport.org/MLB%20RGR%202014%20Revised.pdf>.

<sup>11</sup> Smokeless Tobacco Use in the United States, CENTERS FOR DISEASE CONTROL, [http://www.cdc.gov/tobacco/data\\_statistics/fact\\_sheets/smokeless/use\\_us/](http://www.cdc.gov/tobacco/data_statistics/fact_sheets/smokeless/use_us/). (Use of smokeless tobacco includes the use of chewing tobacco or snuff anytime during the thirty days preceding participation in the research survey) (statistics represent the summation of smokeless, snus, and dissolvable tobaccos users).

<sup>12</sup> *Id.* (statistics represent the summation of smokeless, snus, and dissolvable tobaccos users).

<sup>13</sup> Lapchick, *supra* note 10. (The percentage of Latino and White players on opening day rosters in 2014 was 28.2% and 60.9%, respectively).

## HEALTH EFFECTS OF SMOKELESS TOBACCO

Smokeless tobacco, like cigarettes, contains nicotine, which is highly addictive.<sup>14</sup> Many smokeless tobacco products contain cancer-causing chemicals.<sup>15</sup> Over time, these materials also cause gum disease, tooth decay, and white or gray patches (leukoplakia) inside the mouth, which can also lead to cancer.<sup>16</sup> While smokeless tobacco has not been linked to heart disease and stroke with the same certainty as cigarettes, many other health issues have been well correlated with the use of smokeless tobacco. These health issues include cancer of the mouth, tongue, cheek, gums, throat, esophagus, stomach, and pancreas.<sup>17</sup> Dental health also suffers from the use of smokeless tobacco; it can cause gums to shrink, teeth to become stained, and, overtime, can cause tooth loss.<sup>18</sup>

## HISTORY OF TOBACCO USE IN BASEBALL

Modern baseball originated in the nineteenth-century; the official rules were first construed in 1845.<sup>19</sup> A period of renewed interest in tobacco crops coincided with the development of baseball.<sup>20</sup> By the turn of the century, tobacco companies were utilizing baseball as a means to advertise.<sup>21</sup> Aside from the visual advertisements around the baseball fields, the 1870's marked the beginning of a revolutionary marketing strategy; tobacco companies included baseball cards and coupons for free baseball cards in the

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<sup>14</sup> 89 WORLD HEALTH ORGANIZATION, *Smokeless Tobacco and Some Tobacco-Specific N-Nitrosamines*, 60 (2007).

<sup>15</sup> These chemicals include: (1) tobacco specific nitrosamines; (2) A radioactive element (polonium 210) which comes from the fertilizer used to grow tobacco plants; (3) Polycyclic aromatic hydrocarbons which are chemicals formed when the tobacco is cured with heat; (4) and many harmful metals such as arsenic, beryllium, cadmium, chromium, cobalt, lead, nickel, and mercury. Stanfill SB et al., *Global Surveillance of Oral Tobacco Products: Total Nicotine, Unionized Nicotine and Tobacco-Specific N-Nitrosamines*, TOBACCO CONTROL (2011).

<sup>16</sup> WORLD HEALTH ORGANIZATIONS, *supra* note 14; Mariann R. Piano et al., *Impact of Smokeless Tobacco Products on Cardiovascular Disease: Implications for Policy, Prevention, and Treatment*, THE AMERICAN HEART ASSOCIATION 35 (2010).

<sup>17</sup> AMERICAN CANCER SOCIETY, *What is Spit or Smokeless Tobacco?* (Dec. 03, 2013), <http://www.cancer.org/cancer/cancercauses/tobaccocancer/smokeless-tobacco>.

<sup>18</sup> *Id.*

<sup>19</sup> 19 C BASEBALL, *The Game*, <http://www.19cbaseball.com/game.html>. (Alexander Cartwright (1820-1892) organized and worked out with a group that eventually became the New York Knickerbockers. In September of 1845, the Knickerbocker Baseball Club was officially formed. At that time, Cartwright published twenty rules which became known as the "20 Original Rules of Baseball" or the "Knickerbocker Rules").

<sup>20</sup> Jason Diamond, *Why Baseball Has Never Been Able to Quit Tobacco*, MEN'S JOURNAL, <http://www.mensjournal.com/adventure/races-sports/why-baseball-has-never-been-able-to-quit-tobacco-20140820>.

