

# **A FIELDER’S CHOICE: HOW AGENCY LAW DECIDES THE TRUE OWNER OF THE 2004 RED SOX FINAL-OUT BASEBALL**

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*“The Boston Red Sox, the symbol of heartbreak and human foible to sports fans for nearly a century, are world champions. No more curses. No more moral victories. No more ‘next year.’”<sup>1</sup>*

## **I. INTRODUCTION**

The minute hand crept toward midnight on October 27, 2004. A collective silence lingered over New England, as though the entire region had been holding its breath for the last eighty-six years. The Boston Red Sox had already made baseball history in the American League Championship Series (ALCS) where they came back from a three game deficit to sweep the final four games against their arch rival – the New York Yankees.<sup>2</sup> Now the Red Sox were only one out away from sweeping the St. Louis Cardinals and clinching the World Series Championship that had eluded them for so long.

With two outs in the bottom of the ninth inning, a runner on second and a 1-0 count, Red Sox closer Keith Foulke threw an 89 mph fastball letter high over the outside corner of home

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<sup>1</sup> Mike Dodd, *Curse RIP: 1918-2004*, USA TODAY, Oct. 28, 2004, at 1C.

<sup>2</sup> *There’s reason to grumble in the Bronx; Yankees’ history seems little help as 3-0 lead slip away*, HOUS. CHRON., Oct. 21, 2004, at 16.

plate.<sup>3</sup> Cardinal's shortstop Edgar Renteria swung and hit a hard chopper toward the mound.<sup>4</sup> Foulke reached up, snagged the ball, jogged a few steps towards first base and gingerly underhanded the ball to Doug Mientkiewicz.<sup>5</sup> The joyous image of the ball safely nestled in Mientkiewicz's glove for the final-out of the 2004 World Series immediately embedded itself into the collective consciousness of the "Red Sox Nation."<sup>6</sup> That third and final-out closed a chapter in New England's history books, and Red Sox fans nationwide exhaled a profound sigh of relief.

Accustomed to self-pity and woeful recollections,<sup>7</sup> it was an unfamiliar feeling for New Englanders to spend Thanksgiving, Christmas and the New Year content and happy knowing that they had witnessed perhaps the "most stirring victory in New England since 1776."<sup>8</sup> Meanwhile, the final-out ball that had secured the Red Sox's championship rested safely as one man's souvenir of that historic night.

Not until January 7, 2005 did Red Sox fans begin to wonder what fate had befallen the so-called "Hope Diamond of New England sports."<sup>9</sup> In an article by the Boston Globe's Dan Shaughnessy, it was reported that Doug Mientkiewicz, the Red Sox first-baseman, still possessed the ball and had no intention of handing it over to the organization.<sup>10</sup> Some pegged the potential owners as the Red Sox, the Cardinals, Major League Baseball, and even a few lonely souls

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<sup>3</sup> *Major League Baseball 2004 World Series, Game Four Boston Red Sox at St. Louis Cardinals* (Fox Sports television broadcast, Oct. 27, 2004).

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

<sup>5</sup> *Id.*

<sup>6</sup> "Red Sox Nation" is a phrase used to describe the nationwide Red Sox fan base.

<sup>7</sup> DAN SHAUGHNESSY, *AT FENWAY: DISPATCHES FROM RED SOX NATION* 68, 89 (1997).

<sup>8</sup> *Who else? Red Sox and their fans make Sportsman of the Year choice an easy one*, Sports Illustrated, at <http://sportsillustrated.cnn.com/2004/magazine/specials/sportsman/2004/11/27/wertheim/> (last visited Mar. 28, 2005).

<sup>9</sup> Dan Shaughnessy, *For Now, He's Having a Ball*, BOSTON GLOBE, Jan. 7, 2005, at E1.

<sup>10</sup> *Id.*

believed that Mientkiewicz should keep it.<sup>11</sup> One Red Sox executive described the significance of the final-out ball when he said, “[i]t’s an example of taking something ordinary, like a baseball you can buy in a store, but because of its special nature, it’s sanctified....”<sup>12</sup>

Mientkiewicz’s intentions sparked a quirky national debate on the ownership of the historic ball.

This paper seeks to answer the seemingly innocuous question: who owns the baseball? Ultimately, by applying property and agency law the answer rests within the customs of Major League Baseball (hereinafter “MLB”). Part II explains both the baseball’s significance to the Red Sox community and its monetary value as a historic collectible. Part III establishes that MLB owned the baseball in question, and Part IV describes how MLB “gifted” the ball to Mientkiewicz. Parts V and VI demonstrate that by applying principles of agency law and custom, Mientkiewicz should own the ball. Finally, Part VII considers the avenues that interested parties should take to assure that future historic baseballs are retained by winning teams and not individual players.

## **II. BACKGROUND**

### **A. THE RED SOX – A HISTORY OF SUFFERING**

A brief overview of the Red Sox’s heartbreaking history will offer an average baseball fan a glimpse into the psyche of the Red Sox Nation, and help illustrate the emotional significance of the final-out baseball. It is not surprising that Red Sox fans readily admit seeing the final-out baseball will never approximate the joy they felt when the Sox finally won.<sup>13</sup>

However, after eighty-six years of waiting for a World Series Championship, it was foreseeable

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<sup>11</sup> *Id.* (arguing that the Red Sox are the rightful owners); *but see* Paul Finkelman, Editorial, *This One’s for the Birds*, NY TIMES, Jan. 12, 2005, at A1 (arguing that either the St. Louis Cardinals or MLB owns the ball).

<sup>12</sup> Mike Petraglia, *Sox Thrilled to have Historic Ball*, Major League Baseball, at [http://boston.redsox.mlb.com/NASApp/mlb/bos/news/bos\\_news.jsp?ymd=20050203&content\\_id=939047&vkey=news\\_bos&fext=.jsp](http://boston.redsox.mlb.com/NASApp/mlb/bos/news/bos_news.jsp?ymd=20050203&content_id=939047&vkey=news_bos&fext=.jsp) (quoting Dr. Charles Steinberg, Red Sox Vice President of Public Affairs) (last visited Apr. 28, 2005).

<sup>13</sup> Editorial, *Eyes on the Ball*, BOSTON GLOBE, Jan. 11, 2005, at A10.

that both management and fans would feel some entitlement to the baseball that ended their misery.<sup>14</sup>

The Red Sox had only made it to the World Series four times since 1918 - the last year they took the title.<sup>15</sup> In each of those appearances the opposing team defeated the Red Sox in the seventh game.<sup>16</sup> Perhaps the most infamous of the four World Series losses was the 1986 series where Bill Buckner let a routine groundball scurry between his legs as he crouched behind first base.<sup>17</sup> His error allowed the New York Mets to score the winning run in the sixth game, and eventually go on to win the series.<sup>18</sup> The city of Boston never forgot Buckner's mistake and for years blamed him for the team's failure.<sup>19</sup>

Even when the Red Sox had failed to reach the World Series, they still found ways to break their fans' hearts. In 1978 it was the Yankee's Bucky "F\*\*\*ing" Dent who trampled Boston's hopes with his home run over the Green Monster in the playoff-game's seventh inning.<sup>20</sup> In 2003, it was Yankee Aaron Boone's game-winning home run in the eleventh inning that sealed Boston's fate, denying them another trip to the World Series.<sup>21</sup> It is that long and storied history of failure that has led fans to believe that, "when it comes to the Red Sox... something will go wrong. Always."<sup>22</sup>

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<sup>14</sup> *Red Sox want Mientkiewicz to Fork over Historic Ball*, CHI. TRIB., Jan. 8, 2005, at C2.

