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THREE STRIKES AND YOU'RE OUTTA HERE! MINOR LEAGUE BASEBALL CITIES' POTENTIAL TO BRING UNFAIR AND DECEPTIVE TRADE PRACTICE CLAIM IN THE FACE OF MLB CONTRACTION

MICHAEL VIVERITO[*]

INTRODUCTION

It seems like something straight out of Hollywood. The world has shut down, businesses have closed their doors, and people have been encouraged, and, in most cases, instructed to stay at home.[1] In the wake of the novel COVID-19 global pandemic, sports have become a past memory, rather than a present reality, as hundreds of sporting events across the world have been postponed or canceled.[2] As the world wages its war against an unseen enemy, there persists another major battle behind the scenes in professional baseball; one not at the forefront of the news as of late, but nonetheless poised to have drastic implications for cities across the United States.

In the minds of most communities around the world, one of the most important assets it can possess is a local professional sports franchise. After a city and an owner pour resources into the construction and maintenance of professional sports venues, they expect to see a return on their investment.

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[1] *See* Kaleigh Rogers, *Why Did the World Shut Down for COVID-19 but Not Ebola, SARS or Swine Flu?*, FIVETHIRTYEIGHT (Apr. 14, 2020), https://fivethirtyeight.com/features/why-did-the-world-shut-down-for-covid-19-but-not-ebola-sars-or-swine-flu/; *See also* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. TIMES (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html.

[2] *See Coronavirus Cancellations and Reactions in Sports*, ESPN (Apr. 24, 2020), https://www.espn.com/espn/story/_/id/28871525/coronavirus-cancellations-reactions-sports.

However, in the eyes of some, a local professional sports franchise can be a cumbersome detriment. Take Minor League Baseball ("MiLB"), for example. When it comes to the minor leagues, MiLB and Major League Baseball ("MLB") have staunch disagreements over its necessity and purpose.

The economics of MiLB are unusual and, as such, have led to a bifurcated arrangement between MiLB and MLB regarding finances involved in the operation of the minor leagues.[3] As part of this agreement, MLB teams pay the salaries of their minor league affiliate's players through affiliation contracts,[4] also known as Player Development Contracts ("PDC").[5] Concurrently, MiLB team owners are responsible for field maintenance and operation, team equipment, including uniforms and other "non-personnel operations."[6] This arrangement, however, has led MLB and MiLB to butt heads over the financial burden the other poses. MLB believes that it pours "hundreds of millions of dollars" into what, in their eyes, is "an unprofitable enterprise" on expenses that primarily only benefit the minor leagues.[7] Conversely, MiLB is unhappy with the millions of dollars it devotes to the instruction and development of tens of thousands of players for MLB action as required by a PDC.[8]

In recent months, the two leagues have been scuffling over the finances associated with MiLB, particularly the payment of players' salaries. Tensions have reached a boiling point, as MLB now threatens forty-two MiLB teams with losing their major league affiliation as part of its initiative to contract the minor leagues in an effort to limit operating costs.[9] Cities currently home to minor league teams, as well as those looking to attract team teams, now look for relief in the face of MLB contraction. Because MiLB and MLB work together, MLB is an authoritative voice to which MiLB, and its respective cities, look to for guidance in conforming to MLB's standards and requirements for sustaining an affiliated team.

Accordingly, if a major league team wants its minor league affiliate's field to have a similar layout, or match the dimensions of the field where the big-league ball club plays, that hardship falls on the team owner and city to accomplish that feat by pouring resources into the construction of a park in compliance with the major league team's request. These cities rely on MLB's word that an affiliated team, rather than an independent league team, will play

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[3] Michael McCann, *Save the Spinners: How One Town Attempts to Stave Off MLB's Contractual Plan for the Minors*, SPORTS ILLUSTRATED (Jan. 7, 2020), https://www.si.com/mlb/2020/01/08/save-the-lowell-spinners-controversial-plan-for-milb.

[4] *Id.*

[5] *See Player Development Contracts*, MINOR LEAGUE BASEBALL, https://www.milb.com/about/pdc (last visited Mar. 29, 2020).

[6] McCann, *supra* note 3.

[7] *Id.*

[8] *Id.*

[9] *Id.*

at that stadium if the necessary measures are taken.[10] Thus, in light of MiLB and its respective cities' reliance on MLB guidance and dictation, there exists a potential claim of unfair or deceptive trade practices as a possibility for relief.

This article will examine United States federal law on unfair and deceptive trade practices in an effort to analyze the potential for MiLB cities to bring legal claims against MLB in light of contraction of the minor leagues. First, Part I will explain the affiliation between MiLB and MLB before moving on to the current state of relations between the two leagues, including background on the main lawsuit central to this issue, as well as proposed legislation enacted by government officials. Part I will conclude by identifying the MLB commissioner's "best interest power," which, while powerful within the game of baseball, is largely symbolic and holds little-to-no legal effect, meaning it would be defeated by any legal claim brought against it. Next, Part II of this article will provide a detailed analysis of the elements required to establish liability under Section 5 of the Federal Trade Commission Act[11] for an unfair or deceptive trade practice claim. Part III will examine prior case law to identify comparable factual scenarios before applying the law to a fictitious city in order to weigh its potential to bring a claim under Section 5. Finally, this article will conclude that, through a Section 5 analysis and prior case law review, a city would likely have standing to raise a lawsuit against MLB based on unfair or deceptive trade practices.

I. THE SCOUTING REPORT

This section will introduce readers to former general manager Branch Rickey and explain how he revolutionized the minor leagues into what they are today. The relationship between the major-and-minor leagues exists through PDCs, an agreement between both leagues, giving both certain obligations to fulfill. Then, this section will present the reader with the legal saga created by the lawsuit of a former minor league player that led to the Save America's Pastime Act ("SAPA") and MLB's exemption from federal labor laws. Finally, the reader will learn about the "best interest power," held only by the commissioner, and its viability as an available defense to MLB in its present legal battle.

[10] *Cf.* Ballpark Digest Editors, *2019 Affiliated Attendance by Average*, BALLPARK DIGEST (Sept. 9, 2019), https://ballparkdigest.com/2019/09/09/2019-affiliated-attendance-by-average/ (League leading total attendance was 650,934 in 70 games, with an average of just under 9,300 fans per game); *and* Kevin Richard, *2019 Independent Baseball Attendance by Average*, BALLPARK DIGEST (Sept. 23, 2019), https://ballparkdigest.com/2019/09/23/2019-independent-baseball-attendance-by-average/ (Comparable total attendance for 69 games was 344, 641, with an average of 5,385 fans per game).

[11] *See* 15 U.S.C. § 45 (2020).

However, it will be demonstrated that this power has little-to-no legal relevance when applied to the issue at focus in this article.