<sup>21</sup> *Id.* (Blackwell Tobacco Company, known for revolutionary marketing tactics, advertised their Bull Durham Tobacco over outfield fences where pitchers regularly warmed up. This is one explanation for the term "bullpen" in baseball).

tobacco packages.<sup>22</sup> Interestingly, not all of the featured players wanted to be portrayed on the collectables. For example, Honus Wagner did not use tobacco products and objected to being included in the promotions because he did not want to set a bad example for children.<sup>23</sup> In fact, the 1909 Honus Wagner card is considered the most valuable baseball card currently in circulation.<sup>24</sup>

The relationship between baseball and tobacco is not based entirely on historical tobacco advertisement. Though the rules of baseball were formed in 1845, baseball gloves were not widely popular until the 1870s and 1880s.<sup>25</sup> As fielding gloves became popular, many players used the saliva produced by tobacco to moisten the leather.<sup>26</sup> In addition, pitchers used tobacco saliva juice to throw spit-balls which were legal until 1920.<sup>27</sup>

Estimates suggest that tobacco was used by approximately half of major league players twenty years ago.<sup>28</sup> Today, it is estimated that one-third of major league ballplayers use tobacco products and one-quarter of minor league players are users.<sup>29</sup> These statistics are not surprising considering that in 2001, the year preceding NCAA's adoption of a zero tolerance policy, 41% of college baseball players reported using tobacco.<sup>30</sup> Further, because roughly 30% of players selected in the 2012 MLB draft were high school

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<sup>22</sup> *Tobacco Baseball Cards*, BASEBALL ALMANAC, <http://www.baseball-almanac.com/treasure/autont005.shtml>. (Many different baseball card series were in circulation and could only be collected through packaging with tobacco products).

<sup>23</sup> HONUS WAGNER, <http://www.honuswagner.com/biography.html>. (Honus Wagner is historically considered one of the best all-around baseball players of all time. The longtime member of the Pirates was one of the first five players inducted into the baseball hall of fame).

<sup>24</sup> *Id.* The 1909 Honus Wagner card was recalled the same year.

<sup>25</sup> Brian Palmer, *Why Do So Many Baseball Players Chew Tobacco? Because It's Dusty Out There*, EXPLAINER (Nov. 2, 2009, 5:58 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2009/11/why\\_do\\_so\\_many\\_baseball\\_players\\_chew\\_tobacco.html](http://www.slate.com/articles/news_and_politics/explainer/2009/11/why_do_so_many_baseball_players_chew_tobacco.html).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Jon Heyman, *MLB Tried to Ban Smokeless Tobacco, but Players Union Balked*, CBS SPORTS (June 25, 2014, 6:18 PM), <http://www.cbssports.com/mlb/writer/jon-heyman/24597614/mlb-tried-to-ban-smokeless-tobacco-but-players-union-balked>.

<sup>29</sup> Donna Smith, *Smokeless Tobacco Use Rising Among Teens*, REUTERS (Apr. 14, 2010, 5:07 PM), <http://www.reuters.com/article/2010/04/14/us-tobacco-baseball-idUSTRE63D4QZ20100414> (Gregory Connolly, a Harvard Professor of Public Health, has conducted extensive research on tobacco use in baseball and has spoken to groups of major league players about the effects).

<sup>30</sup> Ty Halpin, *Baseball's Zero Tolerance Policy Calling Tobacco out at the Plate*, NCAA NEWS (May 26, 2003, 9:27 AM), [http://fs.ncaa.org/Docs/NCAANewsArchive/2003/Association-wide/baseball\\_s+zero-tolerance+policy+calling+tobacco+out+at+the+plate+-+5-26-03.html](http://fs.ncaa.org/Docs/NCAANewsArchive/2003/Association-wide/baseball_s+zero-tolerance+policy+calling+tobacco+out+at+the+plate+-+5-26-03.html).

players, it is fair to assume that the majority of professional ballplayers are coming from the college ranks where tobacco use has historically been prevalent.<sup>31</sup> Tobacco use in minor league baseball has been banned since 1993.<sup>32</sup> However, minor league players are not unionized and, therefore, the ban of tobacco use did not have to be negotiated through a collective bargaining agreement.<sup>33</sup> While Major League Baseball would like to ban tobacco products, there is hesitation from the Players' Association.<sup>34</sup> However, following the tobacco-related death of Tony Gwynn, there seems to be more pressure for the prohibition of tobacco in baseball.<sup>35</sup> Gwynn was only 54 years old and his death inspired many ballplayers to give up the habit.<sup>36</sup> The influence of Gwynn's death on the baseball community seems to be influential; past deaths of baseball stars did not prompt talks of prohibition.<sup>37</sup>