<sup>15</sup> SHAUGHNESSY, *supra* note 7, at 45.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 99, 124.

<sup>18</sup> *Id.* at 45, 124.

<sup>19</sup> *Id.* at 122.

<sup>20</sup> *Id.* at 37, 97 (referring to Bucky Dent's notorious nickname received from Boston fans).

<sup>21</sup> Sean T. McMann, *Boone Lowers the Boom*, POUGHKEEPSIE J., Oct. 27, 2003, at 1A.

<sup>22</sup> SHAUGHNESSY, *supra* note 7, at 45.

## B. THE MARKET FOR SPORTS MEMORABILIA

A thriving market for baseball memorabilia has existed beginning with the advent of baseball cards in the late 1800's.<sup>23</sup> Unlike early collectors, today's memorabilia connoisseurs focus on obtaining historic game-used or autographed equipment and cards. Items run the gamut in terms of historical significance, their limited supply creating intense demand and exorbitant prices.<sup>24</sup> Although many people are well aware that a market for sports memorabilia exists, few realize the extent to which some aficionados will go to purchase pieces of baseball history. Presently, the three most expensive items of baseball memorabilia ever sold include: Mark McGwire's 70th homerun ball, which sold for \$3.0 million dollars; a 1909 T-206 Honus Wagner baseball card, which sold for \$1.265 million dollars; and the bat used by Babe Ruth to hit the first home run in Yankee Stadium, which sold for \$1.26 million dollars.<sup>25</sup>

Red Sox memorabilia has certainly garnered a share of that market. In an ironic twist, the baseball that scooted under Bill Buckner's legs and caused countless Red Sox fans' sleepless nights was auctioned off in 1992 for \$93,500.<sup>26</sup> On December 7, 2005, MLB.com auctioned off dozens of 2004 World Series game-used items. Among those was a game-used Red Sox line-up card which sold for \$165,000.<sup>27</sup>

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<sup>23</sup> David E. Rudd, *A Brief History of Baseball Cards*, at <http://www.cycleback.com/1800s/briefhistory.htm> (last visited February 8, 2006).

<sup>24</sup> *SportsCards Plus & Sotheby's Prices Realized December 2<sup>nd</sup>, 2004*, at [http://www.sportscardsplus.com/html/auctions/120204/post/prices\\_120204.pdf](http://www.sportscardsplus.com/html/auctions/120204/post/prices_120204.pdf). (detailing a December 2, 2004 auction. Among the items sold: a Babe Ruth bat used to hit the first homerun in Yankee Stadium for \$1.265 million dollars; Babe Ruth Flannel Road Pants for \$109,250; and Sandy Koufax glove worn during 1963 no-hitter for \$126,500) (last visited Apr. 28, 2005).

<sup>25</sup> The Sports Network, *Gavel Comes Down on Auction*, available at [http://www.kget.com/sports/mlb/story.aspx?content\\_id=E3304765-D3EC-44B5-994C-6BBBB05A45B4](http://www.kget.com/sports/mlb/story.aspx?content_id=E3304765-D3EC-44B5-994C-6BBBB05A45B4) (last visited February 8, 2006).

<sup>26</sup> SHAUGHNESSY, *supra* note 7, at 128 (stating that actor Charlie Sheen purchased the baseball which an umpire had pocketed after Game 6 of the 1986 World Series).

<sup>27</sup> MLB.com, *MLB.com auction of game-used and autographed items from 2004 ALCS and World Series ends*, Dec. 16, 2004, at [http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb\\_com\\_press\\_release.jsp?ymd=20041216&content\\_id=923245&vkey=pr\\_mlbcom&fext=.jsp](http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_com_press_release.jsp?ymd=20041216&content_id=923245&vkey=pr_mlbcom&fext=.jsp) (last visited Apr. 28, 2005).

This fascination with game-used equipment, coupled with an intense demand for Red Sox World Series collectibles has led many memorabilia industry experts to estimate that the 2004 World Series final-out ball could fetch upwards of one-million dollars at auction.<sup>28</sup>

### III. THE TRUE OWNER, BEFORE THE FINAL OUT

The Red Sox final-out ball is not the first time controversy has arisen involving the ownership of a baseball. During the 2001 season, Barry Bonds broke the single season homerun record by crushing his seventy-third dinger<sup>29</sup> into the arcade section of San Francisco's PacBell Park.<sup>30</sup> Chasing what experts suggested might be a million dollar ball, spectators mobbed the fan who initially gloved it – Alex Popov.<sup>31</sup> In the ensuing chaos, Patrick Hayashi emerged from the scrum grinning and holding the historic ball.<sup>32</sup> Popov, who initially stopped the flight of the baseball, brought suit in California Superior Court seeking an injunction to stop Hayashi from selling the keepsake.<sup>33</sup>

In *Popov v. Hayashi*,<sup>34</sup> the court's analysis regarding fan possession and ownership of the home run ball was predicated on the theory that MLB intentionally abandoned the ball when it left the playing field.<sup>35</sup> This is based on a purported "common law of baseball" in which baseball custom, including industry tradition and the fans' expectations that balls may be kept,

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<sup>28</sup> Shaughnessy, *supra* note 9 (quoting owner of Sportsworld, New England's largest memorabilia shop, "[i]t might be worth a million dollars. Who knows?"); *see also* Mark Bechtel, Stephen Cannella, *Money Ball; The Red Sox and Their First Baseman Squabble over a World Series Keepsake*, SPORTS ILLUSTRATED, Jan. 17, 2005, at 21 (quoting Howard Soll of Regency-Superior auction house); Tyler Kepner, *Title is Theirs, and Red Sox Want Ball that Goes With It*, N.Y. TIMES, Jan. 8, 2005, at A1 (quoting Arlan Ettinger of Guernsey's auction house); Paul Doyle, *Mientkiewicz Takes His Ball & Goes Home*, HARTFORD COURANT, Jan. 8, 2005, at 1C..

<sup>29</sup> "Dinger" is one term used to describe a home run.

<sup>30</sup> *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, (Cal. Super. Ct. Dec. 18, 2002).

<sup>31</sup> *Id.* at 2.

<sup>32</sup> *Id.* at 2.

