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Daniel Sparks

SWING AND A MISS: WHY CONGRESS IS MISSING THE MARK ON THEIR LATEST PROPOSED LEGISLATION

DANIEL SPARKS

I. INTRODUCTION

Is professional baseball in jeopardy of losing its foundation, minor league baseball; and in turn depriving generations of Americans' of the enjoyment of a sport they've come to know and love? A recent Congressional proposal implies this is imminent. In the Summer of 2016 Congress introduced the "Save America's Pastime Act," which if passed, would ensure that Minor League Baseball players do not receive a minimum wage.[1] Advocates of this legislation argue that it would prevent the current minor league system from falling apart, but these arguments rely heavily on an unsubstantiated inference that paying minor league athletes a minimum wage would incentivize the major league parent organization to cut funding.[2] Ultimately, this is just the latest development in the long history of mistreatment of Minor League Baseball players, which is due in part to the fact that they are viewed as apprentices, and not full-time employees.[3]

This comment begins with a brief explanation of the relationship between Major League Baseball ("MLB") and Minor League Baseball ("MiLB"). Then, it provides an overview of the history of MLB and MiLB legislation and case law. Specifically, it addresses MLB's treatment under antitrust laws, the Fair Labor Standards Act ("FLSA") and the Curt Flood Act ("CFA"). Next, it discusses the current status of the typical MiLB athlete. As a final

1. *See* Save America's Pastime Act, H.R. 5580, 114th Cong. § 2 (2016) (proposing that minor league baseball players are not entitled to the protections of the Fair Labor Standards Act).

2. *See* Joseph Nocco, *MLB Issues Statement Regarding "Save America's Pastime Act",* www.todaysknuckleball.com/news/mlb-issues-statement-regarding-save-americas-pastime-act (last visited: Oct. 5, 2016) (posting MLB's statement in support of the Act due to alleged inability to afford funding MiLB if MiLB players' wages are raised); *But see* Rob Garver, *The 'Save America's Pastime Act' in Congress is Trying to Justify Low Pay for Some Baseball Players,* www.businessinsider.com/the-save-americas-pastime-act-in-congress-is-trying-to-boost-pay-for-some-baseball-players-2016-7 (last visited: Oct. 5, 2016) (arguing that MLB's argument in support of the 'Save the Pastime Act' is disingenuous because MiLB owners can easily afford to withstand a raise in salaries).

3. *See* Jeff Passan, *How Minor League Baseball Left Its Players in Poverty and Tried to Save Itself Instead,* sports.yahoo.com/news/how-minor-league-baseball-left-its-players-in-poverty-and-tried-to-save-itself-instead-185300079.html, (last visited: Oct. 7, 2016) (quoting MiLB's president describing MiLB players as trainees, or participating in an extended internship).

matter of background, this comment reviews recent developments pertaining to MiLB players, including the pending *Senne* lawsuit and the "Save America's Pastime Act."[4] Finally, these developments are considered collectively in order to assess whether they will influence change in regard to MiLB players' wage status. Furthermore, this comment analyzes whether it is practicable for Congress to reverse course and take action to protect MiLB athletes. This comment concludes with a proposal that Congress borrows from legislation which protects MLB players from antitrust laws in legislation in order to draft legislation which would protect MiLB players from being paid below the federal minimum wage.

II. BACKGROUND

Prior to analyzing MiLB players' circumstances and proposing any sort of solution, one must understand the long history of MLB's treatment in the legal world. Accordingly, this comment first explains the basic structure of MLB and its MiLB affiliate organizations. Next, it discusses MLB's legal position in relation to relevant federal law, including its favorable antitrust exemption, the subsequent drafting of the Curt Flood Act, and the Fair Labor Standards Act. Finally, this section explains the latest developments in legal issues pertaining to MLB and MiLB, namely the recently proposed 'Save America's Pastime Act' and a pending class action suit against MLB.

A. Brief Explanation of the Relationship Between MLB and MiLB

MLB consists of 30 organizations and each organization either owns or is affiliated with up to five MiLB organizations where players improve their skills in order to reach the MLB organization.[5] The MiLB system consists of up to five leagues: Rookie Ball, Single A (often split between Low A and High A), Double A, and Triple A.[6] Players do not take the same path through the MiLB system.[7] Generally, players rise through the minor league

4. Complaint, Senne v. Office of the Comm'r of Baseball, No. 3:14CV00608, 2014 WL 545501 (N.D. Cal. Feb. 7, 2014), available at www.scribd.com/document/224796744/Senne-v-MLB-2d-Amended-Complaint (hereinafter Senne Complaint); *See also* 114 H.R. 5580 § 2 (proposing new legislation to guarantee MiLB players are not entitled to FLSA protections).

5. The Sports Advisory Group, *Overview of Baseball's Minor League Organization,* www.thesportsadvisorygroup.com/resource-library/business-of-sports/overview-of-baseballs-minor-league-organization/ (last visited: Dec. 10, 2016).

6. *Id.*

7. *See* Michael K. Hobbs, *Lifting the Antitrust Exemption Presents a Major Problem for Minor League Baseball,* 84 UMKC L. REV. 1059, 1079 (2016) (discussing a case example of a talented MiLB player, Kris Bryant, who was

system one level at a time; however, more talented players skip levels and graduate faster to the MLB. However, a majority of players never reach MLB.[8]

MLB currently provides all funding for MiLB functions: the coaches, umpires, equipment, and essentially all overhead costs that allow MiLB to operate.[9] MiLB players' salaries are included in this funding provided by MLB.[10]

However, MiLB salaries are remarkably low when taking into account the amount of hours, days, and years put into their job.[11] It is in MLB's best interest to keep these wages as low as possible, and their legal position allows them to do so successfully.[12] However, the low wages of MiLB players have been challenged recently through a class action suit, which will be discussed in further detail in the analysis section of this comment.[13]

III. HISTORY OF LEGISLATION AND CASE LAW PERTAINING TO MLB AND MILB

Federal antitrust laws protect consumers by prohibiting business practices which inhibit a free and competitive marketplace.[14] Congress's primary enforcement of these protections is done through the Sherman Act ("the Act") and the Clayton Act.[15] Congress passed the Sherman Act in 1890 to outlaw any "restraint in trade," or "attempted monopolization."[16] However, the courts determined that the Act only outlawed *unreasonable* restraints on trade, which resulted in corporations exploiting loopholes to circumvent the Act, while continuing to form monopolies.[17] For

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capable of reaching MLB sooner than most MiLB players).

8. *Id.*

9. Hobbs, *supra* note 7, at 1070.

10. *Id.*

11. *See* Garver, *supra* note 2 (quoting Garrett Broshuis, a former MiLB player and current lawyer, describing MiLB player's working 10 hour workdays seven days a week).

12. Hobbs, *supra* note 7, at 1070.

13. *See generally* Senne Complaint, *supra* note 4 (alleging MLB organizations are violating FLSA wage requirements by failing to pay them a minimum wage).

14. *See* FEDERAL TRADE COMMISSION, *The Antitrust Laws,* www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (describing the development of federal antitrust laws; from the Sherman Act (outlawing corporations involved in interstate commerce from taking action which results in unreasonable restraints in trade), to the Clayton Act (designed to strengthen the enforcement of the Sherman Act against corporations involved in interstate commerce)).

15. *See id.* (explaining that the Clayton Act was enacted due to a belief the Sherman Antitrust Act by itself was ineffective at prohibiting monopolies, and the Act in general contained many loopholes).

16. *Id.*

17. *Id.*

example, two companies may form a partnership constituting a restraint in trade, but if the restraint could not be shown to be unreasonable, the Court had no power to strike it.[18] Therefore, the Clayton Act was enacted in 1914 to strengthen the Sherman Act. The Clayton Act prevents corporations from performing mergers if such a merger results in substantially lessened competition or tends to create a monopoly.[19] MLB and the federal antitrust laws first converged in 1922.

MLB purchased a number of teams from the Federal Baseball League after the Federal League began to disband in 1922, arguably leading to MLB's monopolization of professional baseball.[20] The Federal Baseball League challenged MLB's purchase as a violation of antitrust laws, and the result was the seminal case in MLB's treatment under antitrust laws, *Federal Baseball Club, Inc. v. National League of Professional Baseball Clubs*.[21]

In *Federal,* The Federal Baseball League argued that MLB's purchase constituted an anticompetitive monopoly, and therefore violated federal antitrust law.[22] However, Congress enforces the antitrust laws through their Commerce Clause authority.[23] Thus, the determinative question for the Supreme Court was whether or not the business of MLB was involved in interstate commerce.[24] The Court held that MLB's business consisted of holding baseball games within the state, and were thus wholly state affairs not a part of interstate commerce.[25] The Court held this way even though it acknowledged that professional baseball games induce the other team, and often times many fans, to cross state lines to attend the games.[26] According to Justice Holmes, these occurrences of individuals crossing state lines are not enough to change the essential character of the business.[27] Thus, as a result of *Federal,* MLB was exempt from federal antitrust laws because MLB is not involved in interstate commerce.[28]

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18. *Id.*

19. *Id.*

20. Shauna Teresa DiGiovanni, *Underpaid, Unrepresented, Unprotected: A Call for Change in the Status Quo of Minor League Baseball*, 22 SPORTS LAW. J. 243, 245 (2015).

21. *Id.*

22. Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

23. *See* The Sherman Anti-Trust Act, 15 U.S.C. § 1 (2016) (requiring the questioned action be a "restraint of trade or commerce among the several states," to be illegal).

24. U.S. CONST. art. I, § 3, cl. 8 (Congress has the power to "regulate commerce with foreign nations, and among the several states)*; See also* Hobbs, *supra* note 7, at 1061 (2016) (discussing the Court's decision in *Federal* being based on whether or not MLB participated in interstate commerce).

25. *Federal,* 259 U.S. at 208.

26. *Id.*

27. *Id.* at 209.