### COLLECTIVE BARGAINING AGREEMENT, 2012-2016

Of the current Collective Bargaining Agreement (CBA), a mere two pages of the 311 page document addresses tobacco use.<sup>38</sup> Under the CBA, players and coaches must conceal tobacco packages

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<sup>31</sup> Kevin Askeland, *MLB Draft 2012 By the Numbers*, MAXPREPS (June 7, 2012),

<http://www.maxpreps.com/news/Yb40hby1E0Ocecbw72k9w/mlb-draft-2012-by-the-numbers.htm>.

<sup>32</sup> Fred Frommer, *Labor Deal Stops Short of Tobacco Ban*, ASSOCIATED PRESS and ESPN (Nov. 22, 2011), [http://espn.go.com/mlb/story/\\_/id/7269744/baseball-labor-deal-union-limits-does-not-ban-tobacco-use](http://espn.go.com/mlb/story/_/id/7269744/baseball-labor-deal-union-limits-does-not-ban-tobacco-use).

<sup>33</sup> *Id.*

<sup>34</sup> Smith, *supra* note 29. (The Chief Labor Counsel for the Players' Association has said, "We believe baseball players should not be prohibited from using substances that are perfectly legal and available to the general public.")

<sup>35</sup> See Gary Phillips, *MLB: Tony Gwynn's Death and Chewing Tobacco in Baseball*, BLEACHER REPORT (June 27, 2014), <http://bleacherreport.com/articles/2110701-mlb-tony-gwynns-death-and-chewing-tobacco-in-baseball>.

<sup>36</sup> *Id.* (Gwynn began using tobacco while playing minor league baseball in 1981. He died from a form of mouth cancer. In the days following Gwynn's death, Washington Nationals pitcher Stephen Strasburg and Arizona Diamondbacks pitcher Addison Reed announced that they would quit using tobacco. Both Strasburg and Reed played baseball at San Diego State University when Gwynn was the head coach. Following Gwynn's death, Strasburg said, "I think it's a disgusting habit, looking back on it. I was naïve when I started. Just doing it here and there, I didn't think it was going to be such an addiction. Bottom line is, I want to be around for my family. This is something that can affect people the rest of your life. [Chewing tobacco] is prevalent in this game. It's something we all grew up doing.")

<sup>37</sup> *Sports Figures*, THE ORAL CANCER FOUNDATION, <http://www.oralcancerfoundation.org/people/sports-figures.php>. (Babe Ruth died of throat cancer. Ruth once told a reporter, "I learned early to drink beer, wine, and whiskey, and I think I was about five when I first chewed tobacco." It should be noted that there was not as much information about why tobacco was so widely available at the time of Ruth's death.)

<sup>38</sup> The full text of the MLB Collective Bargaining Agreement (CBA) can be viewed online: [http://mlb.mlb.com/pa/pdf/cba\\_english.pdf](http://mlb.mlb.com/pa/pdf/cba_english.pdf). The Tobacco Policy is located in Attachment 28, at 226-227.

during times that fans are allowed in the facilities.<sup>39</sup> In addition, use of tobacco products is prohibited during televised interviews.<sup>40</sup> Therefore, the current CBA is essentially hiding the destructive habit.

If a player violates this brief and insufficient policy, they are subject to written warnings for the first and second offense.<sup>41</sup> The third, fourth, and fifth violations are disciplined with fines of \$1,000, \$2,500, and \$5,000, respectively.<sup>42</sup> Given the current minimum salary of Major League Baseball players, the penalties for violating the tobacco policy are rather light.<sup>43</sup>

For comparison, a player who violates an equipment rule (such as wearing the wrong color cleats) receives a warning only for the first offense. The second and third violations are subject to a \$1,000 and \$5,000 fine, respectively.<sup>44</sup> A fourth violation of equipment regulations is subject to a \$10,000 fine.<sup>45</sup> It seems that player health and players' influence as role models is under-prioritized in the current CBA when punishments for tobacco violations are compared to those regarding the regulation of equipment. Major League Baseball seems to be most interested in how the players look in the eyes of the public; therefore, players must hide their tobacco tins and wear equipment of correct brands and colors.