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 3; *see also* Steven Semeraro, *An Essay on Property Rights in Milestone Home Run Baseballs*, 56 SMU L. REV. 2281, 2284 (2003) (noting that although the parties stipulated (as a starting point) that MLB was the owner of the ball prior to the home run, this fact was immaterial to the outcome. No matter if MLB or the home team owned the ball, it still would have been considered abandoned property).

mixes with the traditional law of abandonment.<sup>36</sup> Because the ball became abandoned when it entered the stands, the *Popov* court was forced to define “possession” and decide whether Alex Popov had gained possession over the abandoned home-run ball. In defining “possession,” the court settled on “Gray’s Rule” which requires that a spectator retain control over the baseball after incidental contact with other spectators and inanimate objects.<sup>37</sup> This definition most closely mirrors the custom in the baseball industry and parallels the majority of spectator’s expectations.<sup>38</sup>

In reaching its conclusion, the court decided that Popov never gained “possession” of the baseball because he didn’t retain control over the ball after his unintended contact with the unruly crowd.<sup>39</sup> However, due in part to the crowd’s violent and unlawful activity, the court concluded that Popov had a pre-possessory interest in the ball,<sup>40</sup> and saw fit to order the parties to sell the baseball and equally divide any proceeds.<sup>41</sup>

Unlike the controversial ball in *Popov*, the final-out baseball in question never left the field of play during the game. It was not hit into the stands as a home run or a foul ball. Rather, it finished the game tightly wrapped in Mientkiewicz’s first-baseman’s mitt. Therefore, the *Popov* court’s abandonment theory seems inapplicable. Thus, the critical question becomes: who owns a baseball that stays inside the park?

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<sup>36</sup> See Paul Finkelman, *Fugitive Baseballs and Abandoned Property: Who Owns the Home Run Ball*, 23 CARDOZO L. REV. 1609, 1616 (2002).

<sup>37</sup> *Popov v. Hayashi*, 2002 WL 31833731 at 6.

<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.* at 6.

<sup>40</sup> *Id.* at 6.

<sup>41</sup> *Id.* at 8.

### A. THE ST. LOUIS CARDINALS' CLAIM TO OWNERSHIP

The rules of Major League Baseball expressly state that the home team supplies all baseballs used during an ordinary, regular-season baseball game.<sup>42</sup> Both laymen and legal scholars agree that baseballs staying inside the playing field are not abandoned and clearly remain property of the home team that supplied them.<sup>43</sup> Thus, some commentators have argued that the St. Louis Cardinals organization is the rightful owner of the final-out ball.<sup>44</sup> The apparent logic behind this argument is that since St. Louis was the home team for the final game of the World Series, they necessarily supplied the final-out baseball. Furthermore, since the baseball never left the playing field during the game, the Cardinals never abandoned it and thus retain ownership rights in the ball.

However, that theory is flawed because during the 2004 World Series, MLB supplied much of the equipment used during the games.<sup>45</sup> This included the baseballs, bases, managers' lineup cards, pitcher's rubber, and even home plate.<sup>46</sup> Therefore, the question becomes whether MLB gifted the equipment to the Cardinals. If the answer to that question is yes, then the Cardinals would presumably be the rightful owner. However, if MLB simply loaned the equipment to the Cardinals with the understanding that those items would be returned once the game was over, then as explained in the next section, MLB retained ownership rights in the historic ball.

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<sup>42</sup> *Major League Baseball, Official Rules: Game Preliminaries 3.01(c)* (stating that an umpire shall: receive from the home club a supply of regulation baseballs); *see also* Rule 3.01(d) (stating that the umpire shall: be assured by the home club that at least one dozen regulation reserve balls are immediately available for use if required), available at [http://mlb.mlb.com/NASApp/mlb/mlb/official\\_info/official\\_rules/game\\_preliminaries\\_3.jsp](http://mlb.mlb.com/NASApp/mlb/mlb/official_info/official_rules/game_preliminaries_3.jsp) (last visited Apr. 28, 2005).

<sup>43</sup> *See* Finkelman, *supra* note 36, at 1616.

<sup>44</sup> *Mientkiewicz in Pickle over World Series Ball*, PROVIDENCE J., Jan. 23, 2005, at D-02 (quoting Yale Law School Dean Harold Hongju Koh, who ranked the claims as "the Cardinals, the Red Sox, Major League Baseball and then the guy who happened to hold it at the end of the game.").

<sup>45</sup> Shaughnessy, *supra* note 9.

<sup>46</sup> *Id.*



## B. MLB'S CLAIM TO OWNERSHIP

With respect to the equipment supplied, the relationship between MLB and the St. Louis Cardinals was that of a bailor and a bailee. Although it seems probable that an express agreement existed which allowed MLB to reclaim their bailed equipment upon completion of a game, an implied bailment may have arisen from the circumstances.

A bailment occurs when an owner of goods, a "bailor," delivers goods to another person, a "bailee," for a specific purpose.<sup>47</sup> Upon acceptance, the bailee must have physical control over the property and intend to exercise that control.<sup>48</sup> Most importantly, the bailee takes the goods with an express or implied promise to return the goods once the specific purpose has been satisfied.<sup>49</sup> A bailment can be formed even in the absence of a written contract or a meeting of the minds.<sup>50</sup> All that is necessary to create a bailment is an "element of lawful possession, however created, and duty to account for the thing as the property of another."<sup>51</sup>

Employing the doctrine of bailment reveals that MLB as a bailor, not the Cardinals, had ownership rights in the final-out baseball. First, unquestionably MLB delivered the game equipment to the Cardinals for the specific purpose of utilizing them during the World Series.<sup>52</sup> Furthermore, the Cardinals certainly intended to and did exert actual physical control over the property because the items were in fact used by the teams to play the game.<sup>53</sup>

Finally, it can be assumed that an express or implied promise to return the equipment to MLB was in effect. As the last out was recorded and the Red Sox rushed onto the field to

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<sup>47</sup> *Goudy & Stevens, Inc. v. Cable Marine, Inc.*, 924 F.2d 16, 18 (1st Cir. 1991), *see also* 8A AM. JUR. *Bailments* §1 (2004).

<sup>48</sup> *Morris v. Hamilton*, 302 S.E.2d 51, 52-53 (Va. 1983).

<sup>49</sup> *See Goudy*, 924 F.2d at 18, *see also* 8A AM. JUR. *Bailments* §1 (2004).

<sup>50</sup> *See Morris*, 302 S.E.2d at 52.

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

<sup>52</sup> *Shaughnessy*, *supra* note 9 (stating the MLB supplied the equipment); *see also MLB Official Rules*, *supra* note 38 (according to the Official Rules, the home team supplies the baseballs, not MLB.).

<sup>53</sup> *Id.* (making an obvious inference that since MLB personnel removed the MLB- provided equipment off the playing field, that the equipment must have been used).

celebrate, MLB personnel were immediately “grabbing the lineup card, the bases, bats and balls, whatever there was to grab at that point,”<sup>54</sup> in an effort to collect and immediately authenticate items. The Cardinals acquiescence to MLB’s retrieval of the property is substantial evidence of that implied promise.<sup>55</sup> Perhaps the most decisive factor in proving that a bailment existed was the Cardinals’ noticeable silence during those subsequent events. It is logical to assume that had the Cardinals believed the property rightfully belonged to them, they would have protested MLB’s actions.

