The Hidden Ball Trick: Major League Baseball’s Collective Bargaining Agreement Attempts to Hide Tobacco Use by Players

Lee N Gilgan, Willamette University
The Hidden Ball Trick

Major League Baseball’s Collective Bargaining Agreement Attempts to Hide Tobacco Use by Players

Lee Gilgan

I. Introduction

a. Major League Baseball Players’ Association (MLBPA) History

Unionization has played a significant role in professional baseball since 1885.1 At that time, John Montgomery Ward and eight other players formed the Brotherhood of Professional Baseball Players.2 Attempts to unionize continued; in 1900, the Players’ Protective Association was formed.3 In 1912 the players union was known as The Fraternity of Professional Baseball Players of America and, in 1946, was called the American Baseball Guild.4 These early attempts to unionize professional ball players all failed to end the reserve clause which contractually bound players to their respective clubs indefinitely.5

---

2 Id.
3 Id.
4 Id.
5 Id.; JAMES B. DWORIN, OWNERS VERSUS PLAYERS: BASEBALL AND COLLECTIVE BARGAINING 63 (Boston: Auburn House Publishing Company) (1981). (Though the reserve clause had been amended slightly at times, the language presented is from the 1973 collective bargaining agreement: "On or before December 20 (or if a Sunday, then the next preceding business day) in the year of the last playing season covered by the contract, the Club may tender to the Player a contract for the term of that year by mailing the same to the Player at his address following his signature hereto, or if none be given, then at his last address of record with the Club. If prior to the March 1 next succeeding said December 20, the Player and the Club have not agreed upon the terms of such contract, then on or before 10 days after said March 1, the Club shall have the right by written notice to the Player as said address to renew this contract for the period of one year on the same terms, except that the amount payable to the Player shall be such as the Club shall fix in said notice; provided, however, that said amount, if fixed by a Major League Club, shall be an amount payable at a rate not less than 80 percent of the rate stipulated for the next preceding year and at a rate not less than 70 percent of the rate stipulated for the year immediately prior to the next preceding game." (emphasis added). That is to say, if the player attempted to shop options with other teams, his most recent team could bind him for another year without the consideration of the player).
In 1965, another attempt to unionize brought about the involvement of Marvin Miller, an economist for The United Steelworkers of America. By 1968, Miller had formed the players into a legitimate labor union and negotiated the first Collective Bargaining Agreement (CBA) in professional sports. The 1968 CBA increased the minimum salary from $6,000 to $10,000 and by 1970 the players had negotiated for a right to arbitration for the purpose of settling grievances. Perhaps the biggest achievement from the Miller era was the invention of a free agency right; giving the players the ability to shop around for the best employment opportunity. As unionization of baseball has progressed, the players have, generally, continued to gain rights and advantages while the league and team owners have continued to lose power.

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

II. Tobacco

a. Tobacco Use in the United States

Tobacco use can begin early among Americans. Among middle school students, 2.2% of males use smokeless tobacco and the number increases to 11.2% for high school students.

---

6 MLBPA, supra note 1.
7 Id. ($6,000 in 1968 is the equivalent of just over $40,000 in today’s money. The current minimum salary for Major League Baseball is $500,000); MLBPA, Frequently Asked Questions, (Nov. 14, 2014, 3:34pm), http://mlb.mlb.com/pa/info/faq.jsp#minimum.
8 MLBPA, supra note 1.
9 It should be noted that Major League Baseball Players are not all United States citizens; therefore, the statistics regarding tobacco use among young American’s is not ideal but it is the best information available for these purposes. On opening day in 2014, approximately 26.1% of players were born outside of the United States. The all-time high was 29.2% on opening day in 2005. Richard Lapchick, The 2014 Racial and Gender Report Card: Major League Baseball, THE INSTITUTE OF DIVERSITY AND ETHICS IN SPORT (Nov. 12, 2014, 6:49am), http://www.tidesport.org/MLB%20RGRC%202014%20Revised.pdf.
10 Use of smokeless tobacco use includes the use of chewing tobacco, snuff, or dip anytime during the thirty days preceding participation in the research survey. Smoking and Tobacco Use, CENTERS FOR DISEASE CONTROL, (Nov. 13, 2014, 7:04pm), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/smokeless/use_us/.
Approximately 8.1% of high school users are white and 5.1% are Hispanic, the two highest use rates among any races. Not only are White and Hispanic populations the most common smokeless tobacco users, they are also the most prevalent races in Major League Baseball.