A. An Overview of MiLB

Even before minor league affiliation came about, a league separate from the major leagues had existed since 1901 with the formation of the National Association of Professional Baseball Leagues ("NAPBL") in September of that year.[12] Today, there are 160 MiLB teams dispersed throughout 17 different leagues around the United States, Canada, and the Dominican Republic.[13] Full-season minor league teams play a 140-game regular season from April to September, in addition to added time for spring training and the playoffs.[14] These teams are colloquially referred to as the "farm systems" for their MLB parent club because of their purpose to foster players in an effort to make them ready and capable for big-league action.[15] In the early years of the NAPBL's existence, major league teams did not utilize the existing league as a way to foster and develop players for use at the major league level. That changed in 1919 with then general manager of the St. Louis Cardinals, Branch Rickey, whose plan for a "farm system" called for Cardinal-owned teams at various minor league levels to develop players that would help the major league team.[16] This was only a plan in theory, however, as major league teams could neither purchase nor own a minor league team. As luck would have it, the new National Association Agreement was signed in 1921, which permitted major league organizations to own minor league teams.[17] Shortly thereafter, Rickey purchased three minor league teams to affiliate them with the big-league club and began loading them with talent to train and develop.[18]

Today, this affiliation is codified in the official MLB rulebook as Rule 56, which states, in part, "[F]or any Major League Club and any Minor League Club . . . to establish or maintain any form of working agreement or other contractual relationship, they both must sign a standard form letter . . . binding them both to the terms and conditions of the standard Player Development Contract . . . ."[19]

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[12] *The History & Function of Minor League Baseball*, MINOR LEAGUE BASEBALL, http://www.milb.com/milb/history/general_history.jsp (last visited Apr. 7, 2020) ("The National Association of Professional Baseball Leagues, [is] now known as Minor League Baseball . . . .").

[13] *About*, MINOR LEAGUE BASEBALL, https://www.milb.com/about (last visited Mar. 29, 2020).

[14] *See Minor League Baseball*, WIKIPEDIA, https://en.wikipedia.org/wiki/Minor_League_Baseball (last visited Mar. 29, 2020).

[15] *Id.* (stating that the "farm" comparison came from MLB players in the 1930 who joked that minor league teams were "growing players down on the farm like corn").

[16] Pat Doyle, *Branch Rickey's Farm*, BASEBALL-ALMANAC, https://www.baseball-almanac.com/minor-league/minor2005a.shtml (last visited Mar. 29, 2020).

[17] *Id.*

[18] *Id.*

[19] *The Official Professional Baseball Rules Book*, MAJOR LEAGUE BASEBALL, RULE 56 (2019), https://registration.mlbpa.org/pdf/MajorLeagueRules.pdf.

Players are then sent a Uniform Player Contract ("UPC"), which lays out the terms of their employment with their parent ball club.[20] This creates a relationship between the player and the parent organization for seven years whereby the player remains subject to the major league club's instructions year-round, both in-season as well as during the offseason.[21] Additionally, the PDC is the only working agreement permitted between MiLB and MLB.[22] Thus, the PDC creates certain obligations for both MLB organizations and their affiliates' players through the duration of the contractual relationship.

MiLB franchise ownership is charged with assembling a front office and staff to manage all business aspects, including gameday operations, which amount to ticket sales, promotion, and broadcasting, in addition to others.[23] This allows MiLB teams to take in revenue from several different streams locally.[24] MLB parent clubs, in turn, make all decisions related to roster assignment, coaching staff, and player development for each MiLB team it holds a PDC with.[25] Most importantly in the scope of this article, major league clubs are responsible for the "payment of all obligations to or for the benefit of" minor league ball players.[26]

Most MiLB franchise owners are private individuals or ownership groups, while construction, ownership, and management of baseball stadiums are left to local municipalities.[27] To put the cost of constructing a stadium into perspective, the Houston Astros' Class A-Advanced affiliate, the Fayetteville Woodpeckers, saw the city of Fayetteville, Arkansas spend $37.8 million on its new stadium that opened in 2019.[28] In High Point, North Carolina, the city constructed BB&T Point, the $36 million stadium[29] where the High Point Rockers, a team in the independent league of unaffiliated baseball, play their

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[20] *See, e.g.*, MINOR LEAGUE UNIFORM PLAYER CONTRACT (2020), https://ipmall.law.unh.edu/content/unh-sports-law-repository-contracts-uniform-contracts (last visited Apr. 6, 2020).

[21] *Id.*

[22] *The Official Professional Baseball Rules Book, supra* note 19, at Rule 56(a).

[23] *Player Development Contracts, supra* note 5.

[24] Anne Wall, *Sports Marketing and the Law: Protecting Proprietary Interests in Sports Entertainment Events*, 7 MARQ. SPORTS L. J. 77, 95 (1996) ("Local revenues generated and maintained at the club . . . level include: (1) local television broadcasts made into the team's 'home territory;' (2) local radio broadcasts; (3) season, group and individual ticket sales; (4) luxury box rental and preferred seating; (5) signage; (6) program sales; (7) local promotions; (8) concession; (9) parking; and (10) participant entry fees"); *See also* David Broughton, *MiLB, Teams Had Record Merchandising Sales in 2018*, SPORTS BUS. J. (Jul. 8, 2019), https://www.sportsbusinessdaily.com/Journal/Issues/2019/07/08/Research-and-Ratings/MiLB-merchandise.aspx. (stating that all 160 clubs across MiLB brought in a combined $73.9 million in merchandising sales, which was up 4% from 2017.).

[25] *Player Development Contracts, supra* note 5.

[26] *The Official Professional Baseball Rules Book, supra* note 19, at Rule 56(g)(5)(A).

[27] *Player Development Contracts, supra* note 5.

[28] Monica Vendituoli, *Baseball Stadium Budget Set at $37.8 Million*, THE FAYETTEVILLE OBSERVER (Mar. 19, 2018), https://www.fayobserver.com/news/20180319/baseball-stadium-budget-set-at-378-million.

[29] Lloyd Whittington, *High Point Baseball Stadium has a Name*, TRIAD BUS. J. (Apr. 12, 2018), https://www.bizjournals.com/triad/news/2018/04/12/high-point-baseball-stadium-has-a-name.html.

home games.[30] Prince William County in Virginia, where the former Potomac Nationals played their games, brought a public referendum to identify the source of funding for the construction of a new $35 million stadium that was to replace the current diminishing venue.[31] The Pawtucket Red Sox wanted to do even more, this time asking fans for public funds to help construct a new $83 million stadium in 2017.[32] In the financial breakdown of the bill for this proposed stadium the Triple-A team of the Boston Red Sox would be personally on the hook for $45 million, whereas the city and state, Pawtucket, Rhode Island, would both contribute a combined $38 million.[33] Cities dedicate absorbent financial resources to stadiums that may be filled one year and vacant the next. Take the Pawtucket Red Sox in the example above; playing in Pawtucket, Rhode Island one year and Worcester, Massachusetts the next, where the city has a planned $100 million at its disposal to finance the new Polar Park.[34]

This article will now explain the current state of affairs in the relationship between MiLB and MLB. As Part II will demonstrate, that relationship is now being tested like never before, especially with the looming threat of MLB contraction and the upcoming expiration of the current operating agreement between MiLB and MLB at the conclusion of the 2020 season.[35]

B. Current State of Relations

Babe Ruth, Hank Aaron, Sandy Koufax, Ernie Banks, Mike Trout; these names all are synonymous with the game of baseball. Fans attribute the names to what the individuals holding them accomplished on the field during their careers. Aaron Senne is not a name one associates with baseball, nor is it one someone would hear and stop to think twice about. Yet, in the coming years, it is possible that Aaron Senne becomes a name that, like those mentioned above, is forever linked with baseball history. In this instance, however, the name will be linked to what a player has accomplished off the field, rather than his successes on it. For Aaron Senne, his legacy will be having given minor leaguers a voice in the game of finances played by MiLB and MLB.