From the facts provided above, it is apparent that MLB supplied equipment to the Cardinals in a bailment relationship. Therefore, MLB owned the final-out baseball caught by Doug Mientkiewicz. As legal professor Paul Finkelman succinctly stated, “[s]ince Major League Baseball provided the ball, it’s theirs.”<sup>56</sup>

#### **IV. MLB’S GIFT TO MIENTKIEWICZ**

In the champagne soaked celebration following Boston’s first World Series win in 86 years, Doug Mientkiewicz slipped the game-winning baseball into his wife’s purse.<sup>57</sup> Back in Boston the following day, Jodi Mientkiewicz brought the ball to Fenway Park<sup>58</sup> and a MLB representative authenticated it as the final-out baseball.<sup>59</sup> Although the exact process used by MLB to authenticate the ball remains a secret,<sup>60</sup> based on prior instances of milestone baseballs, it is safe to say that MLB utilized some special mark, numbering or other identifying technology

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<sup>54</sup> *Id.*

<sup>55</sup> On December 7, 2005, MLB.com auctioned off some of those items from the 2004 World Series including game-used baseballs, bases, line-up cards and even the on-deck circle from games three and four. The auction was created and launched by MLB Properties and MLB Advanced Media, LP, the interactive media and internet company of MLB. See *2004 Red Sox Game Memorabilia from the MLB Authentication Program Available to Fans via Exclusive Auction on MLB.com*, BUSINESS WIRE, Dec. 6, 2004.

<sup>56</sup> Bechtel, Cannella, *supra* note 28 (quoting Professor Finkelman, an expert witness in *Popov v. Hayashi*, referring specifically to the final out ball in Mientkiewicz’s possession).

<sup>57</sup> Shaughnessy, *supra* note 9.

<sup>58</sup> Fenway Park is the home field of the Boston Red Sox baseball team.

<sup>59</sup> Shaughnessy, *supra* note 9.

<sup>60</sup> Telephone interview with Michael Posner, Director of MLB Authentication Program (Apr. 26, 2005) (stating the exact process or method by which they are able to identify special balls is secret information).

on the baseball which allowed it to unequivocally state that the ball presented was the actual World Series final-out baseball.<sup>61</sup>

Months later, amidst brewing public curiosity over the ball's ownership, MLB spokesman Carmine Tiso stated, "Doug Mientkiewicz owns the baseball and we authenticated it. Anything beyond that would be between the Red Sox and Doug Mientkiewicz."<sup>62</sup> Without a doubt MLB's statement was an attempt to remove itself from an awkward situation.<sup>63</sup> Fortunately for Mientkiewicz, the unequivocal statement is also strong evidence that MLB intended to transfer ownership rights directly to him in the form of a gift, lessening the public perception that he was a thief.<sup>64</sup>

Courts have defined a "gift" as "[a] voluntary transfer of property by one to another without any consideration therefor."<sup>65</sup> There are three key elements necessary to classify a transfer of property as a gift. First, the donor must deliver or transfer the property to the donee.<sup>66</sup> Next, the donor must intend to transfer the property and "unconditionally release all future dominion and control over [it]."<sup>67</sup> Finally, the donee must accept the gift.<sup>68</sup> Under the facts of this case, all three requirements were met.

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<sup>61</sup> Finkelman, *supra* note 36 (during the Barry Bonds home run chase baseballs were specially numbered or marked); *see also* Naomi Aoki, *MLB Wants to Make Sure Fans Get the Real Deal*, BOSTON GLOBE, Oct. 28, 2004, at B8 (describing how a Deloitte & Touche accountant collected game used baseballs, bases and home plate from Game 3 of the World Series, and affixed holographic stickers bearing unique identification numbers before "returning" the items to MLB).

<sup>62</sup> Shaughnessy, *supra* note 9.

<sup>63</sup> *See id.* (quoting MLB executive acknowledging that until now, baseball officials had never thought about the ownership of game used balls). MLB's other choices included: declaring themselves, the Cardinals or the Red Sox as rightful owners. That would be tantamount to MLB stating "Doug Mientkiewicz stole the baseball."

<sup>64</sup> Michael Morrissey, *Doug: Not Having Ball*, NY POST, Jan. 27, 2005, at 77 (discussing how Mientkiewicz was "rankled by the perception he was a thief, considering it took months for the Red Sox to ask for the ball."); *see also* Finkelman, *supra* note 11 (discussing his theory that since Mientkiewicz took a baseball clearly not belonging to him, he must have stolen it).

<sup>65</sup> *Stone v. Lynch*, 325 S.E.2d 230, 233 (N.C. 1985) (citing *Manufacturing Co. v. Johnson*, 135 S.E. 2d 205 (N.C. 1964)).

<sup>66</sup> *Beatty v. USAA Cas. Ins. Co.*, 954 S.W.2d 250, 253 (Ark. 1997); *see also* 38 AM. JUR. 2D *Gifts* §17 (2004).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

For the first element, MLB must have delivered/transferred the ball to Mientkiewicz. However, in this instance, delivery of the property to Mientkiewicz with the corresponding intent was both impossible and impractical because the ball was already in his possession when MLB released their statement.<sup>69</sup> Fortunately for Mientkiewicz, courts have recognized that a donee already in possession of the donor's property can be transformed into its owner without the meaningless and formal transfer of property back to the true owner first.<sup>70</sup> When this occurs, courts have overlooked the technical delivery requirement and are satisfied by the donor's words or statements advising the donee that he may keep the property as his own.<sup>71</sup> Because MLB's statement clearly advises Mientkiewicz that he may keep the baseball, a court would likely deem that sufficient evidence and discard the technical requirement of delivery.

A weaker argument could be made that MLB's intent can be implied by their authentication of the controversial baseball. In other words, when Mrs. Mientkiewicz (Doug's bailee) handed the ball to the MLB official to be authenticated and the official returned it, MLB relinquished control and dominion over the ball and transferred it to her. Had MLB sought to retain control, it would have, or at least should have, announced their intention at that moment. In any event, the facts suggest that the first element has been satisfied.

For the second element, MLB must have intended to transfer its ownership rights in the baseball to Mientkiewicz. MLB did so when it publicly announced that "Doug Mientkiewicz owns the baseball."<sup>72</sup> That statement clearly advises the donee, Mientkiewicz, that he may rightfully exercise all dominion and control over it as its new owner. Thus, actual delivery with concurrent intent is not necessary, and the facts appear to satisfy the second element..

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<sup>69</sup> Shaughnessy, *supra* note 9 (MLB's statement quoted on Jan. 7, 2005). The article suggested Mientkiewicz had been in continuous possession since final-out on Oct. 27, 2004.

<sup>70</sup> *Humiston v. Bushnell*, 394 A.2d 844, 845 (N.H. 1978); *see also* *Providence Inst. Sav. v. Taft*, 14 RI 502 (1884), 38 AM. JUR. 2D *Gifts* § 24 (2004).

<sup>71</sup> *See Humiston*, 394 A.2d at 845.

<sup>72</sup> Shaughnessy, *supra* note 9.

The donor's motivation/rationale behind the gift is irrelevant in determining whether the donor possessed the requisite intent to transfer ownership.<sup>73</sup> Common law establishes that the donor must merely intend to relinquish the right of dominion over the property and vest that right in the donee.<sup>74</sup> Equally as irrelevant is whether MLB's gift was an attempt to remove itself from an awkward situation or simply an acknowledgment that it is customary for ballplayers to keep baseballs. What is clear is that MLB intended to divest itself of ownership rights in the baseball and transfer those rights to Mientkiewicz.