b. Health Effects of Smokeless Tobacco

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

c. History of Tobacco Use in Baseball

11 Id.
12 Lapchick, supra note 4. (The percentage of Latino and White players on opening day rosters in 2014 was 28.2% and 60.9%, respectively).
14 These chemicals include (1) tobacco specific nitrosamines; (2) A radioactive element (polonium 210) which comes from the fertilizer used to grow tobacco plants; (3) Polycyclic aromatic hydrocarbons which are chemicals formed when the tobacco is cured with heat; (4) and many harmful metals such as arsenic, beryllium, cadmium, chromium, cobalt, lead, nickel, and mercury. Stanfill SB, Connolly GN, Zhang L, Jia LT, Henningfield JE, Richter P, et al. Global Surveillance of Oral Tobacco Products: Total Nicotine, Unionised Nicotine and Tobacco-Specific N-Nitrosamines. TOBACCO CONTROL (2011).
17 Id.
The mid-nineteenth century was the birthing time of baseball; the official rules were first construed in 1845.\textsuperscript{18} A renewed interest in tobacco crops coincided with the time in which baseball was developing.\textsuperscript{19} By the turn of the century, the tobacco companies were utilizing baseball as a way to advertise.\textsuperscript{20} Aside from the visible advertisements around the baseball fields, the 1870’s marked the beginning of a revolutionary marketing strategy; tobacco companies included baseball cards and coupons for free baseball cards in the tobacco packages.\textsuperscript{21} Interestingly, not all of the featured players wanted to be portrayed on the collectables; Honus Wagner did not use tobacco products and objected to being included in the promotions because he did not want to set a bad example for children.\textsuperscript{22} In fact, the 1909 Honus Wagner card is considered the most valuable baseball card currently in circulation.\textsuperscript{23}

The relationship between baseball and tobacco is not based entirely on historical tobacco advertisement. Though the rules of baseball were formed in 1845, baseball gloves were not widely popular until the 1870s and 1880s.\textsuperscript{24} As fielding gloves became popular, many players

\textsuperscript{18} The Game, 19 C BASEBALL (Nov. 16, 2014, 10:45AM), http://www.19cbaseball.com/game.html. (Alexander Cartwright (1820-1892) organized and worked out with a group that eventually became the New York Knickerbockers. In September of 1845, the Knickerbocker Baseball Club was officially formed. At that time, Cartwright published twenty rules which became known as the “20 Original Rules of Baseball” or the “Knickerbocker Rules.”)


\textsuperscript{20} Id. (Blackwell Tobacco Company, known for revolutionary marketing tactics, advertised their Bull Durham Tobacco over outfield fences where pitchers regularly warmed up. This is one explanation for the term “bullpen” in baseball.)

\textsuperscript{21} Tobacco Baseball Cards. BASEBALL ALMANAC. (Nov. 12, 2014, 7:25AM). http://www.baseball-almanac.com/treasure/autont005.shtml. (Many different baseball card series were in circulation and could only be collected through packaging with tobacco products).

\textsuperscript{22} Honus Wagner. http://www.honuswagner.com/biography.html. (Honus Wagner is historically considered one of the best all-around baseball players of all time. The longtime member of the Pirates was one of the first five players inducted into the baseball hall of fame.)

\textsuperscript{23} Id. The 1909 Honus Wagner card was recalled the same year.

used the spit produced by tobacco to moisten the leather. In addition, pitchers used tobacco spit juice to throw spit-balls which were legal until 1920.

Estimates suggest that tobacco was used by approximately half of major league players twenty years ago. Today, it is estimated that one third of major league ballplayers use tobacco products and one quarter of minor leaguers are users. Tobacco use in minor league baseball has been banned since 1993. However, minor league players are not unionized and, therefore, the ban of tobacco use did not have to be negotiated through a collective bargaining agreement.

While Major League Baseball would like to ban tobacco products, there is hesitation from the Players’ Association. However, following the tobacco-related death of Tony Gwynn, there seems to be more pressure for prohibition in baseball. Gwynn was only 54 years old and his death inspired many ballplayers to give up the habit. The influence of Gwynn’s death on the
baseball community seems to be influential; past deaths of baseball stars did not get rise to talks of prohibition.34

III. Collective Bargaining Agreement, 2012-2016

Of the current Collective Bargaining Agreement (CBA), a mere two pages of the 311 page document addresses tobacco use.35 Under the CBA, players and coaches must conceal tobacco packages during times that fans are allowed in the facilities.36 In addition, use of tobacco products is prohibited during televised interviews.37 Therefore, the current CBA is essentially hiding the destructive habit.