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[30] Eric Boehm, *These Three Cities Spent $70 Million on Stadiums to Lure Minor League Baseball Teams. They All Struck Out.*, REASON (Apr. 1, 2019), https://reason.com/2019/04/01/70-million-minor-league-stadium-fail/.

[31] Jenna West, *Are Minor League Parks a Bad Deal for Cities?*, USA TODAY (Aug. 22, 2017), https://www.usatoday.com/story/sports/mlb/2017/08/22/minor-league-parks-bad-deal-cities/591770001/.

[32] *Id.*

[33] *Id.*

[34] Paul Burton, *Worcester Expects to Borrow $32 Million for Ballpark Overruns*, THE BOND BUYER (Jan. 14, 2020), https://www.bondbuyer.com/news/worcester-expects-to-borrow-32-million-for-ballpark-overruns.

[35] Neil deMause, *Why MLB Declared War on The Minor Leagues*, SLATE (Dec. 19, 2019), https://slate.com/culture/2019/12/mlb-minor-league-baseball-contraction-kill-milb-teams-collusion.html.

Aaron Senne was drafted three times as an amateur, once in high school, and twice in college.[36] The third and final time, Senne signed with the Florida Marlins after being selected in the tenth round of the 2010 MLB Amateur Draft.[37] Senne had an uninspiring minor league career, batting only .279 in 152 games over a three-year career, never making it past Class A-Advanced.[38] While in the minor league system, Senne had first-hand experience with the working conditions imposed upon minor leaguers during the season and what the parent clubs expected from players in their development during the offseason. Players work fifty to seventy hours per week during a five-month season, not including spring training,[39] a camp held annually during the early months of the year in Florida and Arizona by each club before the official start of the regular season. Players in rookie ball and Class A receive minimum monthly salaries of $1,100, while players in Double-A and Triple-A earn $1,500 and $2,150 per month respectively.[40] Thus, many minor leaguers earn wages that place them at or below the federal poverty line.[41] Compare that with the comfortable MLB minimum salary, $555,000 in 2019, and it is quite obvious why minor leaguers want to see some change when it comes to the payment for their services.[42]

In February 2014, Senne commenced an action against the Office of the Commissioner of Baseball (the "*Senne* suit").[43] Dubbed a "'first-of-its-kind' challenge to MLB's minor league pay practices,"[44] the principle point asserted was that MLB violated the Fair Labor Standards Act ("FLSA") by, "failing to pay minor league players in accordance with federal minimum-wage and overtime rules during the regular season," and by, "failing to pay these same players anything at all for their participation in spring training, fall instructional leagues, and mandatory off-season workout programs."[45] In its brief history, the *Senne* suit's existence has been tumultuous, going from certification in

[36] *Aaron Senne*, BASEBALL REFERENCE, https://www.baseball-reference.com/register/player.fcgi?id=senne-001aar (last visited Apr. 6, 2020).

[37] *Id.*

[38] *See Id.*

[39] Theodore McDowell, *Changing the Game: Remedying the Deficiencies of Baseball's Antitrust Exemption in the Minor Leagues*, 9 HARV. J. SPORTS & ENT. L. 1, 2 (2018).

[40] Ronald Blum, *Baseball Players in Minors to Lose Minimum Wage Protection*, ASSOC. PRESS NEWS (Mar. 23, 2018), https://apnews.com/cb183f59e88948e8b9cd49ad07bde807/Baseball-players-in-minors-to-lose-minimum-wage-protection.

[41] Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Litigation Epitomized*, 90 U. COLO. L. REV. 1013, 1014 (2019). *See generally 2018 Poverty Guidelines*, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, https://aspe.hhs.gov/2018-poverty-guidelines (last visited Apr. 6, 2020) (stating that the federal poverty line for single-person households in 2018 was $12,140).

[42] Scott Boeck, *MLB Salaries: The All-Near-League Minimum Team*, USA TODAY (Mar. 29, 2019), https://www.usatoday.com/story/sports/mlb/2019/03/29/mlb-salaries-league-minimum-baseball/3306763002/.

[43] Grow, *supra* note 41, at 1016–17.

[44] *Id.* at 1017.

[45] *Id.*

October 2015, to decertification in July 2016, back to certification in March 2017.[46] In August 2019, the Ninth Circuit heard the case, affirming class certification and remanding it back to the California district court with further instructions relating to choice of law for the certified class.[47]

As of the time of this writing, the suit has not been argued on its merits, and judicial treatment of the issues has been unpredictable at best.[48] During early litigation, however, MLB argued two key defenses – the Seasonal Amusement and Recreation Establishment Defenses and the Creative Professional Exemption.[49] These defenses argue the nature and business of MLB cause it to be exempted from FLSA compliance.[50] Because the issue of FLSA exemption is both a present and future problem, coupled with the uncertainty of how a court will rule on the merits of the *Senne* suit, MLB looked "to find other mechanisms through which it could insulate its minor league pay practices from legal challenge under the FLSA."[51]

In 2016, the Save America's Pastime Act ("SAPA") was first introduced by Rep. Brett Guthrie of Kentucky and Rep. Cheri Bustos of Illinois,[52] exempting MLB from the minimum wage and overtime hours language contained in the Fair Labor Standards Act.[53] This legislation was initially broad, applying to "any employee" who held a contract with an affiliated team to play baseball at the minor league level and completely excluded minor league baseball players from the minimum wage and overtime laws contained in the FLSA.[54] In the eyes of the public, however, this was another example of a multi-billion dollar corporation looking to minimize payments to employees, while increasing their hours of labor. As one author put it, "[t]he prospect of Congress passing a legislative exemption shielding MLB . . . from the legal obligation to pay some of its employees the minimum wage triggered a wave of outcry . . . ."[55] Criticism over the SAPA and the public backlash it received caused the bill to wilt away in the House of Representatives throughout the remaining term of the 114th Congress.[56]

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46. McDowell, *supra* note 39, at 14.
47. Senne v. Kansas City Royals Baseball Corp., 934 F.3d 918, 950 (9th Cir. 2019); *See also* Maury Brown, *Court Ruling Allows Minor League Baseball Players to Seek Wage Increase as Class Action*, FORBES (Aug. 16, 2019), https://www.forbes.com/sites/maurybrown/2019/08/16/court-ruling-allows-minor-league-baseball-players-to-seek-wage-increase-as-class-action/#1ff2e8077fed (discussing the Ninth Circuit's decision to affirm and remand back to the Northern District of California).
48. McDowell, *supra* note 39, at 13.
49. Senne v. Kansas City Royals Baseball Corp., 315 F.R.D. 523, 579-80 (N.D. Cal. 2016).
50. *Id.*
51. Grow, *supra* note 41, at 1023.
52. McCann, *supra* note 3.
53. H.R. 5580, 114th Cong. (2016).
54. *See id.*
55. Grow, *supra* note 41, at 1026.
56. *Id.* at 1028.