### **THE NEXT CBA: A LOOK AHEAD**

Some progress was made in the drafting of the current CBA: players now must hide tins, cans, and packaging of tobacco while the public is allowed in the facilities, which was not the case under previous CBAs.<sup>46</sup> Those involved in the negotiating of the current CBA have said that Major League Baseball pushed hard for a ban on tobacco and that the talks got "contentious" about the subject.<sup>47</sup> Based on the talks that took place during the negotiation for the current CBA, it seems that ban on tobacco products, by way of the

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<sup>39</sup> *Id.* at 226.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (The second written warning includes a recommendation for counseling.)

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; *See* MLBPA, *supra* note 8. (The minimum salary in Major League Baseball is \$507,500.)

<sup>44</sup> CBA, *supra* note 38, at 199. (The Equipment Policy is located in Attachment 19, pp. 193-204. It should be noted that while the tobacco policy's brevity needs only two pages in the CBA, the player's apparel and look requires more than ten pages.)

<sup>45</sup> *Id.*

<sup>46</sup> Heyman, *supra* note 28.

<sup>47</sup> *Id.*

CBA, will not happen in the near future.<sup>48</sup> Players have asserted, as long as it is legal to the public, it cannot be banned in baseball.<sup>49</sup>

However, some believe that the recent death of Gwynn and other famous figures may revive hope in tobacco reform.<sup>50</sup> Following Gwynn's death, nine major public health organizations are pushing Major League Baseball to ban tobacco use.<sup>51</sup> Public health organizations use the logic that kids imitate their role models; high school cigarette smokers has fallen by half since 1999 while chewing tobacco rates among high schoolers has remained steady.<sup>52</sup> If Major League Baseball cannot achieve prohibition of tobacco in the upcoming CBA of 2017, it is doubtful that it will get done in the near future.

### **TOBACCO POLICIES AND BASEBALL STADIUMS**

As more states have regulated the use of some tobacco products beyond what the Master Settlement Agreement of 1998 (MSA) calls for, baseball culture has been affected.<sup>53</sup> Tobacco regulation traces back for decades. In 1975, Minnesota became the first state to enact laws to require separate smoking areas in public places.<sup>54</sup> In 1987, Aspen, Colorado became the first city to require smoke free restaurants.<sup>55</sup> Congress prohibited smoking on domestic flights in 1989.<sup>56</sup> In 1990, San Luis Obispo, California eliminated smoking in most public places, including bars.<sup>57</sup>

While many of these regulations are unrelated to smokeless tobacco and baseball, there is a small, but crucial, crossover. Though Major League Baseball and the players association negotiate a Collective

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (It should be noted that the player's union has no problem encouraging players to quit the habit. This can be seen in the fact that twenty years ago half of the league used tobacco products and now the rate is down to one third.)

<sup>50</sup> Athena Jones & Kim Berryman, *Tony Gwynn's Death Renews Call for MLB to Ban Chewing Tobacco*, CNN (July 15, 2014), <http://thelead.blogs.cnn.com/2014/07/15/tony-gwynns-death-renews-call-for-mlb-to-ban-chewing-tobacco/>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* (Smoking is more strictly regulated, generally, and in baseball.)

<sup>53</sup> The Master Settlement Agreement between the states and many tobacco companies regulates, among other things, the ways in which the tobacco company may advertise.

<sup>54</sup> Minnesota Clean Indoor Air Act § 144.412 (1975) (The Act has continued to progress and has been revised over time).

<sup>55</sup> *American Lung Association's Battle Against Tobacco Use Milestones*, STATE OF TOBACCO CONTROL, <http://www.stateoftobaccocontrol.org/tobacco-timeline.html>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

Bargaining Agreement, the states police power continues to be plenary.<sup>58</sup> Some ballparks have tobacco regulation in place per the desire of the owner of the stadium. Every Major League ballpark has smoking policies; most are smoke free facilities and the stadiums that are not smoke free have designated smoking areas.<sup>59</sup> Many legendary stadiums like Fenway Park, Camden Yards, and Yankee Stadium have a complete prohibition on smoking.<sup>60</sup>

However, Safeco Field has prohibited chewing tobacco as well as smoking on the premises.<sup>61</sup> Neither the Seattle Mariners nor Safeco Field take credit for this rule; the organizations involved cite the Washington Clean Air Act as the reason for the prohibiting chewing tobacco.<sup>62</sup> While the Washington Clean Air Act only calls for the prohibition of smoking tobacco at Safeco Field, the ball club wants their facilities to be tobacco free.<sup>63</sup> However, the players, unlike the fans, are not prohibited from using chewing tobacco at the facility.

