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MORE THAN JUST CALIFORNIA DREAMIN.pdf

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More Than Just California Dreamin'?: California Labor Code §2855 and Its Applicability To Major League Baseball

By

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This Article examines California Labor Law §2855 and explores whether it might apply to Major League Baseball (MLB) clubs operating within the state of California. Further, it attempts to answer the question of how the statute might impact California clubs, as well as those operating outside of California, if in fact it does. It will explore the history, purpose and workings of the statute – one most typically applied to artists and creatives such as Hollywood actors – as well as its public policy aims to see whether the concerns that underpin the language and subsequent judicial interpretation of §2855 are likewise present in modern day professional baseball. For if they are there is a strong argument that the statute applies to the creatives pursing their craft on the diamond just as it does to those who perform on the sound stage. This Article will also examine the issue of federal pre-emption given that player relations within MLB are governed by a collective bargaining agreement negotiated pursuant to the National Labor Relations Act. It will explore how the statute has been applied historically and how the "anti-collusion" language written into MLB's collective bargaining agreement might hinder club owners' ability to prevent their players from exercising their rights under §2855. It will also scrutinize the potential nexus between §2855 and baseball's arbitration rules to see if perhaps some small tweaks of these rules might bring baseball into compliance with the statute surprisingly easily. And finally this Article will take a look at the practical impact the application of §2855 might have on California clubs as well as MLB overall and will show that without its realizing it, baseball has been inching towards compliance with the statute in recent years. As this Article will conclude, rather than ushering in the End of Days of baseball in California as some fear, formally applying §2855 to MLB might very well provide California clubs with negotiating advantages relative to their non-California brethren when it comes to the wooing of free agents. For all of these reasons, this Article argues that, rather than fight it, both MLB and its California clubs ought to instead embrace §2855 as one way or the other, they will be following many of its dictates in the not-so-distant future.

INTRODUCTION

[♠] Professor of Law, Villanova University Charles Widger School of Law. I would like to thank Nathaniel Grow for his helpful comments on a draft of a portion of this article as well as my research assistant, Ericka Esposito. I would also like to thank Mike Risch for his contributions to the 1970s-era flaccid rock list (*see infra* note 33) even though, irrespective of his protestations, I included The Eagles anyway, as they are the embodiment of the genre despite what he thinks.

On June 24, 2009 the Los Angeles Angels of Anaheim selected, with the 27th pick in the first round of the MLB Amateur Draft, outfielder Mike Trout. After spending parts of three seasons in the minors, Trout was promoted to the big-league club in 2011, whereupon he became an almost instantaneous superstar. In 2012, his first full year in the Majors, Trout became the American League's Rookie of the Year and finished second in the league's MVP voting. He finished second once again in 2013 before winning the MVP award the following season. Afterwards, the contract extension he signed prior to the 2014 season went into effect, raising his salary from $1 million annually to $5,250,000 (not including his signing bonus).[1] In all, the extension runs for six seasons, totaling $144,500,000 and ostensibly locks Trout in with the Angels through the 2020 season.[2] By that point Trout will have been with the club for more than 11 seasons and will have been paid handsomely, to be sure. The contract contains numerous perks for the player considered by some to be not only hands-down the best in baseball today but perhaps one of the best in recent memory. However, for all the contract provides Trout one thing it does not bestow upon him is the title one might assume would naturally accompany his status: that of the game's highest-paid player. That honor (as measured by total contract dollars), as of 2015 at least, goes to the Miami Marlins' Giancarlo Stanton, who signed his name to a 13-year $325,000,000 contract prior to the 2015 season.[3] Turning to average annual salary, Trout's contract, at least with regard to the

[1] *See Mike Trout, Current Contract*, Sportrac.com, http://www.spotrac.com/mlb/los-angeles-angels-of-anaheim/mike-trout-8553/
[2] *Id.*
[3] *See* Ricky Doyle, *Could Mike Trout Legally Opt Out of Contract, Become Free Agent?,* NESN.com, http://nesn.com/2017/01/could-mike-trout-legally-opt-out-of-angels-contract-become-free-agent/ January 6, 2017.