It was not until 2018 that the SAPA saw light again. This time, the language contained a slightly more tailored exemption than its predecessor.[57] Under the bill, a minor league baseball player would be exempt from additional pay requirements only if his weekly salary was greater than the current equivalent of a minimum wage forty–hour work week during the championship season (not to include the off season or spring training).[58] That is to say, so long as players earned a minimum salary of at least $290 per week during the 2018 championship season, they would not be entitled to any additional compensation, overtime or otherwise, even if they worked more than forty hours in a single week.[59] However, there was one notable difference between the 2016 and 2018 versions of the SAPA. The 2016 version included language that would have negated the claims raised in the *Senne* suit.[60] That language was removed in the 2018 version, thus preserving the issues maintained by the suit.[61] On March 23, 2018, President Donald Trump signed into law Congress's $1.3 trillion omnibus spending legislation, codifying MLB's labor laws exemption.[62]

This is not the first statutory exemption enjoyed by MLB, however. In the 1922 landmark Supreme Court case, *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*,[63] Justice Oliver Wendell Holmes held that the business of baseball was purely state affairs, and thus not interstate commerce.[64] Through this holding, Justice Holmes effectively created MLB's antitrust exemption.[65] This exemption has stood the test of time, remaining intact through several judicial challenges.[66] In addition to both the antitrust and FLSA exemptions, the judicial system has also faced another pressing issue – one not just inherent to baseball.

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[57] *Id.* at 1029.

[58] H.R. 1625, 115th Cong. § 201 (2018).

[59] Grow, *supra* note 41, at 1029.

[60] H.R. 5580, 114th Cong. § 2(b) (2016) (subsection (f) is amended to state, "In any action or proceeding commenced before, on, or after the date of enactment . . . .").

[61] H.R. 1625, 115th Cong. § 201(b) (2018) (title takes effect the date upon which the law is enacted).

[62] *See* Mike Murphy, *Here's Why These Baseball Players May Suffer from the $1.3 Trillion Spending Bill*, MARKETWATCH (Mar. 23, 2018), https://www.marketwatch.com/story/heres-why-these-baseball-players-may-strike-out-if-congress-passes-the-spending-bill-2018-03-22.

[63] Fed. Baseball Club of Balt. v. Nat'l League of Pro. Base Ball Clubs, 259 U.S. 200 (1922).

[64] *Id.* at 208-09.

[65] *See* 15 U.S.C. § 1 (2020) ("Every contact, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce *among the several States*, or with foreign nations, is declared to be illegal." (emphasis added)).

[66] *See* Toolson v. N.Y. Yankees, Inc., 346 U.S. 356 (1953) (stating that pursuant to the decision in *Federal Baseball Club*, "Congress had no intention of including the business of baseball within the scope of the Federal antitrust laws"); *See also* Flood v. Kuhn, 407 U.S. 258 (1972) (stating that while the Court ruled that baseball is, in fact, "engaged in interstate commerce," baseball's antitrust exemption will persist nonetheless because of its longevity and the Court's respect for stare decisis, and will continue to apply solely to baseball).

C. The Commissioner's "Best Interests" Power

In 1921, with newly appointed MLB Commissioner Kennesaw Mountain Landis at the helm of the league, team owners signed the National Agreement, also referred to as the Major League Agreement, which defined and preserved the authority of the MLB commissioner.[67] Within this document was language granting the commissioner broad power "[t]o investigate either upon complaint or upon his own initiative, any act, transaction or practice charged, alleged or suspected to be detrimental to the best interests of the national game of base ball [sic]. . . ."[68] After Landis' death in 1944, the scope of the "best interests" powers was narrowed with the inclusion of Article I, Section 3: "No Major League Rule or other joint action of the [American and National Leagues], and no action or procedure taken in compliance with any such Major League Rule or joint action of the [American and National Leagues] . . . shall be considered or construed to be detrimental to Baseball."[69] Additionally, this amendment to the original National Agreement eliminated the clubs' right of judicial recourse to challenge a decision by the commissioner.[70] In 1964, after Commissioner Ford Frick's retirement, the agreement was amended once more to restore the club's right to judicial recourse.[71] The agreement was later renamed the Major League Baseball Constitution in 2000, but the nature and scope of the commissioner's "best interests" powers has remained substantively the same since the 1964 amendment.[72]

Perhaps the most notable case in which the Court has addressed the commissioner's "best interests" power is *Charles O. Finely & Co. v. Kuhn*.[73] Here, the Seventh Circuit upheld that Commissioner Bowie Kuhn's rejection of the Oakland Athletics' assignment of three player contracts to the Boston Red Sox and New York Yankees as, "inconsistent with the best interests of baseball, the integrity of the game and the maintenance of public confidence in it."[74] In its decision, the Court concluded that Commissioner Kuhn, after investigation, consultation, and deliberation, acted in good faith in a manner he determined to be in the best interests of baseball, and, further, that whether he was right or wrong in his decision was beyond the competence and jurisdiction of the

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[67] *See* Ted Curtis, *In the Best Interests of the Game: The Authority of the Commissioner of Major League Baseball*, 5 SETON HALL J. SPORT L. 5, 7-8 (1995).

[68] *1921 Major League Agreement,* Article I, Section 2(a), ROADSIDEPHOTOS, http://roadsidephotos.sabr.org/baseball/1921MLAgree.htm (last visited Apr. 19, 2020).

[69] Allan H. ("Bud") Selig & Matthew J. Mitten, *Baseball Jurisprudence: Its Effect on America's Pastime and Other Professional Sports Leagues*, 50 ARIZ. ST. L.J. 1171, 1173 (2018).

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1174.

[73] Charles O. Finely & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978).

[74] *Id.* at 531.

Court.[75] To reinforce its decision, the Court followed up by stating that when baseball selected Kennesaw Mountain Landis, a federal judge, as its first commissioner, "it intended only him and not the judiciary as a whole to be its umpire and governor."[76] This small but powerful statement shows that the courts intended to stay out of the game of baseball and leave its governance and rule enforcement to the league itself.

The MLB commissioner generally has broad discretion when it comes to his "best interests" power, and courts will usually provide "substantial deference" to the commissioner's final judgment.[77] Interestingly, though, in the last few sentences of the opinion, the Court appears to place a limit on the commissioner's powers by stating that judicial intervention is appropriate in certain circumstances when "the rules, regulations, or judgments . . . are in [direct] contravention to the laws of the land or in [complete] disregard of the charter or bylaws of the [NAPBL] and where the [NAPBL] has failed to follow the basic [freedom] of due process of law."[78] Thus, courts recognize and enforce limits on the "best interests" power with contractual, due process, and public law disputes.[79]

As an example, in 1976, Commissioner Kuhn revoked the first round selection of the Atlanta Braves in the upcoming January 1977 amateur draft because of two counts of tampering that violated the Major League Rules.[80] In its analysis of the legal implication of revoking Atlanta's draft pick, the Court inquired into the applicability of the Major League Agreement, which enumerated the punitive measures the commissioner may take, and found that revocation of a draft pick was not one of the measures specifically enumerated by the language of the agreement.[81] What this demonstrates is that the commissioner's "best interests" power is not the end all, be all when it comes to its enforcement.

