

# ALEX ‘ROID’RIGEUZ: LEGAL ALTERNATIVES FOR MLB PLAYER CONTRACT TERMINATION IN THE POST-STEROID ERA

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## Introduction

Beginning with the Mitchell Report in 2007, Major League Baseball began the arduous process of targeting and weeding out performance enhancing substance usage by players in the major and minor leagues.<sup>1</sup> The report highlighted widespread use of the substances throughout baseball.<sup>2</sup> Most recently, Major League Baseball took action, suspending 14 professional players for between 50 and 162 games without pay for violating baseball’s drug policy.<sup>3</sup> These suspensions included superstars Alex Rodriguez, of the New York Yankees, and Ryan Braun, of the Milwaukee Brewers. In addition to losing their salaries, these players also sacrifice millions of dollars in bonuses and lost endorsements because of their new status in baseball as a “cheater.”<sup>4</sup>

Unfortunately for these player’s teams, these stars are more than cogs in their on-field product, but also represent the team in the community and are significant chips in their marketing plans. Suspensions and the hypothetical “asterisk” next to their name for eternity, signifying that they will always be considered cheaters, destroy the player’s marketability.<sup>5</sup> Players like Braun

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<sup>1</sup> GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL, at SR-2 (2007).

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

<sup>3</sup> *Twelve Players Suspended for PEDs*, FOX SPORTS (May 28, 2014 6:20 PM), <http://www.foxsports.com/mlb/story/major-league-baseball-alex-rodriguez-ped-use-080513>.

<sup>4</sup> Erik Matuzewski et. al., *Rodriguez Loses Far More Than \$25 Million Salary in MLB Ban*, BLOOMBERGBUSINESS (Jan. 13, 2014 3:37 PM), <http://www.bloomberg.com/news/articles/2014-01-13/rodriguez-loses-far-more-than-25-million-salary-in-2014-mlb-ban>.

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

were once counted on as the face of the franchise, leaving teams like the Milwaukee Brewers scrambling to replace them with new players with a clean image.<sup>6</sup>

Because of these dangers, teams must consider contractual and legal protections for their player contracts. Unlike other sports leagues, Major League Baseball player contracts are guaranteed, leaving little recourse for teams when players destroy their image.<sup>7</sup> With the value of player contracts ballooning every year,<sup>8</sup> teams should carefully consider their legal options for dealing with possible moral issues, such as a star player using performance-enhancing drugs.

This article will examine three alternatives teams can employ to terminate guaranteed Major League Baseball player contracts in a situation where the player has acted immorally, such as violating baseball's drug policy. First, it will examine the preventative measure of including stronger morality clauses in player's contracts prior to signing the player. Next, it will consider the legal arguments for a suit against the player for fraud. Finally, the article will address the possibility of suing based on the theory of unconscionability.

## **I. TEAMS CAN DRAFT MORALITY CLAUSES TO PROTECT THEMSELVES FROM NEGATIVE PUBLICITY DUE TO IMMORAL PLAYER ACTIONS**

As a preventative measure, Major League Baseball teams can attempt to negotiate a morality clause into players' contracts that allow the team to alter the benefits of the deal or release the team from the contract entirely. Employers can bring suit based on either implied morals clauses or explicit morals clauses within a contract.<sup>9</sup> A player violates an implied morals

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<sup>6</sup> Tom Haurdicourt, *All-star Jonathan Lucroy is the new face of Brewers franchise*, MILWAUKEE JOURNAL SENTINEL (Feb. 23, 2015), <http://www.jsonline.com/sports/brewers/all-star-jonathan-lucroy-is-new-face-of-brewers-franchise-b99450119z1-293769831.html>.

<sup>7</sup> Steven J. Dubner, *N.F.L. vs. M.L.B. as a Labor Market: A Freakonomics Quorum*, FREAKONOMICS (Nov. 11, 2007 11:34 AM), <http://freakonomics.com/2007/11/28/nfl-vs-mlb-as-a-labor-market-a-freakonomics-quorum/>.

<sup>8</sup> Jeff Passan, *MLB on course to spend more than \$4 billion in 2015*, YAHOO! SPORTS (Jan. 15, 2015 2:00 PM), <http://sports.yahoo.com/news/mlb-on-course-to-spend-more-than--4-billion-in-2015-190039420.html>.