2017 season, looks almost pedestrian: the league's reigning MVP (once again) commanded only MLB's 35th highest salary.[4]

Shed nary a tear for Mike Trout, though: in 2018 his average annual salary will jump to $33,250,000 which, at the time of this writing, would make him the game's highest paid player, assuming nobody leapfrogs him in the interim.[5] But what if somebody does? What if several players do? What will that mean to the game's greatest player; the player who very well might be the best player since Willie Mays if not even better?[6] While we may speculate as to how this would affect him psychologically one thing we can be certain about is this: the best player in baseball will be playing with a below-market contract. The question this Article seeks to answer is whether there is anything Mike Trout can do about that and, if so, whether that would bring upon the world the end of baseball – in California and elsewhere -- as we know it.[7]

This question was first broached in a brief but fascinating article posted on the *Fangraphs* website in January, 2017 and which ignited the fantasies of fans of every team other than the Angels while simultaneously causing Angel diehards to experience night

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[4] *See MLB Salary Rankings, 2017 Base Rankings*, Sportrac.com, http://www.spotrac.com/mlb/rankings/base/

[5] *See Mike Trout, Current Contract*, Sportrac.com.

[6] *See* Jon Taylor, *Somehow, the Remarkable Mike Trout is Only Getting Better As He Builds a Historic Season*, Sports Illustrated, https://www.si.com/mlb/2017/05/25/mike-trout-los-angeles-angels?xid=nl_siextra&utm_source=si.com&utm_medium=email&utm_campaign=si-extra&utm_content=2017052611AM May 25, 2017,

[7] *But See*, Bill Shaikin, *Mike Trout's Agent Shoots Back at Industry Critics,* Los Angeles Times, http://articles.latimes.com/2014/mar/29/sports/la-sp-sn-mike-trout-agent-craig-landis-20140329 March 29, 2014. As this article suggests, Trout's agent, Craig Landis, suggested that his client was happy with his contract even though it was very likely below-market value. As such, it does not appear as if Landis and Trout are seeking to terminate their current agreement with the Los Angeles Angels. Regardless, they very well might change their opinions at some point down the road and, even if they do not, there will undoubtedly be other California-based players and agents who will seek market value in the future. Trout merely serves as an avator in my article for any California-based player with at least seven years of uninterrupted service time with his club.

sweats.[8] In it, hopeful and terrified fans alike were introduced to California Labor Code §2855[9] and asked to consider the possibility that the provision, with its seven-year limitation on personal service contracts, might apply to baseball clubs operating within the state of California. If it did, the article posited that this might provide extraordinary players such as Trout with non-negotiated, statutory "out" clauses in their otherwise ironclad contracts. The article immediately rocketed around the Internet until it was forcefully smacked down by, of all people, player agent (and California lawyer) Scott Boras who two days later pronounced the article pure folly. "To litigate this," he said, "probably you're going to have to go to a federal judge, and then the appeals court, then the Supreme Court. So you're looking at a four-year run. And you're talking about a player who is going to spend the prime of his career tied up in litigation."[10] Worse, he speculated, litigating this issue would alienate the player seeking relief via §2855 from his current club's fan base as well as rendering him *persona non grata* with his compadres in the Players Association. "You'll have union members saying, 'why do California players get rights we don't get under the CBA (Collective Bargaining Agreement).'"[11] "You don't want," said the agent who once counseled a rising star of an earlier era, J.D. Drew, to sit out rather than sign with the Philadelphia Phillies in 1997

[8] Nathaniel Grow, *How Mike Trout Could Legally Become a Free Agent*, Fangraphs.com, http://www.fangraphs.com/blogs/how-mike-trout-could-legally-become-a-free-agent/ January 4, 2017.
[9] Cal. Labor Code §2855.
[10] *See* Hannah Keyser, *Scott Boras Wouldn't Advise California Players to Seek Early Free Agency,* Deadspin.com, http://deadspin.com/scott-boras-wouldnt-advise-california-players-to-seek-e-1790913579 January 6, 2017.
[11] *Id.*

and who suffered the wrath of the Philadelphia boo-birds for the rest of his career,[12] "to be a pariah."[13]