Thus, while the commissioner's "best interests" power is valid, enforceable, and carries weight through judicial deference, there are certain situations in which the judiciary will intervene and contradict the commissioner's verdict,

[75] *Id.* at 539.
[76] *Id.* at 537.
[77] Selig & Mitten, *supra* note 69, at 1174.
[78] *Finely*, 569 F.2d at 544.
[79] Selig & Mitten, *supra* note 69 at 1175; *see Finely*, 569 F.2d at 544 n.65 (stating that while issuing disciplinary authority pursuant to his "best interests" power, the commissioner's process and reason behind the implementation of discipline "must not be a sham designed merely to give colorable proprietary to an inadequate process").
[80] Atlanta Nat'l League Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1216–17 (N.D. Ga. 1977).
[81] *Id.* at 1223. (stating that the commissioner has the following remedial measures at his disposal: "(a) a reprimand; (b) deprivation of a Major League Club of representation in joint meetings; (c) suspension or removal of any officer or employee of a Major League or a Major League Club; (d) temporary or permanent ineligibility of a player; and (e) a fine, not to exceed Five Thousand Dollars ($5,000.00) in the case of a Major League Club and not to exceed Five Hundred Dollars ($500.00) in the case of any officer, employee or player").

especially when the suggested remedial measure is not enumerated in the Major League Baseball Constitution, thus making the power largely "a symbolic hammer."[82] In application to the focus of this article – MLB contraction of MiLB teams – and following the footsteps of *Atlanta National League Baseball Club, Inc.* and the final sentences of the *Finely* decision, it is more likely that the commissioner's "best interests" power would be defeated via judiciary intervention because contraction is not an enumerated power available to the commissioner and, consequently, will not be addressed further in this article.

II. THE DRAFT: SELECTING THE LAW

Sports provide a sense of comfort and relief from the stresses that continually arise in everyday life. People eagerly anticipate the opportunity to get lost in their favorite teams when game time rolls around. Athletes become more than people playing a game; they become idols. Fans purchase player merchandise, team apparel, tickets, and, when inside stadiums and arenas, food and beverage. With this in mind, it is not hard to understand that the "business of professional sports is driven by sports consumers."[83] Accordingly, when certain actions taken by an individual player or team "strike a particularly unfair chord," many fans feel that their stake is legally cognizable.[84]

While the states have individually codified their own unfair competition and deceptive trade practice statutes, this article will address solely the federal statute, the Federal Trade Commission Act Section 5 ("Section 5"),[85] so as to keep uniformity in its analysis. The primary purpose of this federal statute is to "protect the consumer public, rather than to punish the wrongdoer."[86] Section 5 has long prohibited "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce."[87] Additionally, Section 5 empowers the Federal Trade Commission ("FTC") to prevent certain entities from engaging in behavior that constitutes "unfair or deceptive acts or practices."[88]

Only the FTC is authorized by statute to bring challenges under Section 5.[89] When faced with an unfairness claim, the FTC must consider three factors in

[82] Howard Bryant, *Bud Selig's Best Interests in Alex Rodriguez Case*, ESPN (Aug. 14, 2013), https://www.espn.com/mlb/story/_/id/9568200/bud-selig-best-interests-alex-rodriguez-case (discussing Alex Rodriguez's PED punishment and the role that the "best interest" power could play).

[83] Tayler W. Tibbitts, *Sports Consumers: Ticket-Holding Fans' Rights in Light of "Spursgate,"* 21 SPORTS L. J. 201, 204 (2014).

[84] *Id.*

[85] *See generally* 15 U.S.C. § 45 (2020).

[86] F.T.C. v. Affiliate Strategies, Inc., 849 F. Supp. 2d 1085, 1104 (D. Kan. 2011).

[87] F.T.C. v. Gill, 265 F.3d 944, 950 (9th Cir. 2001).

[88] Orkin Exterminating Co. v. F.T.C., 849 F.2d 1354, 1363 (11th Cir. 1988).

[89] Richard Craswell, *The Identification of Unfair Acts and Practices by the Federal Trade Commission*, 1981 WIS. L. REV. 107, 115 (1981).

deciding whether to wield its authority:[90] Whether an act or practice "(1) caused consumers, competitors, or other businesses substantial injury; (2) offended public policy as established by statute, the common law, or otherwise; and (3) was immoral, unethical, or unscrupulous."[91] In determining whether an act or practice is unfair, the FTC may "consider established public policies as evidence to be considered along with all other evidence," but may not serve as the primary basis for such determination.[92] There must still be a showing that the act or practice alleged to have caused the injury is unfair under a "well-established legal standard, whether grounded in statute, the common law, or the Constitution."[93]

There are two related doctrines that appear in a Section 5 analysis: the unfairness doctrine and the deception doctrine.[94] This section will analyze both doctrines and will provide the black letter law that will then be applied to Part III's analysis of a hypothetical city facing MLB contraction. The case law is extremely limited as applicable to the issue addressed by this article. However, that does not mean an analysis may not be undertaken. There are examples within case law that may be extracted in order to aid in Part III's analysis. Thus, in an effort to demonstrate how a current analysis over unfair and deceptive trade practice claims would play out, it is necessary to look selectively at facts, in addition to the black letter law, that may shed light on Section 5's applicability in a challenge brought by minor league baseball cities.

A. The Unfairness Doctrine

The FTC has identified four separate circumstances in which the act or practice by the seller is inherently unfair: "(a) withholding material information, (b) making unsubstantiated advertising claims, (c) depriving consumers of various post-purchase rights, and (d) using various high-pressure sales techniques."[95] The most frequent category of practices found by the FTC to be unfair, and most material to the issue at focus in this article, involves a seller withholding material information.[96] A finding of unfairness under this category focuses on the benefits of information in improving the market's performance, "regardless of whether consumers who lacked that information could said to be deceived."[97] In essence, the failure to disclose material information amounts to unfairness if consumers currently lack the information, which may be

[90] LabMD, Inc. v. F.T.C., 894 F.3d 1221, 1228 (11th Cir. 2018).
[91] *Id.*
[92] 15 U.S.C. § 45(n) (2020); *See LabMD*, 849 F.3d at 1129 n.24.
[93] *Id.*
[94] *See infra* Parts II.A., II.B.
[95] Craswell, *supra* note 89, at 108–09.
[96] *Id.* at 116.
[97] *Id.* at 117.

accomplished through direct evidence or testimony, if consumers would choose differently if better informed, and if the benefits of better consumer decisions and improved seller performance are not outweighed by the costs of supplying the information.[98]

Specific to the topic at issue in this article, if an act or practice is not inherently unfair due to the withholding material information, then an analysis must be undertaken to identify whether the particular act or practice is unfair pursuant to Section 5. For the purpose of analysis, it will be assumed that the facts at issue do not amount to being inherently unfair in order to demonstrate the applicability of an unfairness doctrine under Section 5. In an unfairness analysis, proof of intent, negligence, fraud, consumer reliance, or proof of injury is not required to establish that a particular act or practice is unfair.[99] For the FTC to justify a finding of unfairness, the injury must satisfy three tests.[100] The first test recognizes that the injury must be substantial.[101] In most cases, substantial injury would involve monetary harm, as emotional impact and other more subjective types of harm ordinarily would not make a practice unfair.[102] Yet, sometimes, an injury may be sufficiently substantial if it raises a significant risk of concrete harm.[103] Although unfairness claims normally "involve actual and completed harms," they may also be brought on the basis of likely injury, or foreseeable future injury, rather than actual present injury.[104]

In the second test, the injury must not be outweighed by any countervailing benefits to consumers or competition that the allegedly unfair practice produces.[105] The FTC will not find a practice to have unfairly injured consumers unless it is injurious in its net effects, thus making a single, isolated instance of

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[98] *Id.* at 119, 123.