28. See *id.* (affirming the Court of Appeals holding that Major League

The first challenge to MLB's antitrust exemption came in 1953, in *Toolson v. New York Yankees, Inc.*[29] In *Toolson,* the plaintiff was an MLB player under contract with the Newark International Baseball Club who assigned his contract to another team.[30] He refused to report to the team Newark assigned his contract to, was subsequently placed on an ineligible list, and was not allowed to participate in professional baseball up until the time of the suit.[31] The plaintiff appealed his case up to the Supreme Court, which declined to alter MLB's antitrust exemption.[32] In a per curiam opinion, the Court explained that the business of professional business had been left exempt from antitrust laws for 30 years, and any change to such exemption would need to come from congressional action.[33] Thus, the Court deferred to Congress and reasoned that Congress's inaction indicated MLB's antitrust exemption was proper.[34]

Noteworthy however, are comments made in the dissenting opinion written by Justice Burton, arguing against the rationale of Justice Holmes in *Federal.*[35] Justice Burton commented on the expansion of the business of baseball, its larger audiences, television and radio networks and purchases in interstate commerce.[36] Burton's dissenting opinion further states that it would be contradictory to say the business of baseball is not involved in interstate commerce, which would bring MLB within the scope of federal antitrust laws.[37] Justice Burton's dissent is the first commentary from the Court that acknowledged that professional baseball is treated as an anomaly in antitrust jurisprudence.[38]

The next challenge to MLB's antitrust exemption was *Flood v. Kuhn*; when former MLB player Curt Flood filed suit after his contract was assigned to another team and he declined to report.[39] Prior to filing suit, Flood requested to be a free agent to give him a choice of what team to sign a contract with, but the league denied his request.[40] The Court agreed with Justice Burton's dissenting opinion that professional baseball is engaged in interstate commerce due to its growth since *Federal* was decided. However,

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Baseball was not within the purview of federal antitrust laws).

29. *See* Hobbs, *supra* note 7, at 1067 (discussing the history of case law pertaining to MLB's antitrust exemption, including the results of *Toolson*).

30. Toolson v. New York Yankees, Inc., 101 F. Supp. 93 (S.D. Cal. 1951).

31. *Id.*

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

33. *Id.*

34. *Toolson*, 346 U.S. at 357.

35. *See id.* (Burton, J., dissenting) (arguing that it is illogical to describe MLB as a business not involved in interstate commerce due to MLB's increase in the size and reach to consumers).

36. *Id.* (Burton, J., dissenting).

37. *Id.* at 358. (Burton J., dissenting).

38. *Id.*

39. Flood v. Kuhn*,* 407 U.S. 258, 265 (1972).

40. *Id.*

the Court still upheld MLB's exemption from antitrust laws.[41] The Court admitted that MLB's exemption was an anomaly, since other sports were not given such treatment.[42] However, the Court ultimately left it to Congress's discretion to change the law.[43] Congress responded 26 years later by enacting the Curt Flood Act.[44]

A. The Curt Flood Act

The Curt Flood Act ("CFA") stands alone as the only legislation passed by Congress altering MLB's exemption from antitrust laws.[45] The CFA states that its purpose is to declare that MLB players are protected under federal antitrust laws.[46] A strict adherence to the Act's purpose gives rise to the inference that only major league baseball players are covered under the CFA.[47] Yet, supporters of higher wages for MiLB players advocate for a broad interpretation of the Act which would bring MiLB players within the scope of the CFA.[48]

1. Express Language of the CFA

Congress declared in section two of the CFA that the legislation's purpose is to declare that MLB players are protected by antitrust law, insofar as MLB players now have the same rights as do other professional athletes.[49] In other words, MLB players now have standing to sue an organization that violates the Sherman or Clayton Act.[50] Pursuant to the CFA; the conduct, acts, and practices of MLB affecting the employment of its athletes at the major league level are subject to antitrust laws to the same extent as if it was any other sports business affecting interstate commerce.[51] The final section of the CFA consists of qualifications of individuals who are covered by the statute, as well as defining a

41. *Id.* at 282.

42. *Id.*

43. *Id.*

44. *See* Hobbs, *supra* note 7, at 1067 (describing the history of MLB's antitrust exemption, and the factors that contributed to the passage of the Curt Flood Act; including the *Flood* Court's deference to Congress and MLBPA lobbying to Congress for the CFA).

45. *Id.*

46. Curt Flood Act of 1998, Pub. L. No. 105-297 § 2, 105 Enacted S. 53 (1998) [hereinafter The Curt Flood Act].

47. The Curt Flood Act § 2.

48. *See* Hobbs, *supra* note 7, at 1068-70 (analyzing how the language of the CFA, "…directly relating to or affecting employment of major league baseball players…" lends itself to an argument for a broad interpretation of the Act).

49. The Curt Flood Act § 2.

50. Hobbs, *supra* note 7, at 1068.

51. *See* The Curt Flood Act § 3(a) (specifying that the conduct, acts, practices, or agreements of persons in the business of MLB are subject to antitrust laws).

"major league baseball player" for the purposes of the CFA.[52] Each of the four qualifications require a claimant to have been a party to a major league player's contract.[53] Therefore, none of these definitions encompass players in MiLB.[54]

2. The CFA's Impact on MiLB Players

The passage of the CFA has done nothing to extend its protections to MiLB players, since it has only been applied to employment of those in MLB.[55] As such, a MiLB player cannot challenge an organization's decision to alter their contract in any way, but an MLB player can challenge such a decision if it violates antitrust laws.[56] This development, however, has not detracted supporters of higher wages for MiLB athletes from advocating for a broad interpretation of the CFA in order to include MiLB players.[57]

a. Arguments for a broad interpretation

Those who support the belief that the CFA should encompass MiLB players rely on the language of the statute itself.[58] The relevant language states, "the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball directly relating to or affecting employment of major league baseball players to play baseball at the major league level are subject to the antitrust laws..."[59]. Those in favor of a broad interpretation of the CFA argue that the agreements MiLB players sign when they begin their careers ultimately has a direct effect on the employment of MLB players and the agreements are entitled to antitrust protection.[60] Thus, this interpretation would bring MiLB players into the scope of the CFA and entitle them to its protections.

52. *See* The Curt Flood Act § 3(c) (specifying that a MLB player is either: 1) a person who is a party to a major league player's contract or playing at the MLB level; 2) a person who was a party to a major league player's contract or playing baseball at the MLB level at the time of the injury that is the subject of the complaint; 3) a person who has been a party to a MLB' player contract who claims he has been injured in efforts to secure subsequent major league level contracts, but not minor league level contracts; 4) a person who was a party to a major league player's contract or who was playing baseball in the season prior to the expiration of the last CBA).

53. The Curt Flood Act § 3(c).

54. The Curt Flood Act § 3(c).

55. *See* Hobbs, *supra* note 7, at 1069 (detailing that there is a current debate that the CFA should be interpreted broadly); *See also* The Curt Flood Act § 2 (declaring the purpose of the Act is to make only those in MLB protected by antitrust laws).

56. The Curt Flood Act § 3(c).

57. Hobbs, *supra* note 7, at 1069.

58. *Id.*

59. The Curt Flood Act § 3(a)

60. Hobbs, *supra* note 7, at 1069.

b. Arguments for a narrow interpretation

On the other side, the arguments for an interpretation of the CFA which only encompasses players in MLB are also based on a textual interpretation of the CFA.[61] In addition to the purpose of the Act, the CFA precludes those baseball players in the minor league level, or at an amateur level from having standing to sue under the CFA.[62] Moreover, Congress included, as a prerequisite to any of the categories of qualified individuals, the existence of a major league player's contract either at the time of the lawsuit or in the past.[63] Both the stated purpose of giving MLB players antitrust protections, and the stringent standing requirements of the CFA have made it nearly impossible for MiLB players to seek refuge using the CFA. Accordingly, MiLB players have begun to turn to a different recourse, mainly the Fair Labor Standards Act ("FLSA").[64]

B. The Fair Labor Standards Act

The FLSA was enacted in 1938, with the goal of protecting the general welfare of vulnerable employees, i.e. requiring they be paid fair wages for their labor.[65] A key provision of the FLSA is a guarantee that workers are paid at a level that is not below the federally set minimum.[66] However, numerous exemptions from this provision are also available within the FLSA.[67] The pertinent exemptions to MiLB's wage status are the "bona fide professional" and the "seasonal employee" exemptions.[68]

1. The FLSA Minimum Wage Mandate and Relevant Exceptions

Section 206 of the FLSA requires that employers pay their employees at least the federal minimum wage if their employees are engaged in commerce, or if they are employed in an enterprise

61. *Id.*

62. The Curt Flood Act § 3(b)(1).

63. The Curt Flood Act § 3(c).

64. *See generally* Hobbs, *supra* note 7, at 1062 (explaining that there are current lawsuits challenging the application of the CFA strictly to MLB players, implicitly recognizing that a narrow interpretation is currently used).

65. Lucas J. Carney, *Major League Baseball's "Foul Ball": Why Minor League Baseball Players Are Not Exempt Employees Under The Fair Labor Standards Act*, 41 IOWA J. CORP. L. 283, 292 (2015).

66. *See* Fair Labor Standards Act, 29 U.S.C. § 206 (2012) (mandating that employees engaged in commerce shall pay its employees a minimum wage equal to at least the federal level).

67. *See generally* 29 U.S.C. § 213 (2012) (providing a list of employees who are exempt from the mandates of the FLSA).

68. 29 U.S.C. § 213(a)(1), (3).

engaged in commerce.[69] However, Section 213 of the FLSA consists of an extensive list of categories of employees that are exempt from the minimum wage requirements.[70] Two of these exemptions are relevant concerning MLB and MiLB relations: the "bona fide professional" and "seasonal employee" exemptions.[71] Commenters have explained that if MLB is forced to defend FLSA violations, these two exemptions would be their strongest arguments.[72]

a. The bona fide professional exemption

The FLSA defines a "bona fide professional" as someone employed in a bona fide "executive, administrative, or professional capacity".[73] The Department of Labor breaks this section down to two types of professionals: learned and creative.[74] A learned professional is someone with advanced knowledge and is employed in a field of science or learning.[75] If MiLB athletes do fall under this exemption, they would be in the "creative professional" category.[76]

An employee qualifies for the creative professional exemption if they satisfy three requirements.[77] The employee must: 1) be paid on a salary basis, 2) be paid at a rate greater than $455 per week, and 3) the employee's primary duty is performance of work that requires originality or talent in a recognized field of artistic or creative endeavor.[78]

The creative professional exemption is based on a policy that the individuals are compensated adequately with high base pay and

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69. *See* 29 U.S.C. § 206(a)(1)(C) (stating the federal minimum wage at $7.25 per hour).