<sup>9</sup> See Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A History, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 247 (2007) ("using both the express and implied morals clauses").

clause if their behavior constitutes immoral action that significantly devalues the performance required by the original contract.<sup>10</sup> The test courts generally apply in implied morals clause cases is whether the immoral act prevents the employee from fulfilling the requirements of their position.<sup>11</sup> However, certain immoral acts, such as steroid use, might actually *benefit* the primary purpose of the player's contract – to play baseball.<sup>12</sup> With this in mind, teams must instead focus on including a written clause within the player's contract, which forbids certain immoral behaviors.<sup>13</sup> Courts will generally enforce a clear, unambiguous morality clause that is agreed upon by both parties in an employment contract.<sup>14</sup> According to baseball officials, currently in Major League Baseball, currently “all [MLB player] contracts have moral clauses.”<sup>15</sup> A team's ability to collect in a breach of contract suit against a player, based on a morals clause, will depend on the specific wording of the clause.<sup>16</sup> In particular, moral clauses referencing use of performance-enhancing drugs or steroids could be added to contracts to specifically prohibit this behavior.<sup>17</sup>

Unfortunately for Major League teams, baseball players and their agents are becoming more careful about the morals clauses they will agree to include in their contracts.<sup>18</sup> In fact,

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<sup>10</sup> See Corbin on Contracts §34.8 (1999).

<sup>11</sup> See 19 Williston on Contracts §54:45 (4th ed.).

<sup>12</sup> See Mitchell Grossman, et. al., *Steroids and Major League Baseball*, <http://faculty.haas.berkeley.edu/rjmorgan/mba211/steroids%20and%20major%20league%20baseball.pdf>.

<sup>13</sup> See Kressler, *supra* note 9, at 250.

<sup>14</sup> See, e.g., *Nader v. ABC Television, Inc.*, 150 Fed.Appx. 54, 55 (2d Cir. 2005); *Galaviz, v. Post-Newsweek Stations*, 380 Fed.Appx. 457, 458 (5th Cir. 2010); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91-92 (9th Cir. 1957).

<sup>15</sup> Wallace Matthews & Andrew Marchand, *Yankees eye avoiding A-Rod's contract*, ESPN (Jan. 30, 2013 1:41 PM), [http://espn.go.com/new-york/mlb/story/\\_/id/8894904/new-york-yankees-attempting-void-alex-rodriguez-contract-according-sources](http://espn.go.com/new-york/mlb/story/_/id/8894904/new-york-yankees-attempting-void-alex-rodriguez-contract-according-sources).

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

<sup>17</sup> See *Id.*

<sup>18</sup> Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 7 (2005).

“morals clauses are now the most heavily negotiated terms” in sports contracts.<sup>19</sup> The relative star power of a player will greatly affect a team’s ability to negotiate stronger morals clauses into contracts.<sup>20</sup> An MVP candidate will easily command a more general clause from a team clamoring for top talent, while rookies and bench players might struggle to negotiate away a strict morals clause.<sup>21</sup>

The Uniform Players Contract provides teams with sample language, allowing teams to terminate the player’s contract if he shall “fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club’s training rules....”<sup>22</sup> Teams have found some success voiding contracts using this language.<sup>23</sup> Denny Neagle, former Colorado Rockies pitcher, saw his contract terminated when he solicited a prostitute during the offseason.<sup>24</sup> The Baltimore Orioles terminated the contract of pitcher Sydney Ponson for multiple instances of alcohol-related misconduct.<sup>25</sup> Ultimately, these claims were settled prior to reaching an arbiter or courtroom, with the players receiving most of the money they were owed.<sup>26</sup> More recently, some teams have chosen instead to list specific conduct that constitutes prohibited behavior while

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<sup>19</sup> Robb London, *The natural*, HARVARD LAW BULLETIN (Sept. 1, 2006), <http://today.law.harvard.edu/feature/the-natural/>.

<sup>20</sup> See Auerbach, *supra* note 18, at 7.

<sup>21</sup> *Id.*

<sup>22</sup> Cork Gaines, *Take A Close Look At An Actual Major League Baseball Contract*, BUSINESS INSIDER (Apr. 6, 2011 2:29 PM), <http://www.businessinsider.com/uniform-major-league-baseball-contract-2011-4#-3>.