This Article takes a deeper dive into the issue of whether §2855 might apply to Major League Baseball clubs operating within the state of California and, if so, what this might mean – to California clubs as well as those operating outside of California. It will explore the history, purpose and workings of the statute, its public policy aims and whether the concerns that underpin the language and subsequent judicial interpretation of §2855 are likewise present in modern day professional baseball. It will examine the issue of federal pre-emption given that player relations within MLB are governed by a collective bargaining agreement negotiated pursuant to the National Labor Relations Act. It will explore how the statute has been applied historically and how the "anti-collusion" language written into MLB's CBA might hinder club owners' ability to prevent a player such as Trout from exercising his rights under §2855 without first litigating for the right to do so. It will also examine the potential nexus between §2855 and baseball's arbitration rules to see if perhaps some small tweaks of these rules might bring baseball into compliance with the statute surprisingly easily. And finally this Article will take a look at the practical impact the application of §2855 might have on California clubs as well as MLB overall and will show that without its realizing it, baseball has been inching towards compliance with the statute in recent years. And as this Article will likewise show, rather than ushering in the End of Days of baseball in California as some fear, formally applying §2855 to MLB might very well provide California clubs with

[12] *See* A.J. Daulerio, *Philadelphia's Continuing Misguided Hatred Of J.D. Drew*, Deadspin.com, http://deadspin.com/5018042/philadelphias-continuing-misguided-hatred--of-jd-drew June 19, 2008.
[13] Keyser, *Scott Boras Wouldn't Advise California Players to Seek Early Free Agency.*

negotiating advantages relative to their non-California brethren with regard to the wooing of free agents. For all of these reasons, this Article concludes that, rather than fight it, both MLB and its California clubs ought to instead embrace §2855 as one way or the other, they will be following many of its dictates in the not-so-distant future.

I. §2855: A BRIEF HISTORY

Section (a) of California Labor Code §2855 reads as follows:

> **2855.** … [A] contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 (commencing with Section 3070), may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.[14]

The roots of §2855 run deep and beyond the state's boundaries. The initial version of the statute was based on a proposed New York bill – the "Field Code" – that was never enacted into law, and which sought to protect certain classes of employees

[14] Cal. Labor Code §2855(a).

from overly onerous personal service contracts.[15] In 1872 the California legislature enacted §1980 of the California Civil Code which limited the length of enforceable service between an employer and employee to two years.[16] That this was to inure to the benefit of employees rather than employers was established in the 1903 case of *Stone v. Bancroft* when the California Supreme Court held, in essence, that §1980 was a sword to be wielded by employees only.[17] In that case, a salesman claimed that he was owed seven-months' salary. In defense, his employer argued that the plaintiff had no claim under the statute given that the seven months in question occurred beyond the two-year statutory limit. The court disagreed, ruling in favor of the plaintiff and requiring the employer to make good on the contract despite its length.[18]

In 1919 §1980 was amended to lengthen the term of enforceable contracts to five years.[19] Twelve years later the statute was amended again to lengthen the term to the present-day seven years.[20] In 1937 §1980 was repealed and replaced with §2855.[21] Soon it would become popularly known by another name: the DeHavilland Law, after one of the biggest movie stars of the era, Olivia DeHavilland.[22]

That it would become entwined and associated with the entertainment world was no surprise given the nature of the industry at the time. During the "studio era," large