[99] F.T.C. v. Freecom Commc'ns, Inc., 401 F.3d 1192, 1203 (10th Cir. 2005); Michael Flynn, *"The Lie, the Bigger Lie, and the Biggest Lie" –Unfair and Deceptive Trade Practices of TripAdvisor and Other Online Review Websites*, 36 J.L. & COM. 23, 30-31 (2017).

[100] F.T.C. v. Wyndham Worldwide Corp., 799 F.3d 236, 244 (3rd Cir. 2015).

[101] *Id.*

[102] Am. Fin. Serv. Ass'n v. F.T.C., 767 F.2d 957, 972 (D.C. Cir. 1985); *See also* Orkin Exterminating Co. v. F.T.C., 849 F.2d 1354, 1364-65 (11th Cir. 1988) (finding that harm from defendant's unilateral increase in prices, previously specified in contracts as fixed annual renewal fees, violated the terms of the contract in that customers were charged with increased costs of services previously bargained for and the loss of certainty of fixed prices, thus satisfying the first prong of the unfairness doctrine's requirement of a substantial injury); *Wyndham Worldwide Corp.*, 799 F.3d at 245, ("A company does not act equitably wen it publishes a privacy policy to attract customers who are concerned about data privacy, fails to make good on that promise by investing inadequate resources in cybersecurity, exposes its unsuspecting customers to substantial injury, and retains the profits of their business").

[103] *Am. Fin. Serv. Ass'n*, 767 F.2d at 972 (explaining that a concrete injury is found when an injury actually exists or if there is a real chance of harm).

[104] *Wyndham Worldwide Corp.*, 799 F.3d at 246 (quoting In the Matter of Int'l Harvester Co., 104 F.T.C. 949, 1061 (1984)).

[105] *Id.* at 244.

harm incapable for a finding of unfair injury.[106] This turns into a cost-benefit analysis, one in which the FTC weighs the potential costs that the proposed remedy would impose on the parties and society in general against the overall benefit that may be experienced by such remedies.[107]

Finally, the third test undertaken by the FTC in an unfairness analysis hinges on whether the injury is one that consumers could not have reasonably avoided.[108] A consequence is "reasonably avoidable" if people not only understand the physical steps needed to be taken in order to prevent it, but also whether they understand the necessity of actually taking those steps.[109] This focus on a consumer's ability to reasonably avoid injury has developed from the FTC's general reliance on free and informed consumer choice that stems from the availability of all relevant, material information thus making such information the best regulator of the market.[110] If consumers have a reason to anticipate any impending harm they may act to avoid injury, should they have the means to; otherwise, they may seek subsequent mitigation.[111]

With the three tests conducted by the FTC in an unfairness analysis outlined, focus will now shift to the second way the FTC may find a specific act or practice to be in violation of the FTCA: the deceptive doctrine.

B. The Deceptive Doctrine

Under Section 5 deception is present either if the seller affirmatively misrepresents the product to consumers, or if the product differs materially from the consumers' reasonable expectations about the product and the seller fails to disclose that difference.[112] Misrepresentations of material facts made for the purpose of inducing consumers to purchase services or products form the basis of unfair or deceptive trade practices prohibited under Section 5.[113] While there is some overlap between both the unfairness and the deceptive doctrines, there is one distinct difference: "A practice is deceptive when the consumer is forced to bear a larger risk than expected" (i.e., the consumer believes one outcome

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[106] *Am. Fin. Serv. Ass'n*, 767 F.2d at 975; *See also Orkin Exterminating Co.*, 849 F.2d at 1365 (stating that the FTC has noted that acts or practices may result in a "mixture of both beneficial and adverse consequences").

[107] *Am. Fin. Serv. Ass'n.*, 767 F.2d at 975; *See also Orkin Exterminating Co. Inc.*, 849 F.2d at 1365 (holding that the second prong of the unfairness doctrine was met when defendant's increase in fee was not accompanied by an increase in the level or quality of service provided).

[108] *Wyndham Worldwide Corp.*, 799 F.3d at 244.

[109] *Orkin Exterminating Co.*, Inc., 849 F.2d at 1366 (quoting *In the Matter of Int'l Harvester Co.*, 104 F.T.C. at 1066).

[110] *Id.* at 1365.

[111] *See id.* at 1365-1366 (stating that anticipatory avoidance was not possible because neither defendant nor contracts gave any indication renewal fees would increase, and that mitigation was not possible because accommodation program was only available to customers who complained about increases in renewal fees).

[112] Craswell, *supra* note 89, at 116-17.

[113] F.T.C. v. E.M.A. Nationwide, Inc., 767 F.3d 611, 630 (6th Cir. 2014).

will occur and is misled, thus bringing about an outcome the consumer did not expect upon entering into the purchase agreement), "whereas a practice is unfair when the consumer is forced to bear a larger risk than an efficient market would require," (i.e., a normal level of risk allotted to consumers in a freely operating economy).[114] In other words, when a consumer is misled, there will be a finding for deception, rather than unfairness, in the trade practice or act.[115] "[T]he 'cardinal factor' in determining whether an act or practice is deceptive under §5 is the likely [net] effect the promotor's handiwork will have on the mind of the ordinary consumer."[116] The more influence the promotor/seller has over the decision of the reasonable consumer to that consumer's detriment, the more likely there will be a finding that the trade practice or act is considered deceptive. Thus, at the heart of a deception case lies the central inquiry of whether the seller, either explicitly or implicitly, made false or misleading claims, or whether consumers were left with incorrect expectations after the purchase agreement has been validated.[117] Additionally, the FTC will find that ambiguous, confusing, or even inconsistent statements have the tendency or capacity to deceive.[118]

To prove that an act or practice is deceptive in violation of Section 5, the FTC must prove that there was a representation, omission, or practice, which is likely to mislead consumers acting reasonably under the circumstances, and such a representation, omission, or practice is material.[119] Intent to deceive is not a required element for a finding of deception under Section 5; it is sufficient that the representations or practices were likely to mislead consumers acting reasonably under similar circumstances.[120] Furthermore, although proof of actual deception is not necessary to establish that the practice or act is in "violation of Section 5, such proof is highly probative to show that [it] is likely to mislead consumers acting reasonably under the circumstances."[121]

For the purposes of this article, only a representation and an omission are relevant and will be discussed. A "representation" is defined as "a statement or account made to influence opinion or action."[122] An "omission" is "something [that is] neglected or left undone."[123] Thus, for a finding that a representation was made in satisfaction of the first factor of the deceptive doctrine, one must only show that a statement was made that influenced the recipient of the

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[114] Am. Fin. Serv. Ass'n v. F.T.C., 767 F.2d 957, 979 n.27 (D.C. Cir. 1985).
[115] *Id.*
[116] F.T.C. v. Affiliate Strategies, Inc., 849 F. Supp. 2d 1085, 1104 (D. Kan. 2011).
[117] Craswell, *supra* note 89, at 117.
[118] Michael Flynn, *"You Know, It's Just Marketing" – Unfair and Deceptive Trade Practices in Car Dealer Buy-Back Offers*, 42 U. DAYTON L. REV. 11, 18 (2017).
[119] F.T.C. v. Moses, 913 F.3d 297, 306 (2d Cir. 2019).
[120] F.T.C. v. Verity Intern., Ltd., 443 F.3d 48, 63 (2d Cir. 2006).
[121] F.T.C. v. USA Financial, LLC, 415 Fed. Appx. 970, 973 (11th Cir. 2011).
[122] *Representation*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011).
[123] *Omission*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2011).

representation. For an omission to occur, there must be something of substance that was not included or left out, either intentionally or otherwise.