<sup>23</sup> Lance Rinker, *Should MLB contracts be more easily voided?*, SB NATION (Jul. 26, 2013 11:00 AM), <http://www.beyondtheboxscore.com/2013/7/26/4557390/should-mlb-contracts-be-more-easily-voided-yankees-brewers-braun-rodriguez-biogenesis>.

<sup>24</sup> Assoc. Press, *Terms of the settlement were not released*, ESPN (May 5, 2005 8:27 PM), <http://sports.espn.go.com/mlb/news/story?id=2053993>.

<sup>25</sup> Assoc. Press, *Orioles put troubled Ponson on release waivers*, ESPN (Sept. 2, 2005 2:44 AM), <http://sports.espn.go.com/mlb/news/story?id=2148842>.

<sup>26</sup> Rinker, *supra* note 23.

under contract.<sup>27</sup> When determining whether an immoral behavior is included in the clause, courts must consider that “[a]n enforceable contract provision requires a meeting of the minds” as to the important terms of the agreement.<sup>28</sup> If language of the contract clearly shows the player’s conduct is included in the morals clause, teams are likely to find more success with the enforceability of their morals clauses.

A final consideration is that many teams may find contract termination a dissatisfying remedy. Assuming the team had an explicit morals clause similar to the Uniform Players Contract, the player’s contract terminates when the morals clause is exercised.<sup>29</sup> While this relieves the team of the requirement to pay the player their full remaining salary, it also releases the player from their other contractual obligations, including the limitation on playing for another team.<sup>30</sup> Despite their past transgressions, some players who have displayed moral ineptitude are still vital members of their franchise. For instance, Ryan Braun, of the Milwaukee Brewers, continues to be “crucial for [the] Brewers’ offense”<sup>31</sup> following his suspension for performance-enhancing drug use.<sup>32</sup> Because many of the players in moral trouble are stars of their respective teams, the franchise must balance the benefits of cutting ties with the player and saving the remainder of his salary versus the costs of his lost production in the lineup and potential competition on another team.

## II. TEAMS CAN BRING A FRAUD CLAIM AGAINST THE PLAYER

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<sup>27</sup> Dayn Perry, *Report: Cubs can void a player’s contract for...almost anything*, CBS SPORTS (Aug. 30, 2013 10:18 AM), <http://www.cbssports.com/mlb/eye-on-baseball/23396435/report-cubs-can-void-a-players-contract-for-almost-anything>.

<sup>28</sup> *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2012 WL 1068165, at \*5 (S.D. Ohio Mar. 29, 2012).

<sup>29</sup> Gaines, *supra* note 22.

<sup>30</sup> *See id.*

<sup>31</sup> Tom Haudricourt, *Effective Ryan Braun and Aramis Ramirez crucial for Brewers’ offense*, MILWAUKEE JOURNAL SENTINEL (Mar. 7, 2015), <http://www.jsonline.com/sports/brewers/effective-ryan-braun-and-aramis-ramirez-crucial-for-brewers-offense-b99457022z1-295506141.html>.

<sup>32</sup> ESPN.com News Servs., *Ryan Braun suspended rest of year*, ESPN (July 23, 2013 6:12 PM), [http://espn.go.com/mlb/story/\\_/id/9500252/ryan-braun-milwaukee-brewers-suspended-remainder-2013-season](http://espn.go.com/mlb/story/_/id/9500252/ryan-braun-milwaukee-brewers-suspended-remainder-2013-season).

If the team cannot, or chooses not to, enforce a morals clause against the player to terminate their contract, the team could alternatively sue the player directly to recover damages for fraud. To sue for fraud, the player would need to have taken performance-enhancing drugs prior to negotiating their contract. This is because the team would need to sue based on the fact that it was fraudulently induced to sign the contract based on the player not disclosing any prior steroid use.

A fraud in the inducement occurs when a party agrees to the terms of a contract based on inaccurate facts or statements.<sup>33</sup> The courts apply a two-part test in fraud in the inducement cases: (1) “the defendant must have made a false representation of a material fact knowing or believing it to be false and doing it for the purpose of inducing the plaintiff to act[,]” and (2) “[t]he plaintiff must also show his reasonable belief in and reliance on the statement to his detriment.”<sup>34</sup> In most jurisdictions, fraud in the inducement claims must be supported by clear and convincing evidence as to both parts of the test.<sup>35</sup>

In a typical contract negotiation, a player’s agent will “prepare statistics to make the case for what he sees as the market value [of the player] and then entertains offers from clubs interested in the [player].”<sup>36</sup> “Parties will attempt to manipulate information, disclosing some of their subjective evaluations of the risks, aspirations, and reservation points....”<sup>37</sup> Sports

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<sup>33</sup> See 17A Am. Jur. 2d Contracts § 214.