70. *See generally* § 213(a)(1) - (13) (exempting various employees from FLSA protection. For example: publishers of newspapers with circulations of less than four thousand; particular agricultural employees, babysitters or other domestic service workers, *inter alia*);

71. 29 U.S.C. § 213(a)(1), (a)(3); *See also* Carney, *supra* note 64, at 293-94 (explaining the FLSA exemptions that will likely be argued by MLB).

72. Carney, *supra* note 65, at 293-94.

73. 29 U.S.C. § 213(a)(1); *see also* Department of Labor: Wage and Hour Division (2008), www.dol.gov/whd/overtime/fs17d_professional.pdf [hereinafter Department of Labor] (explaining to qualify for the 213(a)(1) exemption the employee must be paid on a salary basis and have a primary duties relating to either executive, administrative, or professional duties).

74. *See* Carney, *supra* note 65, at 296 (citing to Department of Labor guidelines to explain how to determine whether an individual is a "creative professional"); *see also* Department of Labor, *supra* note 72 (explaining that a learned professional and creative professional are both judged on the same salary test, but the duties test differ. They each require the primary duty of the employee to be in a field of science and learning, and in a recognized field of artistic or creative endeavor, respectively).

75. Department of Labor, *supra* note 73.

76. Carney, *supra* note 65, at 297.

77. *See* Department of Labor, *supra* note 73 (promulgating guidelines on how to classify individuals as a creative professional as defined by the FLSA).

78. *Id.*

do not need as much protection as "blue-collar" workers; that is to say the value these employees provide is generally not based on the hours they work.[79] Moreover, it is argued that the value of these employees cannot be quantified by hourly pay.[80] Whether the exemption is applicable is determined on a case-by-case basis.[81] For example, actors, musicians, and authors frequently satisfy the requirements for the "bona fide creative professional" exemption.[82] However, while it is debatable whether MiLB players satisfy the requirements of this exemption, there is no relevant case law pertaining to MLB using the creative professional exemption.

b. The seasonal employee exemption

An employee is also exempt from the FLSA minimum wage requirements if he or she is a seasonal employee.[83] The FLSA defines a seasonal employee as someone employed by an amusement or recreational establishment which operates less than seven months of the year, or if its average receipts for any six months of the year are not more than one-third of its average receipts for the rest of the year.[84] The courts have recognized MLB's entitlement to the seasonal employee exemption in some cases, but have also rejected their argument for the exemption on other occasions.[85]

2. Relevant Case Law for the Seasonal Employee Exemption

In *Bridewell v. Cincinnati Reds,* the court held that the Cincinnati Reds, an MLB organization, may not seek refuge for FLSA violations by using the seasonal occupation exemption.[86] The Reds maintenance workers sued the organization for failure to pay overtime wages, but the team argued it was exempt from doing so because they operate for less than seven months of the year.[87] The

79. Carney, *supra* note 65, at 296.

80. *Id.*

81. *See* Department of Labor, *supra* note 73 (describing the salary and duties tests used to determine if someone is a creative professional which will be discussed in further depth later in the comment).

82. *Id.*

83. 29 U.S.C. § 213(a)(3).

84. *Id.; See also* Carney, *supra* note 65, at 301 (describing in the abstract that an employer must satisfy either duration of operation test (less than 7 months out of the year), or the average receipts test to receive a seasonal employee exemption).

85. *See* Carney, *supra* note 65, at 301-6 (analyzing the three seminal cases—*Bridewell, Adams, and Jeffery*—challenging MLB's entitlement to a seasonal employee exemption).

86. *See* Bridewell v. Cincinnati Reds, 155 F.3d 828, 832 (6th Cir. 1998) (affirming the district court's decision that the organization failed to satisfy both the durational and receipts test to qualify for the seasonal employee exemption).

87. *See* Bridewell v. Cincinnati Reds, 68 F.3d 136, 139 (6th Cir. 1995)

Reds were initially granted the exemption under the less than seven months of operation test on summary judgment, but that was reversed due to the fact that the Reds employed 120 year-round employees.[88] The Reds alternative argument that it satisfied the average receipts test was rejected as well, because their accounting method was improper.[89]

However, in *Adams v. Detroit Tigers,* the Detroit Tigers established their entitlement to a seasonal occupation exemption by satisfying the average receipts test.[90] The court in *Adams* agreed with the *Bridewell* court that MLB organizations operate year-round, and that it is improper to analyze a FLSA section 213(a)(3)(A) claim based only on when the team hosts games.[91] The court thus ruled that the Tigers were a year-round operation just like the Reds in *Bridewell.*[92] However, unlike the Reds, the Tigers were able to satisfy the receipts test in Section 213(a)(3)(B), and were entitled to an exemption from the FLSA.[93] The diverging conclusions are based on the different accounting methods used by the organizations.[94]

In slightly different circumstances in *Jeffery v. Sarasota White Sox*, the court held that an MiLB organization is entitled to a seasonal occupation exemption because they operate less than seven months of the year.[95] In *Jeffery,* a MiLB organization's groundskeeper sued, alleging the organization was not in compliance with the FLSA.[96] Contrary to the cases described above,

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(reversing the district court's grant of summary judgment in favor of the organization because the team does not operate for less than seven months in a given year. The court remanded for determination of whether the Reds satisfied the receipts test).

88. *Id.; See also* Carney, *supra* note 64, at 301-2 (analyzing the procedural posture of *Bridewell*).

89. *See Bridewell,* 155 F.3d at 832 (holding the Reds reporting their receipts as income is not the proper accounting method to grant it entitlement to the FLSA exemption as instructed by FLSA § 213(a)(3)(B)).

90. Adams v. Detroit Tigers, 961 F. Supp. 176, 180 (E. D. Mich. 1997); *See also* Carney, *supra* note 64, at 305 (analyzing the reasoning of the district court granting the Tigers an exemption under § 213(a)(3)(B), that an organization's accountant's undisputed figures were sufficient to show that their average receipts for six months of the year did not exceed one-third of its average receipts for the rest of the year).

91. *Adams,* 961 F. Supp. at 180; 29 U.S.C. § 213(a)(3)(B).

92. *Adams,* 961 F. Supp. at 180.

93. *Id.; See also* Carney, *supra* note 65, at 306 (explaining the differences between *Bridewell* and *Adams*, whereas the Reds accounting method precluded it from a Section 213(a)(3)(B) exemption but the Tigers accounting was sufficient).

94. *Id.*

95. Jeffery v. Sarasota White Sox*,* 64 F.3d 590, 596 (11th Cir. 1995); *See also* Carney, *supra* note 64, at 303 (describing generally the 11th Circuit's decision to diverge from *Bridewell* and *Adams* and grant Sarasota a seasonal employee exemption under section 213(a)(3)(A)).

96. *Jeffery,* 64 F.3d at 593.

the court ruled that team's operation was less than seven months, and the fact that the plaintiff continued to work in the offseason did not change their exempt status.[97] One difference in *Jeffery* compared to the other discussed court decisions is that a minor league organization was sued directly in *Jeffery*.[98]

A pending lawsuit, *Senne v. Office of the Comm'r of Baseball,* challenges MLB's entitlement to FLSA exemptions.[99]

C. Current Status of MiLB Players

MLB's longstanding antitrust exemption, the CFA, and FLSA exemptions collectively allow MLB to legally pay MiLB athletes below the federally mandated minimum wage.[100] Monthly wages for MiLB players typically range between $1,100 to $3,000 depending on the particular player's experience.[101] While the CFA increased MLB's players ability to negotiate a fair contract, MiLB players are still subject to a version of the reserve clause system.[102] This remnant of the reserve clause system grants the MLB parent organization the ability to unilaterally extend or decline a player's contract until the player reaches at least six years of MLB service time (i.e. experience).[103]

Some argue that the benefits from MLB's favorable legal position outweigh the negatives.[104] A common argument supporting MLB's current system is that MLB is better able to fund their MiLB

97. *Id.* at 596; *See also* Carney, *supra* note 65, at 301-6 (discussing the contradictions in past decisions regarding MLB's entitlement to the seasonal employee exemption of the FLSA and arguing they are reconcilable because they were decided on different grounds).

98. *Jeffery,* 64 F.3d at 596.

99. *See generally* Senne Complaint, *supra* note 4 (describing the allegations made by the MiLB plaintiffs against MLB, including FLSA minimum wage and overtime violations); *See also* Carney, *supra* note 65, at 306 (analyzing the FLSA violations alleged by the Senne plaintiffs, and applying the likely defenses used by MLB).

100. *See* Jeff Blank, *Minor League Salary,* www.sportslawblogger.com/baseball/salary-information/minor-league-salary (last visited: Oct. 5, 2016) (providing information on the monthly salaries of minor league players); *But see* Hobbs, *supra* note 7, at 1070-77 (describing the benefits of the antitrust exemption for MiLB teams, players, and the local communities because MLB is able to fund MiLB organizations arguably because of the antitrust exemption).

101. *See* Blank, *supra* note 100 (explaining how the monthly salaries of MiLB players differ depending on how many years they have played).

102. *See generally* Hobbs, *supra* note 7, at 1067 (explaining the CFA's effect of ending the reserve clause system limiting MLB team's control on players contracts); *See also* FANGRAPHS, *Service Time,* www.fangraphs.com/library/principles/contract-details/service-time-super-two (last visited: Oct. 6, 2016) (describing the MLB's service time system; the MLB organization has the ability to unilaterally extend or decline a player's contract until the player accrues at least six years of professional experience).