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[15] *See* Jonathan Blaufarb, *The Seven-Year Itch: California Labor Code Section 2855,* 6 Comm/Ent L.J. 653, 656 (1983-84).
[16] *See* Gregg B. Ramer, *United States: Personal Service With a Smile: A History of California's "Seven-Year" Rule,* Mondaq.com, http://www.mondaq.com/unitedstates/x/279512/employee+rights+labour+relations/Personal+Service+With+a+Smile+A+History+of+Californias+SevenYear+Rule December 6, 2013.
[17] 139 Cal. 78 (1903).
[18] *Id.*
[19] Cal. Civ. Code §1980 (Deering 1923).
[20] Cal. Civ. Code §1980 (Deering 1933).
[21] Cal. Civ. Code §2855 (Deering 1972). This was done pursuant to the Industrial Labor Relations Act. *See* Blaufarb, *The Seven-Year Itch*, 656.
[22] *See* Ramer, *Personal History With a Smile.*

production companies would routinely sign unknowns to lengthy contracts with terms favorable to the studios given the imbalance of bargaining power between the parties. Most of these contracts came to nothing given the elusiveness of fame. But for the few performers who managed to "break out" and achieve prominence, these studio contracts – once celebrated upon their signing – now weighed as albatrosses around their necks. For now the bargaining power between performer and studio had shifted dramatically but for the fact that there was nothing to bargain over given the lengthy term of the studio contract. From the studio's perspective, such contracts were considered an economic necessity – their failure rate was high and unpopular films and actors abounded so a studio's survival depended upon its capacity to capitalize on its relatively few successes by profiting as much as possible through contracts with favorable terms. Equally important was a studio's ability to hold its star performers to their contracts and compel them to capitalize on their fame by continuing to make pictures for it rather than rival studios. As big and seemingly powerful as they appeared, studios were so beholden to their stars that most studios required performers to sign contracts that contained language acknowledging that the performers' services were of a special, unique, unusual, extraordinary, and intellectual character.[23] As flattering to the performers as this language might have been, it served a specific purpose: to render their services non-delegable and allow the studios to sue for injunctive relief – a necessity if the studios were going to realize maximum benefit from the star power of their top performers.[24]

[23] *See* Bayard. F. Berman & Sol Rosenthal, *Enforcement of Persona Service Contracts in the Entertainment Industry*, 7 Bev. Hills Bar Assoc. J. 49, 53 (September, 1973).
[24] *See* Blaufarb, *The Seven-Year Itch*, 657-58.

As DeHavilland understood, this language also brought the typical studio contract under the auspices of §2855 and during a dispute with her studio, Warner Brothers, she sued, seeking, in effect, "free agency" – the right to freely negotiate in the marketplace after being locked into her Warner Brothers contract for seven successive years.[25] Specifically, DeHavilland signed a one-year contract on May 5, 1936 which gave Warner Brothers six successive one-year options should they choose to exercise them. They did. Throughout the seven-year period of her successive contracts with Warner Brothers, DeHavilland occasionally refused to perform and, pursuant to their contractual right, Warner Brothers suspended her for doing so. In all, the suspensions totaled 25 weeks. On May 5, 1943, DeHavilland alleged that her contract was no longer enforceable by Warner Brothers despite their contractual right to extend it the length of the suspensions. Warner Brothers disagreed, contending that §2855's seven-year limit applied to *actual* service "regardless of the time over which such services might extend." Thus, it was Warner Brothers' belief (one shared by their fellow studios) that a contract calling for seven years of service was statutorily enforceable for seven years of performance, even if these extended beyond seven calendar years. Otherwise, a star such as DeHavilland could "sit-out" an unfavorable contract, thereby preventing the studio from achieving peak revenue. What good is a seven-year contract, they argued, if the performer was permitted by statute to refuse to perform for all or part of it?

The court found for DeHavilland, writing that "the Legislature has not used the words 'of service'…. We cannot believe that the phrase 'for a term not beyond a period of seven years' carries a hidden meaning. It cannot be questioned that the limitation of

[25] *See DeHavilland v. Warner Bros. Pictures, Inc.* 67 Cal. App. 2d 225, 153 P.2d 983 (1944).

time to which section 1980 related from 1872 to 1931 was one to be measured in calendar years…The substitution of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal services."[26] Even though it was DeHavilland's own actions that resulted in the suspensions that lengthened the term of the contract, the court held that this was immaterial because (and in an extension of its earlier holding in *Stone*) §2855 was not a provision enacted *merely* for the benefit of employees but, rather for the public and, as such, could not be waived by conduct or otherwise. "Anyone may waive the advantage of a law intended solely for his benefit," the court wrote, quoting the language of California Civil Code §3513. "But a law established for a public reason cannot be contravened by a private agreement."[27]