Finally, Mientkiewicz must have accepted MLB's gift – the baseball. The giving of a gift is often held to be a bilateral transaction requiring the donee's acceptance to complete the transaction.<sup>75</sup> However, when the gift is beneficial, and the donee has a chance to repudiate it, acceptance will be presumed.<sup>76</sup> Mientkiewicz's retention of a valuable baseball can certainly be classified as beneficial to him. His control over the ball coupled with his statements and actions,<sup>77</sup> gave the impression that he believed he had ownership rights in the ball and demonstrate that he had no intention of repudiating the gift. Thus, it is apparent that Mientkiewicz satisfied the acceptance requirement.

All the requirements to make a valid gift appear fulfilled by the facts of this case. Therefore, at this stage of the analysis, Mientkiewicz is the proper owner of the final-out baseball.

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<sup>73</sup> Knight v. Knight, 182 A.D.2d 342, 344 (N.Y. App. Div. 1992), *see also* 38 AM. JUR. 2D *Gifts* §18 (2004).

<sup>74</sup> U.S. v. \$9,041,598.68, 976 F. Supp. 633, 639 (D. Tex. 1997), *see also* 38 AM. JUR. 2D *Gifts* §18 (2004).

<sup>75</sup> United States v. Irvine, 511 U.S. 224, 239 (1994).

<sup>76</sup> Welton v. Gallagher, 630 P.2d 1077, 1083 (Haw. Ct. App. 1981) (showing that where property has some value, a bank account in this case, acceptance will be presumed. There is a low threshold for establishing donee acceptance).

<sup>77</sup> Shaughnessy, *supra* note 9 (Mientkiewicz's statements to the effect that (1) he's holding onto the ball; (2) he put it in a safe deposit box; and (3) if the Red Sox want it they can buy it or call him).

## V. THE RED SOX'S CLAIM TO OWNERSHIP

In response to MLB's statement that Doug Mientkiewicz owned the final-out baseball, the Red Sox organization publicly declared its intention to ask that Mientkiewicz "return" the ball.<sup>78</sup> One Red Sox executive went so far as to state, "I believe we own the ball..."<sup>79</sup> The argument raised by several commentators is that the Red Sox have the power to compel Mientkiewicz to turn over the ball by invoking principles of agency law inherent in their employer-employee relationship.<sup>80</sup> By arguing for a broad interpretation of an agent's duty to account for profits, the Red Sox have a valid argument for forcing Mientkiewicz to cough up the prized keepsake.

### A. THE MIENTKIEWICZ – RED SOX AGENCY RELATIONSHIP

The first step in applying agency law is proving the existence of an agency relationship. In this respect, baseball players are undoubtedly employees, and therefore, agents of their respective teams. The basic tenets of an agency relationship are that one person, a "principal," manifests consent to another, his "agent," that the agent shall act on the principal's behalf and be subject to his control, and that the agent consents to the control.<sup>81</sup> Generally, the agency test focuses on the employer's right to control the agent and the extent of the employer's control when determining the mode and manner in which the work is accomplished.<sup>82</sup> Not surprisingly, numerous courts have presumed agency relationships in cases involving Major League Baseball

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Red Sox Deserve Ball, Scholars Say*, ST. PETERSBURG TIMES, Jan. 23, 2005; *see also Mientkiewicz in Pickle over World Series Ball*, *supra* note 44.

<sup>81</sup> *Leon v. Caterpillar Indus.*, 69 F.3d 1326, 1333 (7th Cir. 1995) (citing RESTATEMENT (SECOND) OF AGENCY § 1).

<sup>82</sup> *Councill v. Douglas*, 126 N.E.2d 597 (Ohio 1955); *see also Southern Ry. Co. v. Black*, 127 F.2d 280, 282 (4th Cir. 1942).

teams and their players.<sup>83</sup> Through that precedent, it can be shown that the Red Sox had sufficient control over Mientkiewicz's actions to deem him an agent of the team.

The first noteworthy factor establishing an agency relationship is that Mientkiewicz was a contractual employee of the Red Sox and was restricted from playing baseball for any other team.<sup>84</sup> Furthermore, the team dictated how and when he was permitted to perform his contractual duties. It was solely at the team's discretion whether his name was written on the lineup card, allowing him to step onto the field and play. Under those facts, the Red Sox's control over Mientkiewicz's actions is sufficient to deem him an agent of the team, thereby rendering general agency laws applicable.

#### **B. DUTY TO ACCOUNT FOR PROFITS ARISING OUT OF EMPLOYMENT**

The most promising argument that the Red Sox have under general principles of agency law is that Mientkiewicz's "gift" arose out of his employment. Consequently, Mientkiewicz is obligated to remit the ball to the team under his duty to account for profits made in connection with his agency.<sup>85</sup>

Implicit in every agency relationship is a duty of "trust, confidence and loyalty."<sup>86</sup> The Restatement (Second) of Agency provides that agents "act solely for the benefit of the principal in all matters connected with his agency."<sup>87</sup> That principle necessarily instills a duty to account

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<sup>83</sup> *Baltimore Orioles, Inc. v. Major League Baseball Players Assoc.*, 805 F.2d 663 (7th Cir. 1986) (stating that baseball players were clearly employees of their teams, but questions arose over scope of employment involving television broadcasts); *see also* *Averill v. Luttrell*, 311 S.W.2d 812 (Tenn. Ct. App. 1957) (holding that baseball player's assault of another player was not within the scope of his employment and thus the employer was not liable under a theory of respondeat superior); *see also* *Atlanta Baseball Co. v. Lawrence*, 144 S.E. 351, (Ga. Ct. App. 1928) (holding that pitcher's attack on a spectator was not within the scope of employment and therefore the team's owner was not liable under a theory of respondeat superior).

<sup>84</sup> *2003-2006 Basic Agreement between the Major League Baseball Player's Association and Major League Baseball Clubs*, at [http://mlbplayers.mlb.com/pa/pdf/cba\\_english.pdf](http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf) (last visited April 3, 2006). "The Player agrees that, while under contract, and prior to expiration of the Club's right to renew this contract, he will not play baseball otherwise than for the Club..." *Id.* at 209 (MLB Uniform Players Contract, clause 5.(a) "Service").

<sup>85</sup> RESTATEMENT (SECOND) OF AGENCY § 388 (Duty to account for profits arising out of employment).

<sup>86</sup> Tory A. Weigand, *Employee Duty of Loyalty and the Doctrine of Forfeiture*, 42 BOSTON BAR J. 6, 7 (1998).