103. FANGRAPHS, *supra* note 102.

104. Hobbs, *supra* note 7, at 1070-72.

organizations for equipment, sign more players, and therefore provide more individuals an opportunity to make the Major Leagues.[105]

The underlying premise to this argument in favor of MLB is that providing a fair wage structure to MiLB athletes will incentivize MLB organizations to limit the size of their rosters.[106] MLB argues they would be forced to allocate expenses differently due to the rise in salaries, and in turn claim this will lead to smaller rosters.[107] However, those in favor of increased wages for MiLB players argue MiLB's rosters would not need to be limited because of MLB's ability to absorb the wage increase, and that MLB's claims are overstated.[108]

D. The Senne Lawsuit

In *Senne v. Office of the Comm'r of Baseball,* a collective group of minor leaguers have filed a class action lawsuit against MLB and the Commissioner of baseball.[109] The complaint cites FLSA violations against the MLB for failure to pay minimum wage and overtime pay.[110] This lawsuit will have a major implication on the wages of MiLB players if the court was to rule in favor of the minor league players.[111] A ruling against MLB would essentially remove the FLSA exemptions as a source of defense for MLB.[112]

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105. *Id.*; *But see* Mark Stanton,*"Juuuussst A Bit Outside": A Look at Whether MLB Owners Can Justify Paying Minor Leaguers Below Minimum Wage Without Violating the Fair Labor Standards Act*, 22 JEFFERY S. MOORAD SPORTS LAW JOURNAL 727, 740 (2015) (analyzing the current relationship between MLB and MiLB organizations, insofar as the fact that the MLB organization pays coach and player salaries while MiLB organizations pay for the business aspects of running a business. Also commenting on the large figures in revenue both organizations receive every year).

106. Hobbs, *supra* note 7, at 1070-72.

107. *See generally* Hobbs, *supra* note 7, at 1070-72 (arguing that MLB would not be able to withstand the increase in operating costs of MiLB if they were forced to pay higher wages); *But see* Garver, *supra* note 2 (arguing MLB owners would not be substantially impacted economically by requiring MiLB players are paid at least a minimum wage).

108. *See* Ted Berg, *The 'Save America's Pastime Act in Congress Will Do Nothing of the Sort,* ftw.usatoday.com/2016/06/save-americas-pastime-act-minor-league-minimum-wage-lawsuit-mlb-salaries (last visited: Oct. 5, 2016) (arguing that MLB's claims are alarmist and that MLB is not in any true danger of suffering from requiring a federal minimum wage); *See also* Stanton, *supra* note 104, at 740 (explaining that MiLB teams are independently owned with a net worth of millions of dollars).

109. Senne Complaint, *supra* note 4; *See also* Stanton, *supra* note 104, at 746 (describing the procedural background of the Senne lawsuit).

110. *See* Stanton, *supra* note 105, at 747-48 (describing of the factual background of Senne).

111. *See Id.* at 751 (analyzing the possible outcomes and implications of the Senne lawsuit depending on how the Court views the FLSA claims, specifically, how a victory by MiLB would require MLB to comply with the FLSA).

112. *Id.*

The plaintiffs in *Senne* were initially dealt a blow in July 2016 when a judge decertified the class action holding that the plaintiffs were not fit to bring a class action.[113] The decertification order stated that individualized issues would arise in connection with the plaintiffs argument that they're FLSA rights were violated, and that a class action was not appropriate.[114] However, the *Senne* plaintiffs filed a motion for reconsideration, and were re-certified in March 2017.[115] The class was re-certified once they limited the class of players to the California league.[116] The deciding judge said this "significantly reduced the variations" within the plaintiffs, which were his main concerns when he initially decertified the class in 2016.[117]

Additionally, the *Senne* plaintiffs face adversity due to recent developments in federal law. In March 2018 President Trump signed the 2018 Federal Omnibus Bill ("Bill") which allocates the government spending for the fiscal year. Due to lobbying on behalf of MLB, a version of the Save America's Pastime Act was worked into the Bill.[118] According to the Bill, MiLB players under contract that pays them minimum wage are exempt from the FLSA's overtime rules.[119] The Bill also only requires teams to pay MiLB during the regular season, and not during spring training or during the offseason. Ultimately, the Bill guarantees a small raise of minimum payment to MiLB players to $1,160 a month, compared to the current $1,100 minimum, but still bars overtime pay despite the long hours MiLB players often work.[120] As of the writing of this comment, it is not clear how the Bill's passage will affect the *Senne* lawsuit.

It is unclear how the court will rule on the FLSA violations alleged by the MiLB plaintiffs if the case does go to trial.[121] This comment will assume arguendo that the class will remain certified, and that the Bill does not render the case moot. The lack of clarity in the case law when it comes to MLB's entitlement to the "seasonal occupation" exemption discussed above makes it difficult to predict

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113. Zach Spedden, *Plaintiffs Granted Appeal in MiLB Wages Lawsuit,* ballparkdigest.com/2016/09/07/plaintiffs-granted-appeal-in-milb-wages-lawsuit/ (last visited: Dec. 20, 2016).

114. *Id.*

115. Zachary Zagger, *Judge Breathes New Life Into Minor Leaguers' Wage Suit,* LAW360 (April 3, 2017, 6:49 PM), www.law360.com/articles/908546/judge-breathes-new-life-into-minor-leaguers-wage-suit.

116. *Id.*

117. *Id.*

118. Debonis, Warner & O'Keefe, *Here's what Congress is Stuffing Into its $1.3 Trillion Spending Bill,* Debonis, Warner, and O'Keefe, (March 22, 2018) www.washingtonpost.com/news/powerpost/wp/2018/03/22/heres-what-congress-is-stuffing-into-its-1-3-trillion-spending-bill/?noredirect=on&utm_term=.7c0bac5a08e5 (last visited: Mar. 22, 2018).

119. *Id.*

120. *Id.*

121. Stanton, *supra* note 105, at 749.

whether the MiLB plaintiffs will be successful.[122]

E. The Save America's Pastime Act

Congress proposed the "Save the Pastime Act" in the Summer of 2016, seemingly in response to concerns over the *Senne* lawsuit.[123] The Act adds to the exemptions of the FLSA by including any person who has signed a contract to play baseball at the minor league level.[124] However, minor league baseball players staunchly oppose the bill's purpose of excluding MiLB players from protection of the FLSA.[125] The public outcry led to Cheri Bustos, one of the original sponsors of the bill to withdraw her support for the bill.[126] It remains to be seen how the bill will progress through Congress, or if it will even become law, but it is still an important development in the federal government's treatment of MiLB players.[127]

IV. ANALYSIS

This section will first analyze why the 'Save the Pastime Act' is an ineffective and misguided attempt at preserving MiLB. Next, this section discusses how the history of MLB and MiLB relations, specifically the FLSA exemptions and CFA will likely impact the

122. *Compare Bridewell,* 68 F.3d at 139 (ruling a MLB organization does not operate for only seven months of the year) and *Bridewell,* 155 F.3d at 832 (ruling an MLB organization did not satisfy the average receipts test to qualify for the seasonal employee exemption) *with Jeffery,* 64 F.3d 590, 596 (holding that a MiLB organization was entitled to the seasonal employee exemption, and their entitlement was not affected by the presence of year-round employees).

123. *See* H.R. 5580 § 2 (proposing that MiLB players are explicitly exempt from FLSA protections, which would render the plaintiffs' claims in Senne moot).

124. H.R. 5580 § 2.

125. *See* Ryan Fagan, *Sponsor of 'Save America's Pastime Act' Withdraws Support for Bill One Day Later,* www.sportingnews.com/mlb/news/minor-league-save-americas-pastime-act-salaries-antitrust-rep-cheri-bustos-congress-support/9drbor8m7wj81v49166y7ztqv (last visited: Oct. 9, 2016) (quoting a minor league player who voiced his concern about the Act, claiming the popular view of the Act was unfavorable); *See also* Garver, *supra* note 2 (describing the working conditions of minor league players, and how a former minor leaguer criticizing the Act as "outrageous," and "despicable").

126. *See* Fagan, *supra* note 125 (describing the development of Cheri Bustos withdrawing her support of the Act after receiving public criticism).

127. *See* H.R. 5580 (showing the progress of the bill as having been introduced)*; See also* Jordin Kobritz, *Column: Lobbying Congress in Save America's Pastime Act,* www.dcourier.com/news/2016/jul/12/column-lobbying-congress-save-americas-pastime-act (last visited: Oct. 5, 2016) (analysis of why Save America's Pastime Act is good policy and consistent with current laws); *But see* Ted Berg, *supra* note 108 (quoting a former minor league player explaining the strong dislike of the proposed legislation, arguing that the policy suggestions behind the Act are fallacious).

Senne lawsuit.[128] Specifically, this comment addresses the MLB's chances of getting the case dismissed, since doing so would leave MiLB player's wages at the status quo.[129] Also, this comment examines the differing opinions on how the CFA should be interpreted and the implications of these interpretations.[130] Finally, this comment discusses if it is practicable for MiLB to lobby to Congress to model legislation after the CFA to protect MiLB players.[131]

A. Why the Arguments for the Save the Pastime Act Are Misguided

The fallacious argument in support of the 'Save the Pastime Act' is based on economic sustainability.[132] MLB's central argument in support of the 'Save the Pastime Act' is that the Act would prevent player-development costs from skyrocketing, and as a direct consequence lead to a significant decrease in the number of individuals in MiLB.[133] Currently, MLB pays the salaries of MiLB players as well as the operating costs of MiLB organizations.[134] The argument follows that requiring MLB to pay MiLB players a minimum wage would drastically increase their costs (estimated at anywhere from $3 to $25 million), and incentivize the league to limit the number of players on MiLB rosters.[135] The flaws in this argument are outlined below.