As for the public reason behind §2855, the court found it in the following:

> The fact that a law may be enacted in order to confer benefits upon an employee group, far from shutting out the public interest, may be strong evidence of it. It is safe to say that the great majority of men and women who work are engaged in rendering personal services under employment contracts. Without their labors the activities of the entire country would stagnate. Their welfare is the direct concern of every community. Seven years of time is fixed as the maximum time for which they may contract for their services without the right to change employers or occupations. Thereafter they may make a change if they deem it necessary or advisable…As one grows more experienced and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.[28]

On a more fundamental level, the court held that the protections of §2855 could not be waived because to permit such waiver would render the statute meaningless; if all that was required to waive the statutory limit was to agree to a contract beyond that length then no contract would ever fall under the statute's protections. "It could scarcely have

[26] *Id.* at 986.
[27] *Id.* at 987.
[28] *Id.* at 988.

been the intention of the Legislature to protect employees from the consequences of their improvident contracts and still leave them free to throw away the benefits conferred upon them."[29]

The interpretation of §2855 was broadened once more in a 1966 case involving the comedian Redd Foxx.[30] Foxx signed a recording contract with Dootone Record Manufacturing, Inc. in 1956 which permitted Dootone to record Foxx's routines on stage and release them on phonograph records. After several years, several comedy albums and several disagreements between Foxx and Dootone, litigation ensued. One of the claims involved Dootone's attempt to unilaterally extend Foxx's recording contract beyond the seven-year mark. In support of its attempt Dootone argued that §2855 did not apply because Foxx was an independent contractor and not an employee and, as such, the statute did not apply. In addition, Dootone contended that because Foxx's contract, unlike DeHavilland's, did not call for continuous performance (Foxx continued to perform as a nightclub comedian outside of his Dootone contract), the statute was likewise inapplicable. Once again the court disagreed and held, as it did in *DeHavilland* that the language in §2855 was absolute – seven years meant seven years, regardless of the nature of the employment or any other technicalities surrounding it.[31] Any seven-year personal service contract fell under the auspices of §2855 provided that the contract did not permit the performer the opportunity to seek market value for his or her skills at any point therein. Case closed. No exceptions.

Until Melissa Manchester threw all of this into doubt.

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[29] *Id.* at 989.
[30] *Foxx v. Williams,* 244 Cal. App. 2d 223, 52 Cal. Rptr. 896 (1966).
[31] *Id.*

Manchester, the adult contemporary singer-songwriter most associated with the maudlin 1979 single "Don't Cry Out Loud," was perhaps the prototypical artist §2855 was by that point thought to protect. She was little-known when she signed a long-term recording contract with Arista Records in 1973.[32] In 1976, after her treacly and regurgative "Midnight Blue" became a top-ten hit, she agreed to a mid-term extension of her contract that extended into the 1980s. Significantly, this extension was offered by Arista prior to the expiration of her initial contract, thereby depriving Manchester of the opportunity to shop her talents, as they were, on the burgeoning flaccid-rock market that was then inexplicably raging across the mid-1970s American music scene.[33] When the differences between Arista and Manchester became profound in 1980 such that

[32] *See Manchester v. Arista Records, Inc.*, 1981 U.S. Dist. LEXIS 18642 (1981).