If a player is to violate this brief and insufficient policy, they are subject to written warnings for the first and second offense.38 The third, fourth, and fifth violations are disciplined with fines of $1,000, $2,500, and $5,000, respectively.39 Given the current minimum salary of a Major League Baseball player, the penalties for violating the tobacco policy are rather light.40

For comparison, a player who violates an equipment rule (such as wearing the wrong color cleats) receives a warning only for the first offense. The second and third violations are subject

Diamondbacks pitcher Addison Reed announced that they would quit using tobacco. Both Strasburg and Reed played baseball at San Diego State University when Gwynn was the head coach. Following Gwynn’s death, Strasburg said, “I think it’s a disgusting habit, looking back on it. I was naïve when I started. Just doing it here and there, I didn’t think it was going to be such an addiction. Bottom line is, I want to be around for my family. This is something that can affect people the rest of your life. [Chewing tobacco] is prevalent in this game. It’s something we all grew up doing.”)

34Sports Figures, THE ORAL CANCER FOUNDATION (Nov. 20, 2014, 10:45PM), http://www.oralcancerfoundation.org/people/sports-figures.php. (Babe Ruth died of throat cancer. Ruth once told a reporter, “I learned early to drink beer, wine, and whiskey, and I think I was about five when I first chewed tobacco.” It should be noted that there was not as much information about tobacco so widely available at the time of Ruth’s death.)
36 Id.
37 Id. (The second written warning includes a recommendation for counseling.)
38 Id. (The second written warning includes a recommendation for counseling.)
39 Id; See MLBPA, supra note 7. (The minimum salary in Major League Baseball is $500,000.)
40 Id.
to a $1,000 and $5,000 fine, respectively.\textsuperscript{41} A fourth violation of equipment regulations is subject to a $10,000 fine.\textsuperscript{42} It seems that player health and influence on the youth is under-prioritized in the current CBA when punishments are compared to those regarding the regulation of equipment. Major League Baseball seems to be most interested in how the players look in the eyes of the public; therefore, players must hide their tobacco tins and wear equipment of correct brands and colors.

\section*{IV. The Next CBA: A Look Ahead}

Some progress was made in the drafting of the current CBA; players now must hide tins, cans, and packaging of tobacco while the public is allowed in the facilities, which was not the case under previous CBAs.\textsuperscript{43} Those involved in the negotiating of the current CBA have said that Major League Baseball pushed hard for a ban on tobacco and that the talks got “contentious” about the subject.\textsuperscript{44} Based on the talks that took place during the negotiation of the current CBA, it seems that ban on tobacco products, by way of the CBA, will not happen in the near future.\textsuperscript{45} The stance the players have taken is that as long as it is legal to the public it cannot be banned in baseball.\textsuperscript{46}

However, some believe that the recent death of Gwynn may revive hope.\textsuperscript{47} Following Gwynn’s death, nine major public health organizations are pushing Major League Baseball to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{41} \textit{Supra} note 34. (The Equipment Policy is located in Attachment 19, pages 193-204. It should be noted that while the tobacco policy’s brevity needs only two pages in the CBA, the looks of the players requires more than ten pages.)
\item \textit{Id.}
\item Heyman, \textit{supra} note 27.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} (It should be noted that the players union has no problem encouraging players to quit the habit. This can be seen in the fact that twenty years ago half of the league used tobacco products and now the rate is down to one third.)
\end{itemize}
\end{footnotesize}
ban tobacco use. Public health organizations use the logic that kids imitate their role models; high school cigarette smokers has fallen by half since 1999 while chewing tobacco rates among high schoolers has remained steady. If Major League Baseball cannot achieve prohibition of tobacco in the upcoming CBA of 2017, it is doubtful that it will get done in the near future.

V. Potential Banishment of Tobacco in Baseball Absent Changes to the CBA

a. Tobacco Policies and Baseball Stadiums

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

While many of these regulations are unrelated to smokeless tobacco and baseball, there is a small, but crucial, crossover. Though Major League Baseball and the players association negotiates to a Collective Bargaining Agreement, the states police power continues to be plenary. Some ballparks have tobacco regulation in place per the desire of the owner of the stadium. Every Major League ballpark has smoking policies; most are smoke free facilities and

48 Id.
49 Id. (Smoking is more strictly regulated, generally, and in baseball.)
50 The Master Settlement Agreement between the states and many tobacco companies regulates, among other things, the ways in which the tobacco company may advertise.
51 Minnesota Clean Indoor Air Act, MSA §144.412 (1975). (The Act has continued to progress and been revised over time.)
53 Id.
54 Id.
the stadiums that are not smoke free have designated smoking areas.\textsuperscript{56} Many legendary stadiums like Fenway Park, Camden Yards, and Yankee Stadium have a complete prohibition on smoking.\textsuperscript{57}

However, Safeco field has prohibited chewing tobacco as well as smoking on the premises.\textsuperscript{58} Neither the Seattle Mariners nor Safeco Field takes credit for this rule; the organizations involved cite the Washington Clean Air Act as the reason for prohibiting chewing tobacco.\textsuperscript{59} While the Washington Clean Air Act only calls for the prohibition of smoking tobacco at Safeco Field, the ball club wants their facilities to be tobacco free.\textsuperscript{60} However, the players, unlike the fans, are not prohibited from using chewing tobacco at the facility.