The claims that MLB either cannot afford to pay increased wages, or that it would decrease the numbers of players in MiLB are exaggerated. MLB has steadily achieved increased revenues, allotting them sufficient funds to fairly compensate MiLB players.[136] For example, in 2014 MLB grossed $9 billion, which was

128. 29 U.S.C. § 213; *See also* Carney, *supra* note 65, at 297-302 (applying the FLSA exemptions to MLB's case).

129. *See generally* Carney, *supra* note 65, at 307 (discussing the possibility of an MiLB victory in *Senne* stripping away MLB's ability to invoke an exemption from the FLSA, as well as a settlement provoking labor negotiations between MLB and MiLB players).

130. *See* Hobbs, *supra* note 7, at 1068-70 (providing a further explanation of the differing opinions of how the CFA should be interpreted).

131. *See generally* Hobbs, *supra* note 7, at 1966-67 (discussing the events leading to the passage of the CFA).

132. Hobbs, *supra* note 7, at 1071.

133. Nocco, *supra* note 2; *See also* Hobbs, *supra* note 7, at 1071 (advocating that the CFA directly causes cost-savings for MiLB because MLB is able to afford to fund the operating costs of MiLB).

134. Hobbs, *supra* note 7, at 1071.

135. *Id.*

136. *See* Maury Brown, www.forbes.com/sites/maurybrown/2015/12/04/mlb-sees-record-revenues-for-2015-up-500-million-and-approaching-9-5-billion/#3478dd842307, FORBES (last visited: Nov. 12, 2016) (providing statistics on MLB's revenues showing an increase for the 13th consecutive year, including a $500 million increase for 2015).

an increase of 13% from the prior year.[137] In 2015, MLB's revenues once again increased, this time to $9.5 billion.[138] Considering the above numbers, if MLB were to allocate $25 million to MiLB players, it would still obtain a $475 million net increase in profit. To break it down further, the average MLB organization is now worth $1.3 billion, an incredible 59% increase from 2014.[139] A key factor leading to these increased revenues is that many organizations have acquired regional broadcast deals.[140]

The figures described above rebut the argument that MLB cannot afford to both pay increased wages and maintain the current MiLB system.[141] MLB has shown a pattern of increased revenues, and even assuming the increased cost to MLB to pay MiLB players a minimum wage is the generous $25 million per year that one commentator has predicted, it would be affordable for MLB.[142]

B. Potential outcomes of the Senne Lawsuit

As mentioned above, a MiLB victory in *Senne* would make it impossible for MLB to justify MiLB players' lower wages through the FLSA exemptions.[143] On the other hand, a victory for MLB would further solidify the precedential value of the *Adams* decision, as well as MLB's general position that MiLB players are not entitled to a minimum wage.[144] MLB is likely to seek dismissal of the *Senne* lawsuit by invoking either the creative professional or seasonal employee exemption.[145] It is important, therefore, to understand the

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137. *Id.*

138. *Id.*

139. *Forbes Releases 19th Annual MLB Team Valuations*, FORBES (Mar. 23, 2016), www.forbes.com/sites/forbespr/2016/03/23/forbes-releases-19th-annual-mlb-team-valuations/#19d736fe57c2 [hereinafter "Forbes Valuation"].

140. *See id.* (providing examples of individual team growth after receiving broadcasting deals: The Houston Astros increased 38% in value, the St. Louis Cardinals increased 14% in value, and the Arizona Diamondbacks increased 10% in value).

141. *Id.;* Brown, *supra* note 136.

142. Hobbs, *supra* note 7, at 1071; *see also* Brown, *supra* note 136 (showing the gradual increase in MLB revenue); *see also* Forbes Valuation, *supra* note 139 (showing significant increase in individual organization revenue, especially after receiving broadcasting deals).

143. *See generally* Carney, *supra* note 65, at 306-8 (discussing the potential impact of MLB's upcoming litigation in the *Senne* case and recommending settling to avoid potential public disapproval of how the MiLB players are compensated if their status receives increased publicity).

144. Carney, *supra* note 65, at 307; *see generally Bridewell,* 68 F.3d at 139 (opining that if the Cincinnati Reds satisfied the average receipts then they would qualify for the section 213(a)(3)(B) FLSA exemption); *see also Adams,* 155 F.3d at 180 (holding that the Detroit Tigers had proved that their average receipts for six months were not more than one-third of the rest of the year, and were therefore entitled to the section 213(a)(3)(B) exemption).

145. Carney, *supra* note 65, at 306; *see also* 29 U.S.C. §213 (a)(1), (3) (providing employers with the creative professional exemption and the seasonal

MLB's argument in favor of receiving the benefit of each exemption for these circumstances.[146]

1. Creative Professional Analysis

As described earlier in this comment, the creative professional exemption is evaluated on a three-part test: 1) the employee is paid on a salary basis; 2) the salary is at least above $455 per week; and 3) the primary duty of the employee involves duties that require originality or talent in a recognized field or creative endeavor.[147]

MLB will have no issue passing the first prong of the test, but faces issues satisfying the remaining two prongs.[148] When a player is drafted to an organization, they typically sign a multiyear contract earning a regular salary, thus satisfying the salary requirement.[149] Moving on to the second prong of the test, each players' salary differs, depending on the league within MiLB the player is currently assigned.[150] The different leagues in MiLB span from Rookie Ball, where most players start their career, to Triple A, which is the highest league in the minor league system.[151] The typical salary at Triple A is $2,150 per month, which when broken down is $537.50 per week.[152] This surpasses the $455 threshold. However, the typical Rookie Ball salary, $1,150 per month, is $287.50 per week, failing to surpass the $455 threshold.[153] Thus, since some levels of minor league baseball meet the salary test and some do not, it would depend on what salary level the Court bases their analysis to determine if MLB satisfies the salary amount

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employee exemption).

146. *See* Department of Labor, *supra* note 73 (explaining that an employer is entitled to the creative professional exemption if the employer is paid a salary of at least $455 per week, and primary duties require originality or talent in a recognized creative field); *see also Adams,* 155 F. Supp. at 180 (granting the Detroit Tigers the seasonal employee exemption because they satisfied the average receipts test); *see also Jeffery*, 64 F.3d at 596 (granting the Sarasota White Sox, an MiLB organization, the seasonal employee exemption because they operated for less than seven months of the year).

147. Department of Labor, *supra* note 73.

148. *Contra* Carney, *supra* note 65, at 297 (arguing that MLB would not be able to satisfy the salary test of the creative professional exemption because MiLB players are not compensated for offseason work); *but see* YOU GO PRO BASEBALL, www.yougoprobaseball.com/how-much-money-do-minor-league-baseball-players-make-get-paid.html (last visited: Oct. 25, 2016) (explaining an MiLB player signs a standard 7 year minor league contract that pays between $1,150 to $2,700 per year, depending on the years of experience and the level which the player reaches).

149. *See generally* YOU GO PRO BASEBALL, *supra* note 148 (describing the terms of a MiLB players' original contract).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

prong.[154]

However, the largest hurdle for MLB to clear when seeking the creative professional exemption is the final prong, the duties test.[155] The Department of Labor has declared that the employee's primary duty must require work of originality or talent in a recognized artistic or creative endeavor.[156] For example, artists and musicians have primary duties in the creative endeavors of art and music.[157] Unlike the seasonal employee exemption, MLB has not attempted to receive the creative professional exemption in the past so it is unclear if the courts will decide baseball players satisfy the duties requirement.[158] It surely does take a certain level of specialized talent to play professional baseball.[159] However, the creative professional exemption has typically only been granted to professions related to performance arts, so MLB would be forced to make a novel argument.[160] The seasonal employee exemption is a stronger argument MLB can pursue to try to invalidate MiLB players' FLSA claims.

2. Seasonal Employee Exemption Analysis

The second FLSA exemption MLB will likely utilize to get the *Senne* case dismissed is the seasonal employee exemption.[161] This exemption applies if an employer is a recreational establishment and can satisfy one of two tests: 1) they operate for less than seven months of the year, or 2) their average receipts for any six-month span are not more than one-third of the average receipts for the rest of the year.[162] The three decisions discussed above, *Bridewell, Adams,* and *Jeffery* focused on MLB's seasonal employee exemption.

The MiLB plaintiffs have the support of the *Bridewell* and *Adams* decisions in their arsenal to counter MLB's argument for the

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154. *Id.*

155. *See generally* Department of Labor, *supra* note 73 (requiring that a creative professional perform duties that require originality or talent in a recognized creative field).

156. *Id.*

157. *Id.*

158. *Cf.* Carney, *supra* note 65, at 301-6 (describing precedent supporting the seasonal employee exemption for MLB, while only providing an analysis of the tests courts should use for the creative professional exemption).

159. *See* Ian Gordon, *Minor League Baseball Players Make Poverty-Level Wages*, www.motherjones.com/politics/2014/06/baseball-broshuis-minor-league-wage-income (last visited: Oct. 29, 2016) (providing statistics on Minor League Players' wages, including the fact that approximately 10% of MiLB players reach the increased wages of Major League players).

160. Department of Labor, *supra* note 73.

161. 29 U.S.C. § 213(a)(3); *see also* Carney, *supra* note 65, at 301 (stating that an employer may be granted the seasonal employee exemption if they either operate for less than seven months per year, or if they satisfy the average receipts test).