[33] *See, e.g.*, Ace, Ambrosia, Stephen Bishop, Debby Boone, Bread, Peabo Bryson, Glen Campbell, Captain & Tennille, Karen Carpenter, Richard Carpenter, The Carpenters, Harry Chapin, Climax Blues Band, Crosby, Stills & Nash (Nash only. *See, e.g.* "Our House." *See also* Stephen Stills as a solo artist and as front man for Manassas), Christopher Cross, John Denver, Neil Diamond, The Doobie Brothers (Michael McDonald-era only), The Eagles (all configurations not featuring Joe Walsh on lead vocals), Firefall, Roberta Flack, Dan Fogelberg, Steve Forbert, Foreigner, Genesis (Phil Collins-as-front-man-assemblage only), Andy Gibb, Hall & Oates, The Hollies (post Graham Nash. *But See* CSN, above), Terry Jacks, Jefferson Starship (*But See* Jefferson Airplane, which was definitely not flaccid. *But See Again* Starship, which was even more flaccid than Jefferson Starship), Billy Joel (post "Piano Man," which is most Billy Joel), Rickie Lee Jones, Journey (other than "Lights," which is treacly but admittedly not a bad song), Carol King, Nicolette Larson, Little River Band, Lobo, Kenny Loggins, Loggins & Messina, Looking Glass, Mary MacGregor, Melissa Manchester, Barry Manilow, Dave Mason, Don McLean, Ronnie Milsap, Van Morrison, Maria Muldaur, Michael Martin Murphy, Anne Murray, Nazareth, Randy Newman (everything other than "You Can Leave Your Hat On"), Olivia Netwon-John, Kenny Nolan, Gilbert O'Sullivan, Orleans, Pablo Cruise, Player, Poco, Pure Prairie League, Gerry Rafferty, Helen Reddy, Linda Rondstadt, Leo Sayer, Boz Scaggs, Seals & Crofts, Carly Simon, Skylark, Starland Vocal Band, Stealers Wheel, Steely Dan, Al Stewart, Styx (pre-synth. The Styx synth era (*See* "Mr. Roboto") offends for different reasons altogether), James Taylor, B.J. Thomas, Three Dog Night (excluding "Momma Told Me Not To Come," written by Randy Newman), Bonnie Tyler, Bob Welch, Paul Williams, Wings, Gary Wright. *CF* Lionel Richie (who rose to prominence in the '80s but whose style was '70s flaccid). *Contra*, The Grateful Dead (other than when Donna Jean Godchaux sings), Led Zeppelin (*Compare* "When The Levee Breaks," *and* "The Rain Song" *with* "Hotel California" *and* "Peaceful Easy Feeling"), The Rolling Stones (*Compare* anything on "Exile On Main Street" *with* anything on "Hotel California"). *But See*, Harry Nilsson, who is often lumped in with the above but who knew how to write and sing in this style while somehow still making it cool (*see, e.g.*, "Jump Into The Fire."). Determinations of flaccidity based upon both the wimpiness of a performer's music combined with his/her/their perceived corporateness/lack of genuine artistic inspiration as measured by their combined score on the "Frey-Loggins Algorithm for Classifying and Categorizing Insipid Dreck" (on file with the author).

Manchester wanted to be released from her contract, it would have seemed that *DeHavilland* controlled and she would thereby be released. For seven years means seven years. No exceptions.

The *Manchester* court saw things differently, however. While acknowledging the significant similarities between the cases, the court nonetheless held that here, seven years did not mean seven years. Not exactly. Instead, it held that an absolutist approach to §2855 was ill-informed because it would "effectively prevent an employee from entering into a new contract with his or her employer until after the completion of all obligations between them."[34] The better course, the court believed, "is to consider the circumstances surrounding the formation of the new contract in each situation. If the new contract was entered into at or near the time of formation of the earlier contract, and if the two contracts appear to have been entered into to avoid the application of §2855 to a single agreement, then they should be considered a single contract for purposes of §2855. However, if the latter contract was entered into toward the end of the first contract, it should be treated as a separate agreement…"[35] Thus, the *Manchester* court rejected the absolutist approach established in *DeHavilland* and instead applied a balancing test that would take into account the "unique facts" of each situation.[36] The court's approach ignored the public policy rationale cited by *DeHavilland* in that it disregarded the inherent imbalance of power between an employer and an employee currently under contract with little recourse other than to sign the extension or continue under her initial – sub-market -- contract. In all likelihood both contracts would be considered to be below

[34] *Manchester*, 1981 U.S. Dist. LEXIS 18642 (1981).
[35] *Id.*
[36] *See Id.*

market-value by the time negotiations on the mid-term extension commenced, leaving the employee to choose between competing sub-market options, albeit one somewhat less odorous than the other. Regardless, after *Manchester* the scope of §2855 was unclear.