<sup>34</sup> *Regensberger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201, 1207 (7th Cir. 1998) (citations omitted).

<sup>35</sup> See, e.g., *Thrifty Rent-A-Car Systems, Inc. v. Brown Flight Rental One Corp.*, 24 F.3d 1190, 1195 (10th Cir. 1994) (stating that Oklahoma law requires clear and convincing evidence to establish fraud); *Pinken v. Frank*, 704 F.2d 1019, 1024 (8th Cir. 1983) (stating that Missouri law requires the same); *Production Specialties Group, Inc. v. Minsor Systems, Inc.*, 513 F.3d 695, 699 (7th Cir. 2008) (stating that fraud elements must be proven by clear, satisfactory, and convincing evidence).

<sup>36</sup> ROGER ABRAMS, *THE MONEY PITCH: BASEBALL FREE AGENCY AND SALARY ARBITRATION* 89 (2000).

<sup>37</sup> *Id.* at 105.

negotiations also contain aspects of puffery which are based in reality, but might have an air of fiction to bolster one side's point of view.<sup>38</sup>

Most of these statements are based on one thing – past statistical performance of the player. Teams looking to sign these players certainly do their own independent research as well, many using statistical analytics and projection systems to determine what the player might be worth over the length of their contract.<sup>39</sup> Nearly all of the major MLB statistical projection systems use past statistics as a key input which drives the formulas.<sup>40</sup> Performance-enhancing drugs have been linked to increases in “OPS” (or on-base plus slugging percentage) for MLB hitters<sup>41</sup>, which is a metric that factors in both a hitter's power and ability to reach base safely.<sup>42</sup>

If a player used performance-enhancing drugs in seasons prior to their contract negotiation, any statistics for those years would have been potentially inflated by the substance use. All Major League teams will be able to satisfy the second element for fraud in the inducement, as they all routinely rely on the statistics for their negotiations. The question becomes whether the player's steroid use constitutes a material fact that is misrepresented, assuming the player did not disclose this fact to the team during negotiation.

Courts find fraud by inducement in cases where there is a fraudulent omission as well as a fraudulent statement made to the contracting party.<sup>43</sup> Knowing this, omitting the fact that a player used steroids prior to contract negotiations is likely material – it affects the player's future marketability, influences potential future suspensions, and adds to their baseball statistics.

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<sup>38</sup> See *id.* (Explaining that negotiations combine aspects of “reality and fiction”).

<sup>39</sup> See Ben Baumer, *In a Moneyball world, a number of teams remain slow to buy into sabermetrics*, ESPN MAGAZINE (Feb. 23, 2015), [http://espn.go.com/espn/feature/story/\\_/id/12331388/the-great-analytics-rankings](http://espn.go.com/espn/feature/story/_/id/12331388/the-great-analytics-rankings).

<sup>40</sup> Dayn Perry, *Looking at baseball projection systems*, FOX SPORTS (May 28, 2014 6:12 PM), <http://www.foxsports.com/mlb/story/perry-looking-at-baseball-projection-systems-021610>.

<sup>41</sup> Grossman, *supra* note 12.

<sup>42</sup> *MLB Statistics Glossary*, ESPN (May 1, 2013 12:00 PM), <http://sports.espn.go.com/mlb/news/story?page=stats/glossary>.

<sup>43</sup> 37 C.J.S. Fraud § 33.

Further, it is likely that the player would have a desire to keep this information private, given the financial risk. Provided the team can show this with clear and convincing evidence, the team has a potential case for fraud in the inducement.