"In demonstrating that a representation is likely to mislead, the FTC must establish that (1) such a representation was false or (2) [that] the advertiser lacked a reasonable basis for its claims."[124] Courts will find that a representation had a reasonable basis if it had some "recognizable substantiation for the representation prior to making it."[125] An omission is likely to mislead consumers if its inclusion would have properly informed the reasonable consumer about certain risks associated that would have otherwise been unknown before entering into an agreement with the seller, but was left off to induce the sale to the seller's benefit.

A representation is material if a reasonable prospective consumer is likely to rely on the representation, thus making it likely to affect the consumer's decision to purchase a product or service.[126] The same goes for an omission. In this same light, "a solicitation may be likely to mislead by virtue of the net impression" it creates, even if there are certain truthful disclosures contained within.[127] Further, "[a] representation does not become 'false and deceptive' merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."[128]

While proof of consumer reliance is not required for a finding that a practice or act violates Section 5, it is necessary to establish the consumer's right to redress.[129] In that instance, to raise a presumption of reliance, the FTC need only show "the business entity made material misrepresentations likely to deceive consumers, . . . those misrepresentations were widely disseminated, and . . . consumers purchased the entity's products."[130]

Having now gone through an explanation of the black letter, along with seeing examples in case law for how courts have navigated both the unfairness

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[124] F.T.C. v. John Beck Amazing Profits, LLC, 865 F. Supp. 2d 1052, 1067 (C.D. Cal. 2012).

[125] *Id.*

[126] F.T.C. v. NPB Advert., Inc., 218 F. Supp. 3d 1352, 1358 (M.D. Fla. 2016); F.T.C. v. E.M.A. Nationwide, Inc., 767 F.3d 611, 631 (6th Cir. 2014); *see also* F.T.C. v. Verity Intern., Ltd., 443 F.3d 48, 63 (2d Cir. 2006) (finding that defendants engaged in "representation of uncontestability" when they caused subscribers to receive explicit and implicit representations regarding the inability to avoid charges for the download of a program used to purchase adult entertainment); F.T.C. v. Medlab, Inc., 615 F. Supp. 2d 1068, 1081 (N.D. Cal. 2009) (stating that the representations were material because they addressed "critical information intended to affect consumers' choice to purchase defendants' product").

[127] F.T.C. v. Cyberspace.Com LLC, 453, F.3d 1196, 1200 (9th Cir. 2006); *see also E.M.A. Nationwide, Inc.*, 767 F.3d at 633 (finding that scripts used by defendants to solicit consumers in initial phone calls consisted "almost entirely" of material representations which actually induced consumers into purchasing defendants' services at high costs, even though there were truthful disclosures buried in subsequent communications).

[128] Andrew Serwin, *The Federal Trade Commission and Privacy: Defining Enforcement and Encouraging the Adoption of Best Practices*, 48 SAN DIEGO L. REV. 809, 824 (2011).

[129] *E.M.A. Nationwide, Inc.*, 767 F.3d at 631 n.12.

[130] *Id.*

and the deceptive doctrines, this article will now shift to Part III's application to a hypothetical city facing MLB contraction to weigh the likelihood of that city having a legitimate claim against MLB.

III. STEPPING UP TO THE PLATE

The following facts will be pertinent to Part III's analysis: The city of Alpha has been in talks with MLB to bring a MiLB team, that played last season in the city of Bravo, into town, as it is something the city believes will be a positive addition and a boost to the economy since its last team's departure several years ago.[131] Because the stadium is not currently suited to MLB's liking for MiLB play in Alpha, city leadership has been informed by MLB that an extensive overhaul of the existing stadium and facilities will be required in order for the team to come and play its games therein. Because of this, Alpha must pour finances into the reconstruction of the stadium site in compliance with MLB's request, even when MLB keeps pushing more additions to the stadium site that increase costs for Alpha. MLB has approved designs submitted by city leadership and has repeatedly given assurances to Alpha that, following adherence to these approved plans, Alpha will acquire a MiLB team and be able to market the team as an MLB affiliate. Unbeknownst to Alpha, however, the team originally located in Bravo is one of the forty-two set to lose MLB affiliation through contraction. While contraction is not a certainty, there is widespread internal belief through the MLB that contraction is inevitable, with a concurrent plan for its execution in development.

Because Section 5 of the FTCA is, "phrased in the disjunctive, prohibiting 'unfair *or* deceptive' acts or practices," the FTC is not required to prove violation under both the unfairness and deceptive doctrine in order to obtain relief.[132] Once one has been proven, the FTC has met its burden. However, for the sake of argument in this article, both doctrines will be applied to the facts.

A. The Unfairness Doctrine Applied

In analyzing the most frequent category of practices found by the FTC to be unfair, withholding material information, the central focus of this article meets the legal threshold determined by the FTC through previous challenges. Here, city officials currently lack the critical information that the team from Bravo they are looking to bring to the city is one of the forty-two proposed for contraction. This may be easily achieved through direct evidence via emails, text messages, proposals, etc., that will prove MLB never divulged information

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[131] The previous team that played in Alpha had no MLB affiliation, and is considered a part of the Independent League. As such, the stadium has limited capacity and lackluster facilities for training.

[132] F.T.C. v. Verity Intern., Ltd., 443 F.3d 48, 65 (2d Cir. 2006) (emphasis in original).

that the incoming team was up for contraction. There is no doubt that city officials in Alpha would choose differently had they been informed. As has been demonstrated earlier in this article, the costs associated with stadium construction and maintenance are high. City officials have the difficult task in appropriating funds throughout different projects and causes within. Had they been informed of the inevitable contraction of their team, the money allocated for stadium construction would undoubtedly have been reallocated to other areas in Alpha. Lastly, the costs of supplying the information does not outweigh the benefits of better consumer decisions and improved seller performance. Supplying this information simply means making Alpha city officials aware that the team they are taking on is facing contraction, which would unquestionably bring about a better decision for them in deciding how to allocate funds. However, simply stating that this issue fits the mold of the most frequent category of practices found to be unfair would not be wise, as courts have been known to be unpredictable. Thus, further analysis will be conducted under the unfairness doctrine to reinforce the idea that the acts or practices on MLB's part are considered unfair pursuant to Section 5 of the FTCA.