Clarity would arrive in 2001 in the form of a lawsuit brought by the champion Welterweight boxer Oscar De La Hoya.[37] De La Hoya signed a series of contracts with Top Rank Boxing in the 1990s that were subsequently extended beyond the seven-year mark. Although these appeared to be no different than the mid-term extensions at issue in *Manchester*, the *De La Hoya* court dismissed the *Manchester* balancing test and found in favor of De La Hoya, holding, in effect, that *DeHavilland* controlled and seven years once again meant seven years. No exceptions. The court cited to proposed amendments to §2855 in the wake of the *Manchester* decision, which would have explicitly permitted new or superseding contracts to restart the seven-year period, none of which passed the California legislature. This failure, the court concluded, provided proof that pursuant to the statute, "an employee may not be compelled to serve one employer for more than seven years where a subsequent personal services agreement is reached while an original agreement remains in effect and the combined term of both contracts exceeds seven years. A new seven years is not started under the statute unless the new agreement is struck while the employee is free from any existing contract, able to consider competitive offers and able to negotiate for his true value in the marketplace."[38] Significantly, although De La Hoya and Top Rank entered into a series of one-year-contracts, the court treated them as a single agreement given that there was no break between them providing De La Hoya the opportunity to test the open market. After *De La Hoya* the absolutist rule

[37] *See De La Hoya v. Top Rank, Inc.*, 2001 U.S. Dist. LEXIS 25816 (2001).
[38] *Id.*

was back, landing with all the force of a De La Hoya haymaker. In all respects, yet another knockout for The Golden Boy.[39]

Throughout the twists and turns of §2855 recounted above, one theme that courts – aside from *Manchester* -- have repeatedly driven home has been the public policy underlying it and how this drives everything else. Like the *DeHavilland* court decades earlier, the *De La Hoya* court relied on its understanding of the public reason behind the statute to conclude that it was absolutely non-waivable. This is because although §2855 benefits the employee most immediately, its ultimate benefits run to the public. As such, no individual has the authority to waive a public benefit via a private agreement. Despite employers' contentions that prior bad acts by their employees precluded them from seeking the benefits conferred by the statute,[40] courts have repeatedly held that the behavior of any particular employee was of no matter. Seven years means seven years. Moreover, despite employers' claims that their employees freely bargained for the mid-term extension they ultimately agreed to, courts (again, outside of *Manchester)* have similarly held that this was not dispositive; the public purpose of the statute overrides freedom of contract.[41] And despite employers' contentions that, practically speaking, the absolutist interpretation of §2855 runs to the detriment of employees in certain instances, courts have turned a blind eye here as well. Given the unenforceability of mid-term extensions that extend beyond seven years, some commentators have suggested that the

[39] *See* Lance Pugmire, *Golden Boy opens its ESPN2 slate in prime boxing time, Oscar De La Hoya says*, The Los Angeles Times, http://www.latimes.com/sports/boxing/la-sp-sn-boxing-golden-boy-espn-quigley-tapia-20170320-story.html March 20, 2017.
[40] *See e.g.*, Henry I. Bushkin and Rauer L. Meyer, *The Enforceability of Mid-Term Extensions Of Employment Agreements Under California Labor Code §2855*, 15 Bev. Hills Bar Assoc. J. 385, 393 (Winter, 1981). *See also, DeHavilland*, wherein Warner Bros. unsuccessfully contended that DeHavilland should be estopped from benefitting from the statute given that it was her refusal to work that led to her suspensions that caused her contract to run beyond seven years.
[41] *See* Blaufarb, at 653.