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

\textit{b. Police Power to Regulate Tobacco Use in Baseball}

Police power is an inherent power of a community to regulate activities for the protection of public health and safety.\textsuperscript{61} Because Safeco Field in Seattle has the most stringent tobacco policy among Major League Baseball venues, I will discuss the police power in Washington, specifically, to pursue the issue of whether it is possible to regulate tobacco out of baseball by way of local police powers.\textsuperscript{62}

\begin{footnotes}
\item[57] \textit{Id.}
\item[58] \textit{Id.}
\item[59] \textit{Id.}; Washington Clean Air Act §70.94 RCWA (2006).
\item[60] The Seattle Mariner’s website uses the Clean Air Act to justify its ban on smokeless tobacco. Available at: http://seattle.mariners.mlb.com/sea/ballpark/information/index.jsp?content=guide.
\item[61] Washington Clean Air Act, \textit{supra} note 59.
\end{footnotes}
It could not be possible for the CBA’s contract to circumvent the regulations put in place by the Washington Clean Air Act; the Washington Supreme Court has held that private parties cannot enter contracts to nullify otherwise valid ordinances or laws.\textsuperscript{63} That is to say, if individual states or municipalities were to regulate tobacco out of baseball stadiums, the players could not point to the CBA for an exemption from the law.

In Washington State, tobacco could likely be regulated out of the ball park absent the Washington Clean Air Act.\textsuperscript{64} In the Washington State Constitution, as is common; counties, cities, and towns are given police power.\textsuperscript{65} This gives counties, cities, and towns the ability to enact ordinances to protect public health and safety. Therefore, the city of Seattle or King County could pass regulation that required places of large public gathering to be tobacco free.\textsuperscript{66}

It is probable that these regulations would be met by challenges by tobacco companies and, possibly, Major League Baseball or the players’ association. However, opposition is only natural with a habit as widely spread as tobacco, especially given the money-wielding companies that would affected by such regulation. However, if multiple jurisdictions pass similar ordinances and legislation, the movement may find traction. It is not possible to know the results of an attempt to regulate tobacco in baseball (or professional sports, generally). However, considering that this regulation would have a specific target, it is not all that extreme; some scholars still support arguments for an outright ban.\textsuperscript{67}

\section*{VI. Conclusion}

\textsuperscript{63} City of Seattle v. Hurst 50 Wash. 424, 432, 97 P. 454, 457 (1908); Washington Clean Air Act, supra note 59. (It should be noted that the Washington Clean Air Act, in part, finds its authority in Policing Power.)
\textsuperscript{64} Washington Clean Air Act, supra note 59.
\textsuperscript{65} WA CONST Art. 11, § 11
\textsuperscript{66} The exact way in which the legislation would be written is, of course, debatable. The language would depend upon which types of places the municipality sought to outlaw tobacco. The language could be designed to fit just sports stadiums or also, for example, concert halls.
Because the players association and Major League Baseball have negotiated and agreed to the CBA, it is a contractual agreement and not statutory law. It is unlikely that the entirety of players would agree to the prohibition of tobacco; obviously, tobacco users would find this disagreeable. It is unlikely that the portion of players whom disagreed would have a remedy. The unionization of players allows the group to collectively decide the terms of its labor with Major League Baseball.

A player cannot use performance enhancing drugs because they are disallowed under the CBA.\textsuperscript{68} Therefore, it would seem that a prohibition of tobacco under the CBA would prevent Major League ballplayers from being able to use tobacco products in the same way that it prohibits the use of performance enhancing drugs. This situation becomes more complex by the stance put forth by the players association: as long as it is legal to the public it cannot be banned in baseball.\textsuperscript{69} This view raises some questions; why is it that the players association does not fight for allowing cigarette use by ballplayers? The answer, though not within the scope of this paper, is likely that smoking is more difficult to hide. So long as players are required to hide tobacco use (as the CBA now requires), the public outcry will continue to stay quiet barring future unrests that may have the effect that Gwynn’s death had.

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

\textsuperscript{68} \textit{supra} note 35.
\textsuperscript{69} Heyman, \textit{supra} note 27.
While baseball players have embraced tobacco use far before sufficient health information was available, it has come time to remedy the public health problem. The health problems associated with tobacco are now well known and the effects continue to make headline news. Meanwhile, tens of thousands of fans attend ball games each day, millions watch on television, all the while players continue to go about their competition with bulging lips full of a substance that is catastrophic to the player’s health.

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

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

70 The headline news refers to the death of Tony Grynn and current Major League players’ vows to quit the habit.