Even though Safeco Field still allows for tobacco use by players, it sheds light upon the idea of prohibiting tobacco in a way that circumvents the CBA. Safeco Field and the Seattle Mariners may have opened the door to a new opportunity for communities to take the lead in the banishment of tobacco from baseball.

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<sup>58</sup> U.S. CONST. amend X; see *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>59</sup> See generally *Smoking Policies at Major League Baseball Stadiums*, AMERICAN NONSMOKERS' RIGHTS FOUNDATION (Apr. 2, 2015), <http://www.no-smoke.org/pdf/majorleaguebaseballstadiumpoliices.pdf>.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 4.

<sup>62</sup> *Id.*; Washington Clean Air Act § 70.94 (2006).

The Seattle Mariner's website uses the Clean Air Act to justify its ban on smokeless tobacco:

"In compliance with the Washington Clean Air Act, Safeco Field is a no-smoking facility (*including chewing tobacco* and electronic cigarettes). Smoking is not permitted in any location inside Safeco Field or within 25 feet of all entrances, windows and ventilation intakes. Smoking is permitted only in designated areas 25 feet away from the Home Plate, Right Field, Left Field and Center Field Gates, as well as the north end of the Parking Plaza. Guests exiting the ballpark to smoke must have their ticket scanned for re-entry by a Gate Host at an entrance gate prior to exiting."

<http://seattle.mariners.mlb.com/sea/ballpark/information/index.jsp?content=guide> (emphasis added).

<sup>63</sup> Washington Clean Air Act, *supra* note 62.

## POLICE POWER TO REGULATE TOBACCO USE IN BASEBALL

Police power is the inherent power of a community to regulate activities for the protection of public health and safety.<sup>64</sup> Because Seattle's Safeco Field has the most stringent tobacco policy among Major League Baseball it is the quintessential starting point to pursue a discussion regarding the issue of whether it is possible to regulate tobacco out of baseball by way of local police powers.<sup>65</sup>

It is impossible for the CBA's contract to circumvent the regulations put in place by the Washington Clean Air Act; the Washington Supreme Court has held that private parties cannot enter contracts to nullify otherwise valid ordinances or laws.<sup>66</sup> That is to say, if individual states or municipalities were to regulate tobacco out of baseball stadiums, the players could not point to the CBA for an exemption from the law.

In Washington State, tobacco could likely be regulated out of the ballpark absent the Washington Clean Air Act.<sup>67</sup> In the Washington State Constitution, as is common, counties, cities, and towns are given police power.<sup>68</sup> This gives counties, cities, and towns the ability to enact ordinances to protect public health and safety. Therefore, the city of Seattle or King County could pass regulation requiring places of large public gathering to be tobacco free.<sup>69</sup>

The majority of smoking regulations are not government law, but a result of the MSA. However, states have authority to regulate. Recently, Hawaii raised the State's legal smoking age to twenty-one; it is the first state to do so.<sup>70</sup> Eighty-one cities in the United States have already raised the age of legal tobacco

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<sup>64</sup> Hugh D. Spitzer, *Municipal Police Power in Washington State*, 75 WASH. REV. 495, 497 (2000).

<sup>65</sup> *Smoking Policies at Major League Baseball Stadiums*, *supra* note 59.

<sup>66</sup> *City of Seattle v. Hurst*, 50 Wash. 424, 432 (1908) (The policy justifications for this reason are clear and it is no surprise that laws such as this are present across the United States); Washington Clean Air Act, *supra* note 62 (It should be noted that the Washington Clean Air Act, in part, finds its authority in Policing Power).

<sup>67</sup> Washington Clean Air Act, *supra* note 62.

<sup>68</sup> WASH. CONST. art. XI, § 11.

<sup>69</sup> The exact way in which the legislation would be written is, of course, debatable. The language would depend upon which types of places the municipality sought to outlaw tobacco. The language could be designed to fit just sports stadiums or also, for example, concert halls.