162. Carney, *supra* note 65, at 301.

exemption under Section 213(a)(3)(A), the seven-month duration test.[163] It should be noted that in *Bridewell* the court explicitly rejected MLB's contention that their business lasted for less than seven months per year due to the number of year-round employees within the organization.[164] In *Adams,* the court agreed with that decision but granted an exemption under Section 213(a)(3)(B)—the average receipts test.[165] However, the third decision in the triad of cases discussed above, *Jeffery,* works against the MiLB plaintiffs, and may be used for its persuasive authority.[166]

C. Application of FLSA Case Law to the Senne Complaint

In *Jeffery,* the Eleventh Circuit was faced with a complaint by a groundskeeper for the Sarasota White Sox, a MiLB organization of the Chicago White Sox, alleging FLSA violations.[167] The court granted summary judgment to the organization in part, because their operations did not last for more than seven months.[168] Moreover, the court diverged from the *Bridewell* and *Adams* decisions by ruling that the fact that the plaintiff was employed by the Sarasota White Sox in the offseason did not alter MLB's entitlement to the seasonal employee exemption under section 213(a)(3)(A).[169] The court did not elaborate on this stark difference from *Bridewell* and *Adams*; which both held that MLB organizations' year-round employment precluded them from arguing they were only a seven-month organization.[170] Thus, the differing opinions appear to be a circuit split based on how many year-round employees disqualify an organization from using the seven-month duration test.[171]

Why did the *Jeffery* court differ so strongly from the other decisions with similar facts? The court reasoned that, "it is the revenue-producing operation of the Sarasota White Sox as a professional baseball franchise which affords it the protection of the

163. *Adams,* 961 F. Supp. at 180*; see also Bridewell,* 155 F.3d at 829 (approving of the district court's analysis that the Cincinnati Reds are only barred from using the seasonal employee exemption because they did not satisfy the average receipts test).

164. *Bridewell,* 155 F.3d at 829.

165. *Adams,* 961 F. Supp. at 180.

166. *Compare Jeffery,* 64 F.3d at 593 (holding that a minor league organization operates for less than seven months and is entitled to the seasonal employee exemption under section 213(a)(3)(A) *with* Senne Complaint, *supra* note 4 (alleging MLB is violating the FLSA because MiLB players are not paid the federal minimum wage).

167. *Jeffery,* 64 F.3d at 592-93.

168. *Id.* at 596.

169. *Id.*

170. *Bridewell*, 68 F.3d at 139; *Adams,* 961 F. Supp. at 180.

171. *Bridewell,* 68 F.3d at 139; *Adams,* 961 F. Supp. at 180; *Jeffery,* 64 F.3d at 596.

exemption."[172] This conclusion can arguably be reconciled with *Bridewell and Adams*.[173] The *Jeffery* court cited to *Bridewell* when stating that it is the revenue-generating period of the organization that entitles it to the seasonal employee exemption.[174] It appears that all three cases focus on the revenue generated from the operation, but the *Jeffery* court did not believe there were enough year-round employees to disqualify the organization from the seasonal employee exemption.[175]

1. How the Senne Plaintiffs Can Distinguish Themselves from Jeffery

The plaintiffs in the *Senne* lawsuit will benefit from aligning themselves as close as possible with the plaintiffs in *Bridewell* and *Adams* to defeat MLB's argument for a section 213(a)(3)(A) exemption.[176] Both decisions indicate that an MLB franchise may not avail itself of the 213(a)(3)(A) exemption because they are year-round operations due to the amount of employees that are employed on a full-time basis.[177]

Contrary to *Jeffery*, the plaintiffs in *Senne* filed their complaint against all MLB teams and its Commissioner, rather than against individual MiLB organizations.[178] The two cases, *Bridewell* and *Adams,* that dealt with MLB organizations held that the organizations had too many year-round employees to be "seasonal"; whereas the MiLB organization in *Jeffery* presumably did not suffer from that same limitation.[179] It is also important to stress that each of these three cases did not deal with players within the organization, rather the past complaints were brought by support staff members, specifically, groundskeepers, batboys, and general maintenance staff members.[180] Therefore, it is unknown how a court will decide a case with actual players as the complainant.

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172. *Jeffery,* 64 F.3d at 596.

173. *Bridewell,* 155 F.3d at 829; *Adams,* 961 F. Supp. at 180.

174. *Jeffery,* 64 F.3d at 596.

175. *Bridewell,* 155 F.3d at 829; *Adams,* 961 F. Supp. at 180; *see also Jeffery,* 64 F.3d at 596 (reasoning that the organization is not required to terminate *every* employee to receive the seasonal employee exemption).

176. *Id.*

177. *Bridewell,* 155 F.3d at 829; *see also Adams,* 961 F. Supp at 180 (agreeing with the *Bridewell* court insofar that a MLB organization is a year-round operation because they employ a significant amount of year-round employees).

178. Senne Complaint, *supra* note 4.

179. *Jeffery,* 64 F.3d at 596.

180. *See Jeffery,* 64 F.3d 590 (alleging FLSA violations by failing to pay a MiLB organization's groundskeeper minimum wage); *see also Bridewell,* 155 F.3d 828 (alleging FLSA violations by failing to pay the MLB organizations' maintenance workers minimum wage); *see also Adams,* 961 F. Supp. 176 (alleging FLSA violations by failing to pay the MLB organizations' batboys a minimum wage).

Even if the plaintiffs in *Senne* can distinguish themselves from *Jeffery,* they still face the hurdle of arguing against the section 213(a)(3)(B) test, otherwise known as the average receipts test.[181] If an employer's average receipts for any given six-month period are not more than one-third of the rest of the year, they are entitled to the seasonal employee exemption.[182] The *Bridewell* court determined the Reds did not satisfy this test because of their accounting method, but the *Adams* court granted the Detroit Tigers an exemption, holding that the organization used the proper accounting method to show they passed the average receipts test.[183] Thus, it appears that under *Bridewell* and *Adams,* if MLB can satisfy the average receipts test similar to the defendant franchise in *Adams,* it will likely qualify for the seasonal employee exemption.[184] If MLB can satisfy the average receipts test it may be useful for MiLB to argue from a policy perspective, that it is unfair to treat MiLB players similar to employees who typically work for a seasonal operation.[185] The basis for this policy argument is outlined below.

a. Rationale of the seasonal employee exemption in general

Particular portions of the legislative history of the seasonal employee exemption indicate Congress was concerned with how requiring a minimum wage would affect student workers[186]. During debates in the Senate, various Senators commented that exempting these seasonal student workers would preserve their jobs.[187] Congress justified not requiring minimum wages for student workers because they could afford to earn lower wages due to their dependent status on their parents.[188] In *Brennan v. Yellowstone*, the court opined that this legislative history might indicate that the seasonal employee exemption was in fact, designed for student workers.[189]

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181. 29 U.S.C. § 213(a)(3)(B).

182. *Id.*

183. *Bridewell,* 155 F.3d at 829; *Adams,* 961 F. Supp. at 180.

184. *See Adams,* 961 F. Supp. at 178 (stating that the Tigers accountant's figures were unchallenged and they showed that they were less than one-third of their average receipts for the rest of the year).

185. 29 U.S.C. § 213(a)(3)(B); *see generally* Department of Labor: Wage and Hour Division (2008), www.dol.gov/whd/regs/compliance/whdfs18.pdf (promulgating guidelines on how to classify employers who qualify for the seasonal employee exemption).

186. Charlotte S. Alexander & Nathaniel Grow, Article, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act,* 49 U.C. DAVIS L. REV. 123, 137 (2015).

187. *See id.* (expounding on the reasoning for exempting student workers from the FLSA; out of fear that requiring student workers be paid minimum wage would result in elimination of a number of jobs held by students).

188. *Id.*

189. *See* Brennan v. Yellowstone, 478 F.2d 285, 288-89 (10th Cir. 1973)

b. How the Senne plaintiffs can apply this policy argument

The *Senne* plaintiffs may argue that it is unfair to hold them to this exemption. They can cite to their independent status with many players supporting families, the fact that this is a career for them rather than a part-time job, and the amount of time they must put into being successful at their craft.[190] All of these factors are not involved in the employment of student workers.[191] Granted, the actual season for MiLB players coincides with the length of the MLB season, ranging from March to October, however, players must train year-round to improve their abilities.[192] Moreover, these minor league players also have bills to pay, families to support, and typically must work multiple jobs in the offseason, like delivering pizzas and carpentry side jobs.[193]

These are issues not present with student employees at typical recreational establishments addressed by the *Brennan* court.[194] Not to mention, some minor leaguers are required to attend certain team events during the offseason; for example, some Chicago Cubs minor leaguers attend the Cubs fan convention every winter.[195] Ultimately, MiLB plaintiffs must argue that the Tenth Circuit's opinion of the intent of the Section 213(a)(3) is correct, and it is inherently unfair to hold them to the same standard as student workers.[196]

However, this is a difficult argument for MiLB to make given the strict construction courts have given the FLSA exemptions.[197] It

(discussing the possible intent of the seasonal employee exemption being limited to student employees since they often worked summer recreational jobs, which required less protection).

190. *Brennan,* 478 F.2d at 288-89.

191. Alexander & Grow, *supra* note 186, at 137.

192. MAJOR LEAGUE BASEBALL, www.mlb.mlb.com/mlb/schedule/index.jsp#date=10/02/2016 (last visited: Oct. 26, 2016).

193. *See* Zack Meiesel, *Many Minor Leaguers Work Second, Third, or Fourth Jobs During the Offseason, So When Do They Find Time to Train?* www.cleveland.com/tribe/index.ssf/2016/02/many_minor_leaguers_work_secon.html (last visited: Oct. 29, 2016) (illustrating MiLB players' necessity to work multiple jobs while training for their season at the same time during the offseason).

194. *Cf. Brennan,* 478 F.2d at 288-89 (opining on the intent behind the seasonal employee exemption in a case involving hotel student employees at Yellowstone National Park).

195. *See* CHICAGO CUBS ONLINE, chicagocubsonline.com/archives/2016/01/31st-cubs-convention-schedule-and-list-of-attendees.php (last visited: Oct. 28, 2016) (providing list of players on the Chicago Cubs required to attend their fan convention in January, which in this case included minor leaguers such as Dan Vogelbach, Zac Rosscup, and Pierce Johnson among others).

196. *Brennan,* 478 F.2d at 288-89.