Applying the first test under the unfairness doctrine, which necessitates that the injury suffered be substantial, it is clear that Alpha's harm meets this threshold. As has been stated in this article, the construction of stadiums for MiLB consistently requires tremendous capital contribution from cities. Because, in most cases, substantial injury involves monetary harm, the monetary commitment made by Alpha towards the redesign and reconstruction of its stadium meant for MiLB play is no simple waste. This is capital that could have otherwise been applied to other projects or causes in the city, but is no longer available because of its waste on a stadium that will no longer house a MiLB team.

On the contrary view, while the money may be found to not have been wasted, thus calling into question the validity of the substantial injury threshold, one must contemplate the overall effect of losing a MiLB team. However, since an unfairness claim may also be brought on the basis of likely harm, as opposed to actual harm, there is likely harm Alpha will suffer vis-à-vis its return on investment. The draw of a MiLB team is seeing your team's prized prospects play and develop before they are called up to big league action. MiLB games also provide out-of-market fans the opportunity to see veteran players who may be with the team for a rehab assignment before they are declared healthy and suited for a return to their big-league ball club. Once inside the stadium, fans purchase food and beverage, as well as visit gift shops to player apparel of aspiring big leaguers. Further, drawing in fans to the stadium may become more, as families may decide to make a weekend trip out of it and spend time in the nearby downtown center of the city, where they will purchase lodging, meals, and pursue further entertainment, thus contributing further to the city's economy. Take these crucial components of MiLB away and the draw is not the same for an independent league team.

Accordingly, because Alpha must contribute capital to the redesign and reconstruction of its stadium to meet MLB's standard for a MiLB affiliated team to play its games therein, the actual or likely harm Alpha will be subject to, should MLB contract the promised team, is substantial enough to satisfy the threshold established by the first test under the unfairness doctrine.

Next, the injury to Alpha is not outweighed by any countervailing benefits to consumers or competition that contraction produces. MLB contraction would be injurious in its net effects due to the harm that comes not only to the city for lost capital, but for other industries around the city. The money that was devoted to the redesign and reconstruction of Alpha's stadium site could have been allocated to other causes within the city, such as public works, education, law enforcement, etc. Fans that would be in town taking in a ball game would no longer be there to venture out into the downtown area and spend their money. This harms not only Alpha's treasury, but all those who rely on the several different industries that enable a city to operate and generate revenue.

Along the same thinking, a cost-benefit analysis turns in favor of Alpha, as well. The detriment experienced by the city and those relying on essential services and maintenance far outweighs the benefit experienced by MLB upon contraction. Citizens of Alpha would experience tax increases to recover lost funds and profit expected from having an affiliated team playing its games in the city. Thus, Alpha can be said to have satisfied the second test under the unfairness doctrine in that there are no countervailing benefits to Alpha and its citizens as a result of MLB contraction.

In the final test under the unfairness doctrine, the FTC must prove that Alpha could not have reasonably avoided or mitigated the injury. There appears to be no issue proving that Alpha could not have reasonably avoided injury in this instance. The harm comes from losing a team with MLB affiliation, the draw such a team brings to the stadium, and the money spent by those crowds and generated from advertising. This draw is unique to MiLB due to, as explained above, the irreplaceable opportunity fans get to see some of their favorite players and potential superstars for their clubs. The hypothetical facts indicate that MLB is actively working on a plan of execution for contraction, and that Alpha has no indication it is even in jeopardy of losing the team. Had Alpha been informed of the possibility of contraction, the city would have been free to contemplate its move – whether to undertake the overhaul of the stadium in hopes that another team would come along, or redirect those funds elsewhere to other needs in the community.

There is an argument for MLB that Alpha has the ability to subsequently mitigate their potential loses by bringing on another team to fill the stadium. While this is true, the extent of mitigation does not allow Alpha to recoup its investment and projected profits that come from having an affiliated team in the city. As was shown earlier in this article, there is a drastic difference between attendance and, consequently, revenue between an independent league team and an MLB affiliated MiLB team. There would be no immediate impact of mitigation from an unaffiliated team felt by Alpha. Thus, it is possible for Alpha to show that the injury resulting from MLB contraction could not reasonably be avoided.

This section has shown that, while admittedly fact specific, it is possible for the FTC to bring a claim on behalf of Alpha under the unfairness doctrine of Section 5 FTCA for unfair or deceptive trade practices. Now, the focus of this article will shift to an analysis under the second doctrine so provided by the federal statute.

B. The Deceptive Doctrine Applied

There is no question that MLB is making a representation to Alpha through its communications. Much like the *Verity International Ltd.* court found that defendants engaged in explicit and implicit representations, there is no question here that MLB has made explicit representations to Alpha regarding the guarantee of an affiliated team pending stadium redesign and reconstruction. Thus, a representation has been made.

This representation is likely to mislead Alpha's city officials because of its falsity, in addition to it being made without a reasonable basis with some recognizable substantiation for the representation. According to the hypothetical facts, there is a widely held belief internally at MLB that contraction is inevitable to the point that there is a plan currently in motion for its execution. In stating that Alpha is guaranteed a team if they adhere to the approved plans for stadium redesign and reconstruction, the representation MLB is making is false and without any reasonable basis. Thus, the representation is likely to mislead.

Furthermore, this representation is material because it affects Alpha's decision to proceed with the overhaul of its current stadium in reliance on MLB's assurances that doing so will yield in the award of an affiliated team. Absent these assurances, there is no telling whether Alpha would have proceeded with dedicating funds to a stadium overhaul, rather than dedicating those funds to other projects around the city.

MLB is being deceptive in that Alpha is being forced to bear a larger risk of recouping its investment and projected profits in the absence of having a MiLB team play its games in the city. There is no telling whether a new team will even be formed or come to Alpha in place of the MLB-promised MiLB team, making it a possibility that the stadium sits idly with no occupant, resulting in serious financial loss to Alpha. Thus, in light of the facts of this hypothetical, MLB contraction meets the standards set forth in the deceptive doctrine under a Section 5 FTCA analysis for unfair or deceptive trade practices.

CONCLUSION

Through an application of the facts, it has been illustrated how a city can prevail on a FTCA Section 5 claim for unfair or deceptive acts or trade practices. The applicability of the statute to a hypothetical scenario was the goal of this article, and that goal has been achieved. It must be noted, however, that the applicability of Section 5 of the FTCA is very fact-specific and will not apply to every similar situation. Further, what was not discussed is the damages cities can expect after prevailing on a Section 5 claim. Stated earlier, the primary purpose of Section 5 of the FTCA is the protection of the consumer public. Apart from the diamond and the bright lights, baseball is still a business, and should be treated as such. As such, that makes fans and cities lobbying to bring in team consumers. Even in the game of baseball, the FTC can leave its impact and protect the "little guy" against MLB and its economically driven directives.

What this means for cities is that there is a potential for relief in the face of MLB contraction that cities will have at their disposal, should MLB make its ultimate decision and contract forty-two minor league teams. However, given the current state of the sports in the world amid the novel Covid-19 pandemic, the primary focus of leagues is on the re-start of professional, major league-level competition. So, while the possibility, or even inevitability, or MLB contraction of the minor leagues remains an issue that will have drastic effects, the focus for not only sports, but the world as a whole, is to slowly heal and return to a state of normalcy. For minor league cities, there is hope amidst the chaos.