<sup>87</sup> RESTATEMENT (SECOND) OF AGENCY § 387.

for profits arising out of employment.<sup>88</sup> The Restatement also provides that, “[u]nless otherwise agreed, an agent who makes a profit in connection with transactions conducted by him on behalf of the principal is under a duty to give such profit to the principal.”<sup>89</sup>

In *Laseter v. Sistrunk*,<sup>90</sup> the Supreme Court of Mississippi held that an agent receiving gifts arising out of his employment owed a duty to account to his principal for the profits received.<sup>91</sup> Laseter, the principal, employed Sistrunk to represent him in acquiring leases on land believed to have deposits of oil and gas.<sup>92</sup> Undertaking that endeavor, an acquaintance of Sistrunk brought him in contact with a drilling company interested in purchasing the leases.<sup>93</sup> The acquaintance, Frascogna, who was acting on his own behalf when he rendered services to the drilling company, expected he would be compensated by them as a “finder.”<sup>94</sup> When the drilling company eventually paid Frascogna a finder’s fee for bringing the Laseter-Sistrunk leases to their attention, although under no obligation to, Frascogna paid Sistrunk half of that amount.<sup>95</sup>

In its analysis, the court directly quoted the Restatement (Second) of Agency,<sup>96</sup> and cited one variation of the Restatement’s view that an, “agent is under a duty to account for the value of anything received from a third person, given either in exchange for his services or because of them.... The burden is on the agent to prove that it was merely a friendly act, not motivated by the transaction.”<sup>97</sup>

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<sup>88</sup> SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 54:29 (Richard A. Lord ed., 4th ed. 1990).

<sup>89</sup> RESTATEMENT (SECOND) OF AGENCY § 388.

<sup>90</sup> *Laseter v. Sistrunk*, 168 So. 2d 652 (Miss. 1964)

<sup>91</sup> *Id.* at 657.

<sup>92</sup> *Id.* at 653.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 655.

<sup>95</sup> *Id.* at 657.

<sup>96</sup> RESTATEMENT (SECOND) OF AGENCY § 388.

<sup>97</sup> *See Laseter*, 168 So. 2d at 656.



In applying those principles, the court swiftly dismissed Frascogna’s testimony that the gift “sprang out of the magnanimity of his heart.” They noted that the gift’s impetus was to reward Sistrunk for his efforts which had the result of substantially lessening the burden of the process on Frascogna.<sup>98</sup> The court held that the cash gift to Sistrunk was “fruit of the agency,” which had been received in recognition of his actions during and in furtherance of his agency.<sup>99</sup> Since the actions for which he was rewarded arose out of the agency relationship, Sistrunk had a duty to Laseter to account for those profits.<sup>100</sup>

In *Southern Ry. Co. v. Black*,<sup>101</sup> the situation involved station terminal’s “red-caps”<sup>102</sup> who were objecting to their employer’s practice of including tips in the computation of their salary for the purpose of reaching the minimum wage.<sup>103</sup> Apathetic to the workers claim, the court rejected the employees’ view that their employer had no right to exercise control over the gratuities directly received from passengers for services rendered.<sup>104</sup> Judge Parker’s opinion stated that although these gratuities came from passengers, they could “not be received except as incident to the service which defendants permit plaintiffs to render.”<sup>105</sup>

Although the court’s reasoning does not explicitly cite the Restatement’s Duty to Account for Profits rule,<sup>106</sup> it nonetheless reinforces its underlying concept. If profits are received by employees for services rendered during their scope of employment and in

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<sup>98</sup> *Id.* at 657.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Southern Ry. Co. v. Black*, 127 F.2d 280 (4th Cir. 1942).

<sup>102</sup> “Red-caps” refers to porters or baggage handlers.

<sup>103</sup> *Id.* at 283.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> RESTATEMENT (SECOND) OF AGENCY § 388.

furtherance of their agency, they are considered to be arising out of employment. Absent any agreements to the contrary, the principal has a right to possess and control those profits.<sup>107</sup>

### 1. “ARISING OUT OF EMPLOYMENT” – A MOTIVE TEST

Existing case law has yet to establish a clear rule on what constitutes a gift “arising out of employment.” One narrow interpretation suggests that the proper test should focus on the donor’s intent or motive.<sup>108</sup> In both *Laseter* and *Southern Ry. Co.* the “gifts” or “profits” were actually payments in return for services rendered.<sup>109</sup> These services were clearly incidental to the agency relationship, and it was the donor’s intention that the agent be rewarded for providing said services. The court in *Laseter* accepted Seavey’s view on agency which reinforces a “motive test.” This view states that if the employee can prove the transfer of property “was... a friendly act, not motivated by the transaction [in which he participated as an agent],”<sup>110</sup> then it will not be considered arising out of employment and the principal has no right to the profit.

Applying this motive test, the Red Sox could not reasonably argue that MLB compensated Mientkiewicz for services rendered in connection with his agency because the Red Sox could not pay him with property the team never owned. Rather, MLB gifted the ball to Mientkiewicz to remove itself from an awkward situation, not reward him for his diligence and service.

### 2. “ARISING OUT OF EMPLOYMENT” – A “BUT FOR” TEST

The strongest argument that the Red Sox could make would be to suggest a broad interpretation of the “arising out of” standard espoused in the Restatement<sup>111</sup> and utilized in

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<sup>107</sup> See *Southern Ry. Co.*, 127 F.2d at 283 (the court also found that employees retaining tips was customary in the industry yet the employers entered into a contract with employees to negate that custom).

<sup>108</sup> This is distinguishable from the intent necessary to make a gift. Intent to make a gift requires the intent to transfer and divest all ownership rights.

<sup>109</sup> See *Laseter*, 168 So. 2d at 657; see also *Southern Ry. Co.*, 127 F.2d at 283.

<sup>110</sup> See *Laseter*, 168 So. 2d at 657.

<sup>111</sup> RESTATEMENT (SECOND) OF AGENCY § 388.

*Laseter*. The Red Sox could argue for a liberal “but for” test to determine when a gift or gratuity arises out of employment. The test’s critical question is: but for the agency, would the agent have been in a position to receive the gift? When an employee is in the position to provide services or occupy a specific spatial area only by means of their employment, then the duty to account for profits should apply.

In *Laseter*, the agent never would have been in a position to receive a gratuity “but for” his efforts on behalf of his principal.<sup>112</sup> Furthermore, in *Southern Ry. Co.*, “but for” their employment, the “red-caps” never would have been allowed to perform their services and receive gratuities in the terminal station.<sup>113</sup>

Now interpreting the facts under this broad standard yields the conclusion that, but for his employment by the Sox, Mientkiewicz would never have been in a position to catch and retain the baseball. By substituting him into the game as a defensive replacement for David Ortiz in the bottom of the seventh inning,<sup>114</sup> the Red Sox placed Mientkiewicz in a position to come into contact with the ball and possess it. Conversely, had the Sox left Mientkiewicz on the bench, he would never have had that chance. It was solely by his agency with the Red Sox, and their utilization of his skills, that circumstances arose wherein MLB felt compelled to gift Mientkiewicz the final-out baseball.

## **VI. MIENTKIEWICZ’S CLAIM TO OWNERSHIP**

Doug Mientkiewicz’s strongest argument for keeping the ball is that custom in the baseball industry permits players to keep final-out balls. Admittedly, Mientkiewicz acted as an agent of the Red Sox when he caught the final-out ball, and the general rule is that agents must

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<sup>112</sup> See *Laseter*, 168 So. 2d at 657.

<sup>113</sup> See *Southern Ry. Co.*, 127 F.2d at 283.