197. 29 U.S.C. § 213; *see also Brennan*, 478 F.2d at 289 (declining to accept an employer's argument because it ran contrary to accepted rules of construction which require a narrow construction of exemptions).

is well settled that the exemptions for the FLSA are to be strictly construed and the employer need only prove that the employee falls within the language of the exemption.[198] Thus, the *Senne* plaintiffs may fail in defeating either FLSA exception, and the best remaining avenue for change would be through legislation.[199]

D. Is it Plausible to Replicate the CFA in a Beneficial Way to MiLB Players?

Prior to determining if it is plausible for Congress to replicate the CFA in a beneficial way for MiLB players, it is necessary to understand the circumstances leading to the passage of the CFA.[200] The CFA was passed in response to the lawsuit filed by Curt Flood, who believed the reserve clause, which restricted a player's freedom to determine what team he would play for, was unjust and unfair.[201] The reserve clause gave an organization perpetual control over any given players' contract, including their salary.[202] The CFA for all intents and purposes eliminated the reserve clause for MLB players, but did nothing to improve the situation for MiLB players.[203]

1. Does the Same Unfairness Which Was Present Prior to Passage of the CFA Still Exist for MiLB Players?

Prior to the CFA, all players were subject to the reserve clause in their contracts, giving the MLB organization sole discretion over players' rights.[204] MLB players were determined to remove the reserve clause, in part, because they can earn higher salaries if they are able to enter a free market.[205] The CFA, in conjunction with developments in contract arbitration, essentially eradicated the use of the reserve clause, since its ability to perpetually control a player's salary tended to operate as a monopolistic device.[206]

198. *Brennan,* 478 F.2d at 289.

199. *See generally id; see also Adams,* 961 F. Supp. at 180 (granting MLB the seasonal employee exemption under Section 213(a)(3)(B), hindering MiLB's argument against MLB's entitlement to being exempt from the FLSA).

200. *See generally* Hobbs, *supra* note 7, at 1068-70 (discussing generally the purpose of the CFA and the differing opinions of how it should be interpreted).

201. Hobbs, *supra* note 7, at 1067; *see also* Carney, *supra* note 65, at 286-87 (describing the reserve clause as a tool for MLB organizations in the past to perpetually tie players to an organization, giving the owners permanent unilateral control over contracts).

202. Carney, *supra* note 65, at 286-87.

203. *See* FANGRAPHS, *supra* note 102 (describing service time requirements, which require six years of major league experience before a minor league player reaches free agency and can receive a new contract).

204. Carney, *supra* note 65, at 286.

205. *Id.* at 287.

206. *Id.*

Moreover, the CFA gave MLB players standing to sue the owners for antitrust violations, and the reserve clause has since been abandoned for contracts based on service time.[207] Players are now granted free agency after six years of MLB service time.[208] This service time requirement is nearly identical to the reserve clause as applied to minor leaguers since a majority of them never get the chance to surpass that six-year threshold.[209]

MiLB players are subject to the same six-year restriction before they are able to seek a new contract.[210] This restriction essentially functions in the same manner as the reserve clause, insofar as it tends to perpetually tie a player to an organization. A majority of players do not end up making a major league roster (approximately 10% of all minor leaguers make it to the MLB).[211] Therefore, MiLB players are forced to deal with at least six years of no bargaining power and no control over where they play baseball. [212] Such circumstances are starkly similar to those faced by Major League players prior to *Flood,* and the CFA.[213] One theory to fix this issue is to interpret the CFA in a manner that includes MiLB players. However, that proposal has faced push back because of the textual interpretations described earlier in this comment.

2. Should the CFA Encompass MiLB Players' Claims of Antitrust Violations?

This issue lacks precedent, but that has not stopped arguments for a broad interpretation of the CFA to include MiLB athletes.[214] Supporters of this view argue that the CFA is intended to apply to all aspects of professional major league baseball, including MiLB contracts.[215] However, a closer look at the CFA shows that, although no court has spoken on its interpretation, the CFA was likely not intended to include MiLB.[216]

The CFA qualifies baseball players entitled to antitrust protection with the phrase "major league" three separate times in

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207. *Id.* at 286-87.

208. FANGRAPHS, *supra* note 102.

209. *See* Gordon, *supra* note 159 (providing data that shows approximately 10% of those who play in MiLB ever reach MLB).

210. FANGRAPHS, *supra* note 102.

211. *See* Gordon, *supra* note 159 (providing statistics on Minor League Players' wages, including the fact that approximately 10% of MiLB players reach the increased wages of Major League players).

212. FANGRAPHS, *supra* note 102; *see also* Hobbs, *supra* note 7, at 1068-70 (discussing the events and circumstances that led to the passage of the Curt Flood Act).

213. *Id.*

214. *See* Hobbs, *supra* note 7, at 1068-69 (describing *Miranda,* a pending lawsuit arguing uniform player contracts should be subject to the CFA)

215. Hobbs, *supra* note 7, at 1068.

216. *Id.*

the statute.[217] First, "it is the purpose of this legislation to state that major league baseball players are covered under the antitrust laws…"[218] Next, it states that, "…the conduct, acts, practices, or agreements of persons in the business of organized professional major league baseball…are subject to the antitrust laws…"[219] Finally, the statute limits who has standing to bring suit under the CFA to only major league baseball players.[220] Thus, even though MiLB players can argue for a broad interpretation of the CFA, the language of the CFA significantly hinders that argument.[221]

3. The Current Status of MiLB Players Requires Legislation in Their Favor.

MiLB players' situation has hit a point where they are finally taking a stand and fighting for their protection, evidenced by the *Senne* lawsuit.[222] It is important to note that the court in *Flood* recognized that MLB's antitrust exemption was an anomaly, but was hesitant to disrupt precedent.[223] Instead, they deferred to Congress stating that if there was to be a change it would need to come from Congress, with the result being the CFA.[224] It is plausible that the court which decides *Senne* may be sympathetic to the MiLB plaintiff's circumstances. However, it may still be forced either to recognize MLB's FLSA exemption due to the statute's strict construction, or defer to Congress.[225]

The next step for MiLB in this event would be to lobby Congress to take action to protect their interests, similar to what occurred after *Flood*.[226] Former MiLB players have been actively

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217. The Curt Flood Act §§ 2-(3)(a), (3)(c).

218. The Curt Flood Act § 2.

219. The Curt Flood Act § 3(a).

220. The Curt Flood Act § 3(c).

221. The Curt Flood Act § 3; *see also* Hobbs, *supra* note 7, at 1069-73 (describing the support for a narrow interpretation of the CFA as well as arguing that MLB's funding of MiLB and the amount of players MiLB can support can only be retained through a narrow interpretation).

222. *See generally* Senne Complaint, *supra* note 4 (alleging all MLB organizations and the Commissioner of MLB of violating the FLSA in their failure to pay MiLB athletes, as a class, a federal minimum wage).

223. *See Flood,* 407 U.S. at 284 (agreeing that the antitrust exemption MLB enjoys is in fact an anomaly, but ultimately deciding that Congress is the body of government that has the right to change that fact, and the Court must adhere to precedent).

224. *Id.*

225. *See generally id.* (granting deference to Congress and showing hesitance to disrupt longstanding antitrust precedent regarding MLB's exemption); *see also Brennan,* 478 F.2d at 289 (explaining that exemption provisions of the FLSA are to be construed strictly).

226. *See* Hobbs, *supra* note 7, at 1067-68 (explaining that the CFA was passed 26 years after *Flood,* and after MLB and its players agreed to lobby to Congress to pass a law that would ensure the players are protected by antitrust laws).

speaking out in efforts to paint the bleak picture that is the wage status of current MiLB athletes.[227] MiLB's best chance to succeed in guaranteeing a minimum wage is through legislation.[228] They can do this by arguing against the inherent unfairness of their current wage status, and by tying themselves as closely with the circumstances that led to the passage of the CFA as possible.[229]

V. PROPOSAL

This comment concludes by proposing a novel solution. Drafting new legislation modeled after the CFA to protect minor league players. First, this proposal discusses solutions offered by other commentators and explains why these solutions have potential, but ultimately fall short.[230] Next, this proposal explains the logistics of legislation which would protect MiLB, while borrowing language from the CFA. Contrary to the CFA, the focus of legislation protecting MiLB players would be entitling them to the benefits of the FLSA, rather than antitrust laws.[231] Finally, this comment also proposes that a reporting and disclosure system be implemented to guarantee MLB compliance with the proposed legislation.

A. Why Other Proposals Are Insufficient to Protect MiLB Players

Multiple commentators have proposed giving MiLB players the right to collectively negotiate for their rights.[232] A MiLB union does have its benefits, since increased numbers generally provides

227. *See generally* Fagan, *supra* note 125 (describing the Save the Pastime Act's purpose of guaranteeing MiLB players would not be protected by the FLSA is outrageous); *see also* DiGiovanni, *supra* note 20, at 259-60 (advocating for MiLB players to unionize, but at the same time recognizing that it took nearly 80 years for MLB players to form a union).

228. *See* Carney, *supra* note 65, at 286-88 (describing the situation MLB players faced prior to Congress passing the CFA. This can be compared to MiLB players' current situation)

229. *See generally id.* (describing the reserve clause which was in place prior to the CFA being passed, which MiLB can compare to the service time requirements before they can reach free agency); *see also* Gordon, *supra* note 159 (describing the circumstances regarding MiLB players' wages, including the fact that MLB salaries have increased 2,500% since 1976 while MiLB salaries have increased 70%).

230. *See* Carney, *supra* note 65, at 310-11 (proposing minor league players unionize to negotiate labor issues with MLB).

231. The Curt Flood Act § 2 (protecting MLB players from antitrust violations,

232. Carney, *supra* note 65, at 310-11; *see also* DiGiovanni, *supra* note 20, at 259-60 (arguing that even though unionization of MiLB players seems unlikely, it would be the best solution for MiLB to protect their interests).

increased power in negotiating.[233] The Major League Player's Association ("MLBPA") was instrumental in the drafting of the CFA, however, the current MLBPA is not legally required to protect MiLB interests.[234] The drawbacks to proposing unionization as a solution are uncertainty and the length of time it would take to implement. One commentator's proposal of unionization is premised on MLB settling with MiLB in *Senne*.[235] Settlement in *Senne* is far from certain, given the potential FLSA defense of MLB.[236]

Moreover, assuming arguendo that MLB does ultimately settle with *Senne,* the eventual unionization of MiLB players would take too long to adequately protect today's MiLB players. Proponents of this solution recognize this drawback, admitting that the MLBPA took over eighty years to successfully unionize.[237] MiLB is much more diverse than MLB due to MiLB having more teams and players.[238] Thus, it would likely be as hard, if not more difficult for MiLB to unionize as it was for MLB. Furthermore, even if MiLB were to successfully unionize, it would not be completed for an extended period of years, leaving MiLB players still unprotected for an indefinite amount time.