<sup>70</sup> Cathy Zhao, *Hawaii Becomes the First State to Raise Legal Smoking Age to 21*, PBS NEWSHOUR, (June 20, 2015, 6:22 PM), <http://www.pbs.org/newshour/rundown/hawaii-first-state-raise-legal-smoking-age-21/> (The law includes electronic cigarettes as well).

use to twenty-one.<sup>71</sup> The trend is catching on; other states are considering similar legislation.<sup>72</sup> More than a century ago, the Supreme Court upheld a State's authority to heavily regulate the sale, trade, packaging, and transport of cigarettes.<sup>73</sup>

It is probable that these regulations would be met by challenges by tobacco companies and, possibly, Major League Baseball or the players' association. However, opposition is only natural with a habit as widespread as tobacco use, especially given the money-wielding companies that would be affected by such regulation. However, if multiple jurisdictions pass similar ordinances and legislation, the movement may find traction.<sup>74</sup>

It is impossible to know the results of an attempt to regulate tobacco in baseball (or professional sports, generally). However, considering that this regulation would have a specific target (Major League Baseball), it is not all that extreme; some scholars still argue for an outright ban.<sup>75</sup> States enjoy plenary policing power to regulate health and safety.<sup>76</sup> Therefore, if states decided to enact widespread regulation that would govern jurisdictions where baseball stadiums are located, the standard of review favors the states. Historically, courts have heard challenges to tobacco laws under rational basis review.<sup>77</sup>

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<sup>71</sup> *Id.*

<sup>72</sup> Matthew Fossen, *Push to Raise Smoking Age to 21 Could Light Up After Hawaii Oks Change*, FOX NEWS (June 28, 2015), <http://www.foxnews.com/politics/2015/06/28/push-to-raise-smoking-age-to-21-could-light-up-after-hawaii-oks-change/> (California, Washington State, Oregon, Vermont, and New Jersey).

Lee changes to: *See generally* Zhao, *supra* note 70.

<sup>73</sup> *Austin v. State of Tennessee*, 179 U.S. 343 (1900) (The development of Constitutional law over the last century likely renders *Austin* as a poor example for a potential modern day analysis of the same issue).

<sup>74</sup> Jacobson, *supra* note 58 ("The police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.") (citing *Gibbons v. Ogden*, 9 Wheat. 1, 203 (1824); *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 470 (1877); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1877); *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U.S. 650, 661 (1885); *Lawson v. Stecle*, 152 U.S. 133 (1894)).

<sup>75</sup> Justin C. Levin, *Protect Us or Leave Us Alone*, 68 ALB. L. REV. 183 (2004).

<sup>76</sup> Jacobson, *supra* note 58, at 25 ("The police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety.") (citing *Gibbons v. Ogden*, 9 Wheat. 1, 203 (1824); *Hannibal & St. J. R. Co. v. Husen*, 95 U.S. 465, 470 (1877); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1877); *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U.S. 650, 661 (1885); *Lawson v. Stecle*, 152 U.S. 133 (1894)).

<sup>77</sup> *See generally* American Legion Post #149 v. Washington State Dep't of Health, 164 Wash. 2d 570 (2008) (A nonprofit challenged a Washington State law that expanded prohibition on smoking in public places to include facilities such as schools, bars, bowling allies, casinos, and places of employment. The Washington State Supreme Court used rational basis review and upheld the law against Due Process and Equal Protection challenges); *Liebes v. Guilford Cnty. Dep't of Pub. Health*, 724 S.E. 2d 70 (N.C. App. 2011) (Court of Appeals used rational basis review to uphold the prohibition of smoking in bars against an equal protection challenge); *City of Tucson v. Grezaffi*, 200

Opponents of tobacco regulation attempt to shoe the habit into a right that is protected by the Federal Constitution. The arguments that are most common are (1) tobacco use is a fundamental right protected by the Due Process Clause and (2) that users are a suspect class entitled to special protection under the Equal Protection Clause.<sup>78</sup> Because tobacco use is not a fundamental right under the Federal Constitution, the Due Process and Equal Protection challenges are reviewed under rational basis.<sup>79</sup> Rational basis is a standard that gives substantial deference to the states. Under this standard, a law will only be overturned if it “has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare.”<sup>80</sup> This means the challenged law enjoys “a strong presumption of validity”<sup>81</sup> and must only be “rationally related to a legitimate state interest.”<sup>82</sup> This standard is a primary reason why tobacco regulation has historically been upheld.<sup>83</sup>

While the rational basis for smoking regulation would seem to be a concern for second hand smoke, this cannot justify the elimination of smokeless tobacco. However, because states seek to protect the public health and safety, tobacco use could be regulated due to its influence on minors. This is especially important for the context of tobacco use by Major League Baseball players because ballparks are flooded with children. In fact, courts have held previously that the welfare of minors concerning tobacco products establishes a compelling government interest.<sup>84</sup>

Cities, counties, and states have successfully banned smoking in specific buildings and locations.<sup>85</sup> It is feasible and justifiable to add sports venues to the list places where tobacco is prohibited.