<sup>114</sup> ESPN.COM, *ESPN Play by Play Analysis of Major League Baseball 2004 World Series, Game Four Boston Red Sox at St. Louis Cardinals*, at <http://sports.espn.go.com/mlb/gameLog?gameId=241027124> (last visited Mar. 2, 2005).

account for profits arising out of employment. However, if an agreement contrary to the general rule is found, an agent will not be required to account for profits arising out of employment. The Restatement (Second) of Agency provides that “[a]n agent can properly retain gratuities received on account of the principal’s business if, because of custom or otherwise, an agreement to that effect is found.”<sup>115</sup> An agreement does not have to consist of an actual writing which evidences the agent’s right to keep gifts, but can be shown by “custom or otherwise.”<sup>116</sup>

Custom can be shown by establishing the principal’s acquiescence to past situations in which agents retained gifts of an analogous type. This reasoning is verified in the Restatement (Second) of Agency.<sup>117</sup> In illustration five of section 388, a purchasing agent for a restaurant frequently receives gifts of food from perspective suppliers for his own personal benefit and consumption.<sup>118</sup> Although the gifts are clearly incidental to and arising from his employment, the agent does not have to account to his principal for them.<sup>119</sup> This stems from the fact that the owner of the restaurant witnessed several of these transactions in the past and said nothing. Therefore, due to the principal’s past acquiescence, the agent has not breached any duty to the owner and the principal has no interest in the gifts.<sup>120</sup>

The United States Supreme Court followed that line of reasoning in *Williams v. Jacksonville Terminal Co.*<sup>121</sup> Again in the context of “red-caps” at terminal stations, the court held that where tipping in an industry is customary, the gratuities collected by an employee

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<sup>115</sup> RESTATEMENT (SECOND) OF AGENCY § 388 cmt. b.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at ill. 5.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Williams v. Jacksonville Terminal Co.*, 315 U.S. 386 (U.S. 1942).

belong to the recipient, absent a specific agreement or understanding to the contrary.<sup>122</sup> In the other “red-cap” case, *Southern Ry. Co.*, an agreement existed which trumped the custom.<sup>123</sup>

The customary practice in professional baseball is to allow players to retain the inexpensive balls at game’s end. Instances of World Series final-out baseballs ending up in the hands of players are well documented.<sup>124</sup> A majority of World Series championship teams are simply unaware of the location of their respective final-out baseballs.<sup>125</sup> Conversely, when the a ball’s whereabouts are publicly known, the ball usually resides with a player or coach. Examples of players recording the final-out and then keeping the baseball include the Baltimore Orioles’ Cal Ripken, Jr. who caught a line-out to end the 1983 World Series, Cincinnati Reds’ first baseman Todd Benzinger who caught a pop-fly to end the 1990 World Series, and Anaheim Angels’ outfielder Darin Erstad who caught a pop-fly off Kenny Lofton’s bat to end the 2002 World Series.<sup>126</sup> Baseball is unique in that respect. In other sports, such as professional football, it is customary for teams to retain possession of game-used footballs.<sup>127</sup> Usually, a team either holds the ball for their collection or gives out a “game ball” to a deserving player for his feats on the field.<sup>128</sup> Occasionally, pursuant to an understanding with individual players, football teams will allow the player to retain special milestone footballs.<sup>129</sup>

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<sup>122</sup> *Id.*

<sup>123</sup> *See Southern Ry. Co.*, 127 F.2d at 283.

<sup>124</sup> Kepner, *supra* note 28. Tino Martinez of the New York Yankees caught the final out in the 1998 World Series and gave it to pitcher Andy Pettitte, who presumably still has it. The 1988 World Series final-out ball was caught by Los Angeles Dodgers’ catcher Rick Dempsey, who as promised, gave it to general manager Fred Claire, who still owns it. Even the Baseball Hall of Fame in Cooperstown, NY only has two World Series final-out balls – from the 1889 and 1903 World Series.

<sup>125</sup> *Id.* The “whereabouts of other final World Series balls are less certain.” World Series championship final-out baseballs locations are unknown for the Philadelphia Phillies only World Series championship from 1980, the Kansas City Royal’s only World Series Championship from 1985, and the 1986 New York Mets.

<sup>126</sup> *Id.*; *see also* Matt Wilste, *World Series Final Outs*, at [http://www.baseball-almanac.com/ws/world\\_series\\_final\\_outs.shtml](http://www.baseball-almanac.com/ws/world_series_final_outs.shtml) (last visited February 8, 2006).

<sup>127</sup> Darren Rovell, *Ownership Rules Unclear*, at <http://sports.espn.go.com/mlb/news/story?id=1972865> (last visited Mar. 15, 2005).

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (allowing Emmitt Smith to keep touchdown balls for his collection).

Although baseball teams may have required players to return baseballs in the past, witnessing a present day final-out validates Mientkiewicz's "custom" argument. In today's classic final-out situation, the pitcher hurls strike three past the opposing hitter. Then the catcher, ball in hand, jogs to the mound and hands it to the pitcher as he congratulates him. The sport has never seen a team representative ask for the ball back.<sup>130</sup> The Mientkiewicz-ball controversy is arguably the first documented instance where a baseball team has requested that a player return a specific ball.<sup>131</sup>

In addition to establishing an industry wide custom,<sup>132</sup> Mientkiewicz can demonstrate that the Red Sox have allowed players to keep final-out balls in the past. An example of the team's assent occurred seven days before Mientkiewicz's fateful World Series catch when they defeated the New York Yankees in game seven of the 2004 ALCS. In that game, Mientkiewicz also recorded the final out, but gave the baseball to pitcher Derek Lowe for his efforts.<sup>133</sup> As one commentator exclaimed, "[w]hat's this about Lowe having the New York ball? That's the ball I want. Who cares about the Cardinals."<sup>134</sup>

The Red Sox have several arguments to respond to Mientkiewicz's "custom" theory. First, the Sox could argue that an additional custom dictates that players return historic or special game balls to the team, recognizing their inherent sentimental value to the organization. Even Mientkiewicz acknowledged the ball's importance by stating "I know this ball has a lot of

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<sup>130</sup> *Mientkiewicz in Pickle over World Series Ball*, *supra* note 44.

<sup>131</sup> Shaughnessy, *supra* note 9 (quoting Joe Januszewski, Red Sox director of corporate partnerships as saying, "I don't know any precedent for a team saying we need it back. Like, "Hey, Doug, we'd like to have that for our museum."").

<sup>132</sup> Ian Brown, *Who Owns the historic Baseball*, Major League Baseball, at [http://boston.redsox.mlb.com/NASApp/mlb/news/article.jsp?ymd=20050107&content\\_id=928470&vkey=news\\_bos&fext=.jsp&c\\_id=bos](http://boston.redsox.mlb.com/NASApp/mlb/news/article.jsp?ymd=20050107&content_id=928470&vkey=news_bos&fext=.jsp&c_id=bos) (noting "it is commonplace for players to hold onto baseballs after the last out of the game, be it in the regular season or in the postseason.") (last visited Apr. 28, 2005).

<sup>133</sup> *Mientkiewicz in Pickle over World Series Ball*, *supra* note 44.