### **III. TEAMS CAN CLAIM THAT THE ATHLETE’S CONTRACT WAS UNCONSCIONABLE**

Finally, teams could attempt to nullify the contract based on contract unconscionability. Courts find contracts unconscionable when they “[are] so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms.”<sup>44</sup> To find a contract unconscionable, courts must consider both procedural unconscionability, where the party lacks meaningful choice, and substantive unconscionability, where the terms of the contract itself are unfair.<sup>45</sup> In most states, courts apply a sliding scale test that allows for a contract to be found unconscionable without procedural unconscionability if the substantive unconscionability is significant.<sup>46</sup>

Sophisticated parties negotiate most contracts between MLB players and teams. Agents are often attorneys, and the franchise executives have negotiated hundreds of similar deals before. Procedural unconscionability is, therefore, extremely unlikely.

Substantive unconscionability, on the other hand, “centers on the terms of the agreement and whether those terms are so one-sided as to shock the conscience.”<sup>47</sup> The “courts must

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<sup>44</sup> Gillman v. Chase Manhattan Bank, N.A., 534 N.E.2d 824, 828 (N.Y. 1988) (citation omitted).

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

<sup>46</sup> *See, e.g.* Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1280 (9th Cir. 2006) (stating that procedural and substantive unconscionability should be weighed in proportion in California); Chalk v. T-Mobile USA, Inc., 560 F.3d 1087, 1093 (9th Cir. 2009) (stating that substantive and procedural unconscionability should be considered on a sliding scale, and that only substantive unconscionability is truly required under Oregon law); Luna v. Household Finance Corp. III, 236 F.Supp.2d 1166, 1174 (W.D. Wash. 2002) (stating that Washington courts can find a contract unconscionable with only substantive unconscionability).

<sup>47</sup> Ingle v. Circuit City Stores, Inc., 328 F.3d 1165, 1171 (9th Cir. 2003) (citations omitted).



analyze the contract as of the time it was made.”<sup>48</sup> Applying this to a contract with a performance-enhancing drug user, the athlete again would have had to use the drugs prior to signing his contract. To be deemed unconscionable, any perceived reduction in value in the player’s worth would have to exist at the time the contract was signed. Further, the differences in value between what the team is paying and the athlete is providing must be shockingly different. Alex Rodriguez’s contract provides a perfect example of this situation. Rodriguez’s contract includes a \$6 million bonus every time he hits a “milestone” homerun.<sup>49</sup> Because Rodriguez used performance-enhancing drugs prior to, and following, signing his contract, his marketability was destroyed in the New York market.<sup>50</sup> Similarly, Roger Clemens dealt with the fallout of performance-enhancing drugs when he landed on the Mitchell Report in 2007.<sup>51</sup> Clemens lost \$3.5 million in endorsement deals because of his involvement with performance-enhancing drugs. Teams can argue that they too lose the marketing opportunities either inherent in a Major League player’s contract, or explicitly stated in bonuses within the contract. The value of these monetary bonuses to the player, following an allegation of performance-enhancing drug use, becomes much higher than the value of any potential milestone to the team, leading to potential substantive unconscionability, especially considering many of these bonus numbers are in the millions of dollars.

## CONCLUSION

With the guaranteed nature of Major League Baseball contracts, teams must increase their awareness of possible immoral behavior prior to negotiating a contract with a star player.

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

<sup>49</sup> Brendan Kutty, *Yankees vs. Alex Rodriguez: How lawyers say team could avoid paying him*, NJ.COM (Jan. 27, 2015), [http://www.nj.com/yankees/index.ssf/2015/01/fraud\\_among\\_defenses\\_yankees\\_could\\_use\\_to\\_not\\_pay.html](http://www.nj.com/yankees/index.ssf/2015/01/fraud_among_defenses_yankees_could_use_to_not_pay.html).

<sup>50</sup> *Id.*

<sup>51</sup> John Helyar, *Mitchell report can’t be good for baseball’s short-term business*, ESPN (Dec. 15, 2007), <http://sports.espn.go.com/mlb/news/story?id=3155470>

The best choice in preventing being stuck with an unmarketable player is negotiating a strong, specific morality clause into player's contracts. They are generally legally enforceable and offer the best protection for violations of baseball's rules and other behavior issues. Teams must balance the benefits of these clauses, however, with potential backlash from players and refusal to sign contracts with this type of language. While fighting for contract termination without these clauses is an option, under a suit for fraud or unconscionability, these legal arguments present an enormous challenge to professional teams and are unlikely to result in more than a potential settlement for a portion of the player's salary. With this in mind, teams should continue to plan ahead for how they can deal with their next player should he end up like Mr. Rodriguez.