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Ariz. 130 (2001) (The Arizona Supreme Court upheld a city ordinance that prohibited smoking in restaurants against a constitutional challenge).

<sup>78</sup> Collin Schueler, *Not Out There: Why Outdoor Smoking Bans Finally Pass Constitutional Muster*, 15 QUINNIPIAC HEALTH L.J. 127, 129 (2012).

<sup>79</sup> Burnette v. Bredesen, 566 F. Supp. 2d 738, 746 n.3 (E.D. Tenn. 2008) (“[T]he Court is unaware of any legal source which protects a citizen's choice to smoke . . . or . . . characterizes such a choice as a fundamental right.”)

<sup>80</sup> Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928) (internal citations omitted).

<sup>81</sup> Fed. Comm'n Comm'n v. Beach Comm'n, 508 U.S. 307, 314 (1993).

<sup>82</sup> New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

<sup>83</sup> See generally American Legion, *supra* note 77.

<sup>84</sup> Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 528 (2001) (*Lorillard* was a First Amendment challenge due to legislative restrictions on tobacco advertisement).

<sup>85</sup> See generally American Legion, *supra* note 77.

## CONCLUSION

Because the player's association and Major League Baseball have negotiated and agreed to the CBA, it is a contractual agreement and not statutory law. It is unlikely that the entirety of players would agree to the prohibition of tobacco; obviously, tobacco users would find this disagreeable. It is unlikely that the portion of players whom disagreed would have a remedy. The unionization of players allows the group to collectively decide the terms of its labor with Major League Baseball.

A player cannot use performance-enhancing drugs because they are disallowed under the CBA.<sup>86</sup> Therefore, it would seem that a prohibition of tobacco under the CBA would prevent Major League ballplayers from being able to use tobacco products in the same way that it prohibits the use of performance-enhancing drugs. This situation becomes complicated by the position of the players association: as long as it is legal to the public it cannot be banned in baseball.<sup>87</sup> This view raises a question, why is it that the players association does not fight for allowing cigarette use by ballplayers? The answer, though not within the scope of this paper, is likely that smoking is more difficult to hide. So long as players are required to hide tobacco use (as the CBA now requires), the public outcry will continue to be muted, barring future unrests similar to the effect of Gwynn's death.

The unionization of Major League Baseball players has resulted in more power to the players, but less for the league and the owners. The players' victory regarding wages and the reserve clause may have been in the best interest of justice. However, the stubbornness of the players' association on tobacco has had a continuing effect on the health of players and Americans (via the contention that baseball players serve as role models to impressionable children).

While baseball players have embraced tobacco use far before sufficient health information was available, it has come time to remedy the public health problem. The health problems associated with tobacco are now well-known and the effects continue to make headline news.<sup>88</sup> Meanwhile, tens of

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<sup>86</sup> CBA, *supra* note 38, at 8.

<sup>87</sup> Heyman, *supra* note 28.

<sup>88</sup> The headline news refers to the death of Tony Gwynn and current Major League players vow to quit the habit; *see* Gary Phillips, *supra* note 35.

thousands of fans attend ball games each day, millions watch on television, all the while players continue to go about their competition with bulging lips full of a substance that is catastrophic to the player's health.

Though the players' association and Major League Baseball have proven unable to come to an agreement regarding tobacco use, the states have failed to attempt to implement regulation. Safeco Field has implemented regulations that are progressive and modern. However, the regulation is not overt to the public, making it difficult for other stadiums to follow suit. Because Safeco Field and the Seattle Mariners cite the Washington Clean Air Act as authority for their stadium tobacco regulation, it seems plausible that other states, counties, or cities could enact similar laws to prohibit tobacco use in ball parks. However, states would need to enforce those laws for all. Recall, Safeco Field does not enforce the smokeless tobacco regulations against the players.

Major League Baseball failed to prohibit a habit that affects not only the game, but, through its outside influences, society's public health at large. It is now time for the states to act with their plenary police power to protect public health and safety.