<sup>134</sup> *Id.*

sentimental value,”<sup>135</sup> noting “[t]his is something that took 86 years, and 86 years is a long time.”<sup>136</sup> Although this theory implies that players recognize a duty to return game balls to their team, it is more realistically derived from an individual player’s sense of good sportsmanship or team loyalty. For example, though the location of the Chicago White Sox’s 2005 World Series final-out baseball was initially a mystery, the player that gloved it, Paul Konerko, eventually presented it to team owner, Jerry Reinsdorf, in the days following their first championship since 1917 – proving not all of today’s players ascribe to Mientkiewicz’s seemingly selfish outlook.<sup>137</sup>

Second, the Red Sox may accept that it is customary to allow players to retain a normal baseball of nominal value,<sup>138</sup> however, they could argue that the custom does not extend to million-dollar baseballs.<sup>139</sup> This value-based argument seems to satisfy the underlying purpose of the Restatement’s Duty to Account for Profits rule,<sup>140</sup> which is to prevent unjust enrichment by converting the agent into a constructive trustee.<sup>141</sup> Unfortunately for Red Sox fans whose instincts demand that Mientkiewicz return the baseball, absent an agreement to the contrary, a stronger custom exists in the player’s favor and thus Mientkiewicz is not obligated to remit the ball to the Red Sox.

## VII. PROPOSED SOLUTION

Although the Red Sox will ultimately lose a claim to the 2004 World Series final-out baseball, future teams have options to avoid a repeat of this misfortune. In several leading cases involving gifts or gratuities arising out of employment, the courts ultimately based employer-

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<sup>135</sup> Jim Souhan, *The Ball' is in Mientkiewicz's court*, STAR TRIB., Jan. 8, 2005, at 1A.

<sup>136</sup> Bill Sanderson, *Red Sox Ball Hog – Player Won't Give Up Historic Series Last Out*, N.Y. POST, Jan. 8, 2005, at 13.

<sup>137</sup> *Chicago Fans Flock to Sox Parade*, DETROIT FREE PRESS, (Oct. 29, 2005) at Sports 5.

<sup>138</sup> A normal baseball retails for approximately \$8-\$12.

<sup>139</sup> Kepner, *supra* note 28.

<sup>140</sup> RESTATEMENT (SECOND) OF AGENCY § 388.

<sup>141</sup> *Id.*

beneficial outcomes on agreements struck between the employers and their employees.<sup>142</sup> These arrangements negated industry custom and required employees to remit gratuities or tips directly to the employer.<sup>143</sup>

Baseball teams have the same option. The teams could specifically include a clause in players' contracts or provide notice to the club as a whole that final-out balls remain property of the team. Additionally, the team could explicitly forbid players from either keeping or giving away specific final-out or milestone baseballs. Although pros and cons exist to such an arrangement,<sup>144</sup> courts have found analogous agreements in other industries to be valid within the confines of contract and agency law.<sup>145</sup>

The interesting question regarding final-out baseballs is: which team gets the ball? The most logical agreement is that the winning team has ownership rights in the final-out baseball. Similar to the custom in professional football, the winning team could then decide whether to keep it or give it to a deserving player as a game ball. Commentators have agreed with this proposal and criticized MLB for not clarifying the rules for the entire industry.<sup>146</sup> For its part, MLB acknowledges that until now, they had not thought about who owned the game balls.<sup>147</sup>

Under the proposed "winner-take-ball" solution, it is inconsequential whether a team wins by recording the final-out on defense or winning by a run scored while batting. In either

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<sup>142</sup> *Harrison v. Kansas City Terminal Ry. Co.*, 36 F. Supp. 434, 438 (1941); *see also* *Gloyd v. Hotel La Salle Co.*, 221 Ill. App. 104 (Ill. App. Ct. 1921).

<sup>143</sup> *Id.*

<sup>144</sup> In the context of baseball, the following arguments are applicable: Players keeping the ball: pros include maintaining the custom or tradition, encouraging good sportsmanship in giving the ball to pitcher or deserving player; cons include one player getting a bonus, player might sell to uninvolved third party, player might make the team pay him more money, public persona of disloyalty to team. Teams keeping the ball: pros include being able to display for fans, or donating to the hall of fame, teams more likely to give to a deserving player. Cons include the possibility they're just doing this for money, so they can make revenue off charging people to see the trophy and game ball.

<sup>145</sup> *See Southern Ry. Co.*, 127 F.2d at 283.

<sup>146</sup> *Mientkiewicz in Pickle over World Series Ball*, *supra* note 44 (quoting Professor Paul Finkelman as stating "MLB should decide that the winning team should be able to dispose of the game ball...")

<sup>147</sup> Murray Chass, *Newest Met Finally Lets Go Of the Ball*, N.Y. TIMES, Jan. 27, 2005, at D3.



situation, ownership rights could transfer to the winning team immediately, allowing them to enforce those rights against any player that takes possession of the ball. However, if the winning team allows a player to keep the ball, the player may argue that the team gifted the ball to him.

By considering the sentimental and financial motives of players and their teams, the players' union and the teams should come to a reasonable and fair agreement in order to prevent a future public dispute over important memorabilia. As of the publishing of this piece, no such formal agreement is in place within this author's knowledge.

### **VIII. CONCLUSION**

Through baseball custom, Doug Mientkiewicz should be allowed to keep the 2004 World Series final-out baseball. Although the gift may have arisen out of his employment relationship with the Red Sox, the baseball industry's long-standing tradition of allowing players to keep final-out baseballs would effectively negate the Sox's claim of ownership. This unique situation of a team requesting a sentimental ball back has given notice to MLB that some guidelines must be established.

The potential outcome of this controversy may seem disappointing to many fans who believe that the ball represents an entire team's effort over a 176 game season.<sup>148</sup> To those fans, allowing a single member of the team to possess the final-out ball is a great injustice. Interestingly, commentators have noted that Mientkiewicz's short tenure as a Red Sox player may have created a less sympathetic atmosphere among the Boston faithful.<sup>149</sup> Perhaps if the player were a fan favorite like Curt Shilling, Manny Ramirez or David Ortiz the story would be

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<sup>148</sup> Souhan, *supra* note 135 (Kent Hrbek, a former Mientkiewicz teammate, offered this advice: "If Doug was playing in the U.S. Open tennis tournament and he won it on the final serve, then that tennis ball belongs to him. But baseball is a team game, so that's a team ball...").

<sup>149</sup> *Mientkiewicz in Pickle over World Series Ball*, *supra* note 44.

different. Nevertheless, the Red Sox have learned a valuable lesson. Perhaps a view that all players possess characteristics of good sportsmanship and team pride is too naïve.

Will the ball ever belong to the Red Sox? Depending on the size of the Red Sox's checkbook, or their willingness to bring suit, the historic baseball marking the end of eighty-six years of heartbreak will probably find a permanent home in Beantown. For now, the Red Sox are content to have reached an agreement wherein Mientkiewicz has "loaned" the baseball to the team for one year to be a part of the World Series trophy tour.<sup>150</sup> When asked by reporters what he would do if he found himself in the same situation next year, Mientkiewicz responded, "I'm going to make it point blank and clear what they want me to do with it after [the Mets] win the World Series."<sup>151</sup>

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<sup>150</sup> Morrissey, *supra* note 64.

<sup>151</sup> Morrissey, *supra* note 64.