B. Congress Can Use the CFA for Guidance When Drafting Legislation to Protect MiLB Players

Congress can go in two separate directions if they choose to protect MiLB wage status. They can choose to amend the current CFA and grant minor league players the right to sue in Section 3(c). Alternatively, they could draft a stand-alone statute that applies strictly to MiLB players. Congress would be better suited to choose the latter option. As discussed earlier in this comment, the interests of MiLB and MLB players differ greatly, due in large part to the increased number of MiLB players.[239] Drafting a separate statute

233. *See* DiGiovanni, *supra* note 20, at 259-60 (explaining that the MLBPA has no legal obligation to protect MiLB players, and that the two groups interests differ to the point where the MLBPA would nonetheless be insufficient to protect MiLB interests).

234. *Id.*

235. Carney, *supra* note 65, at 310.

236. Carney, *supra* note 65, at 306-07; *see also Adams,* 961 F. Supp. at 178 (stating that the Tigers accountant's figures were unchallenged and they showed that they were less than one-third of their average receipts for the rest of the year, thus entitling them to the seasonal employee exemption).

237. DiGiovanni, *supra* note 20, at 260.

238. *See* Nocco, *supra* note 2 (citing MLB's statement in support of the 'Save the Pastime Act' where MLB argues that they cannot afford raises due to the 7,500 players. On the other hand, MLB only has 30 teams with 25 men rosters, which would total only 750 players).

239. *See id.* (explaining the significant difference in number of MiLB players compared to MLB players (7,500 in MiLB compared to approximately 750 in MLB)).

for MiLB players, while looking to the CFA for guidance provides for more flexibility if future changes are necessary.

Also, it is important to remember that the CFA protected major league players from antitrust violations, as shown by its stated purpose.[240] It is more appropriate for Congress to protect MiLB players from FLSA violations, rather than antitrust violations. Protection under FLSA rather than antitrust is more appropriate because of the troublesome history of MiLB and MLB regarding the former's wages.[241] Antitrust protections are certainly desirable, but would likely require significantly longer to establish sound policy, due to MLB's desire to retain as much control over players as possible.[242] Achieving protection from antitrust laws is also difficult to accomplish considering how careful the Court has been in refusing to alter MLB's antitrust exemption in any fashion.[243] Providing MiLB players FLSA protection can be done much quicker, and will significantly improve the working conditions of MiLB players.[244]

1. Structure of Legislation Protecting MiLB Players

Certain provisions of new protective legislation can borrow from the CFA in various respects. First, the purpose of the new act would be to declare that minor league baseball players are not subject to the exemptions of the FLSA. Note, this is essentially the opposite of the 'Save America's Pastime Act', which proposes that MiLB players are expressly exempted from the FLSA exemptions.[245] Congress can support this endeavor by showing evidence of the low wages earned by MiLB players coupled with the wealth of MLB organizations discussed above.[246]

As for the substance of the act, Congress can borrow from the

240. The Curt Flood Act § 2.

241. *See* Stanton, *supra* note 105, at 744-45 (explaining that the 2012 Basic Agreement limited minor league player's earning potential and bargaining power before they play in the minor leagues).

242. *See generally* Hobbs, *supra* note 7, at 1066-67 (describing the history of the development of the CFA, specifically that there was 26 years in between the decision in *Flood* and Congress finally passing the CFA); *see also* Alexander & Grow, *supra* note 183, at 176 (quoting a former Congressman as once stating that the professional baseball lobby is, "…as great a lobby that descended upon the House…" that he saw in 35 years of experience).

243. *See generally Toolson,* 346 U.S. at 357 (deferring to Congressional inaction and declining to alter MLB's exemption from antitrust laws; *see also Flood,* 407 U.S. at 282 (acknowledging that MLB's treatment under antitrust law is an anomaly but once again declining to alter it due to Congressional inaction).

244. *See* Gordon, *supra* note 159 (providing statistics on the disparity between MiLB and MLB salaries).

245. 114 H.R. 5580 § 2.

246. Gordon, *supra* note 159; Brown, *supra* note 136; Forbes Valuation, *supra* note 139.

CFA again, but declare that any conduct, acts, practices, or agreements between organizations in MLB, MiLB, and MiLB players are now subject to the FLSA minimum wage requirement.[247] Thus, MLB would be required by law to pay their MiLB players at least the federally minimum wage, and they may not seek to avoid doing so by justifying such action through FLSA exemptions. This proposal begs the question of what constitutes an hour of work for a MiLB player. For the purposes of this proposal, an hour of work should be considered the time a MiLB player spends doing mandatory or team sponsored activities. This encompasses the long hours players spend at facilities prior to games (batting practice, fielding drills, etc.) and the games themselves.[248] Moreover, team sponsored activities would compensate players for particular off-season programs they are required to attend. However, this proposal, as described, does not provide recourse if an MLB organization fails to follow it. Once again, Congress can borrow from the CFA to resolve this issue.

The new act should include a provision defining who can challenge a violation of the substantive provision. The best way to accomplish this is to provide standing to sue under the act to: 1) any individual who has signed a MiLB or MLB contract, 2) and is currently signed and on the roster of a MiLB organization.[249] The standing to sue can also be limited by excluding players who are currently playing for a MLB organization.

2. Secondary Proposal to Guarantee Protection of MiLB Players

Legislation prohibiting unfair wages is an important solution to the plight of MiLB players, but Congress must be mindful of supplementary ways to enforce it. The threat of individual players bringing lawsuits may not be sufficient to deter MLB organizations from violating the legislation. One must keep in mind the heightened revenues MLB organizations continue to gross, and contrast that with the low wages of the average MiLB player.[250] Therefore, it is not out of the realm of possibility that an MLB organization choose not to abide by the Act and risk a lawsuit, believing they can absorb the losses of any suit. One way to counteract this possibility is to institute a disclosure and

247. *See* The Curt Flood Act § 3(a) (declaring that the conducts, acts, practices and agreements of persons in professional major league baseball are subject to the antitrust laws).

248. *See* Senne Complaint, *supra* note 4 (explaining that the players often spend at approximately eight hours per day at stadiums for mandatory activities).

249. The Curt Flood Act § 3(c).

250. Forbes Valuation, *supra* note 139; Gordon, *supra* note 159; *see also* Blank, *supra* note 100 (providing the typical monthly salaries of minor league players).

monitoring system.

The disclosure and monitoring system can be operated by the Department of Labor to ensure that MLB is abiding by the statute. MLB would be required to file a copy of each MiLB players contract with the Department of Labor so that each player's salary is known. This allows the Department to monitor MLB's payment of its MiLB players, to ensure they are not violating the FLSA and the new proposed Act. By implementing a disclosure and monitoring system, MLB will have less incentive to violate the Acts. Without the disclosure requirement, there would be a loophole in the Act capable of exploitation. MLB could either take the chance of being sued and pay damages or drag out a lawsuit filed by a MiLB player. In the latter, the case can be delayed to the point where the possible damages won are insufficient to outweigh litigation costs.

Opponents of this proposal are sure to be numerous and powerful. Commentators have noted that the professional baseball lobby is among the most powerful in existence, a fact that was exemplified by their ability to pass the original CFA.[251] They would likely be against this type of proposed legislation, especially considering MLB's statement in support of the 'Save the Pastime Act'.[252] However, as a matter of fairness and good public policy, it is time for Congress to stand against the self-interested wealthy MLB, and repair the distressing wage situation that is unique to minor league baseball players.

VI. CONCLUSION

MLB has benefited from favorable treatment by the courts and Congress regarding antitrust and FLSA laws for nearly a century. It is evident even from the Court's own statements in *Toolson* and *Flood* that MLB's exemption from antitrust laws is an anomaly which does not exist elsewhere.[253] Congress finally stepped up to the plate and protected major leaguers from antitrust violations by passing the CFA, but injustices still persist for the MiLB players who dream of one day making it to MLB. MiLB players' wages are below the minimum wage. This is inherently unfair considering the

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251. *See* Alexander & Grow, *supra* note 186, at 173 (discussing a former congressman's comments about the professional baseball lobby being one of the most powerful ever to come to Washington D.C.)

252. *See* Nocco, *supra* note 2 (publishing MLB's statement in support of the 'Save the Pastime Act', citing concerns that they would not be able to afford paying the raised wages of MiLB players).

253. *See Toolson,* 346 U.S. at 357 (granting deference to congressional inaction, regarding MLB's antitrust exemption, "We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation"); *see also Flood,* 407 U.S. at 282 (acknowledging baseball's anomaly in the field of antitrust law, "With its reserve system enjoying exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly").

amount of time and practice they must put into their craft.[254] To continue to subject them to FLSA exemptions would allow MLB, who can certainly afford the raise in wages, to continue to prosper off their work through MiLB revenues.

Unionization of MiLB, if ever successful, would undoubtedly take an unreasonable amount of years. Therefore, the best opportunity to improve MiLB players' situation is for Congress to draft legislation to protect them from FLSA violations. MLB's arguments for the opposite are misguided. They can afford to pay MiLB players modest raises to give them fair compensation, as shown by their progressively increasing net revenues which are not expected to decline due to the growth of individual organization broadcast deals.[255] These increased revenues contradict MLB's argument that they would be forced to decrease MiLB roster sizes due to an inability to fund increased MiLB wages. It is more likely that the number of MiLB players would decrease due to the players' inability to provide for themselves with their low wages.

254. *See* Berg, *supra* note 108 (quoting former MiLB player and current lawyer Garrett Broshious speaking about the amount of work MiLB players put in, "Guys are frequently working 60 or 70 hours a week, and they're doing so for very low wages").

255. Forbes Valuation, *supra* note 139.