absolutist interpretation perhaps acts as a disincentive for employers to renegotiate long-term contracts upward to the benefit of their employees. For without the carrot of an extended term, employers have no real reason to sweeten a below-market contract, the argument goes.[42] Regardless, public policy outweighs private concerns here as well. And in any event, mid-term extensions, regardless of the additional benefits conferred upon the employee, do not reflect the true market value of the employee's services if they were negotiated during a time when the employee was constrained from entertaining competing offers. For these reasons, the *Manchester* balancing test could not have been correct when decided and, as *De La Hoya* notes, is most certainly bad law after the California legislature refused to adopt the mid-1980s proposed amendments to the statute. Despite employer claims that the employee is free to decide whether to entertain offers of a mid-term extension or simply let their original contract expire upon its completion or the seven-year mark, such freedom is nonetheless limited. Without the ability to consider other offers, employee autonomy is necessarily constrained. As a result, the public policy of §2855 is necessarily and unavoidably violated.

If, however, the employer was able to demonstrate that the terms of a mid-term extension were indeed representative of fair market value, there is a possibility that perhaps California courts would take a somewhat less absolutist approach to §2855 given that their overriding concern in their enforcement of the statute is the absence of a true market. At least one commentator has suggested that rather than the *Manchester* balancing test, a rebuttable presumption either be written into the statute or implied in its interpretation, one that would presume all contractual amendments or modifications that

[42] *See* Bushkin and Rauer, at 393-94.

extend the term to be part of the initial contract unless the employer can demonstrate equality in relative bargaining positions as well as a resulting contract that is consistent with "current industry standards."[43]

As for how an employer might meet this standard, proof that the employee was provided an opportunity to shop his or her services on the open market would seem to be a requirement. In order for the employer to not lose control over its employee during this market-shopping period, a contractual "right of first refusal" would appear to give both sides much of what they'd need while still satisfying the public policy driving §2855. Pursuant to this right, the employee is afforded the opportunity to gauge the market for his or her services while the employer still maintains the ability to match the top market offer if it so desires. Everybody wins, so to speak.

Unfortunately, it is unclear how California courts would respond to such an approach because, due to the nature of the entertainment industry, relatively few cases have been litigated under §2855.[44] As such, it is difficult to gauge much about how the statute would be treated by the judiciary beyond what has been described above, which contain, admittedly, fairly broad strokes of interpretation. Because, by definition, entertainment personal services contracts pertain to services of a "special, unique, unusual, extraordinary, or intellectual character," employers are loath to overly antagonize those who are largely responsible for the success or failure of their bottom lines. Likewise, performers are similarly disincentivized. "Litigation is often inimical to the interests of both parties," one commentator noted. "The short-lived nature of entertainment careers makes it imperative for the artist to maximize available public

[43] Blaufarb, at 691.
[44] *See Id.* at 654-55.

exposure, even a brief hiatus from the limelight may diminish or destroy the momentum of a career. An artist in the courtroom is neither advancing his own career nor making money for his employer."[45]

In order to avoid the pitfalls and hazards of potential litigation, many California employers have taken to implementing what is known as a "lag day," wherein their employees are, technically speaking, unemployed.[46] At least for that day. After the "lag day," the employer then "re-signs" the employee and, presumably, the seven-year period begins anew.[47] Here again it is unclear how a California court might respond to this work-around given the dearth of litigation under §2855. But there is reason to believe it might pass muster; although the *Foxx* court did not definitively rule on the issue, it only considered (for the purposes of §2855) the final seven years of Foxx's nine-year contractual relationship with Dootone because there had been a break in the relationship between the parties when Foxx's earlier contracts expired after the first two years.[48] The "lag day" would seem to be no different. In both cases the employee had the opportunity to test the open market, at least for a day. That seems to be sufficient although a court might take issue with the limited open market opportunity presented in the "lag day."

At least in theory, everything discussed above – the purpose and policy of §2855 as well as the vagaries of the entertainment industry – applies to professional baseball players as well. They, like actors and actresses, often lack leverage when negotiating their initial contracts. Worse, given that many players are subject to a mandatory amateur draft, they are practically devoid of leverage in total at that point. The successful ones –

[45] *Id.*
[46] *See* Ramer.
[47] *Id.*
[48] *See generally, Foxx.*

the ones that bring the fans into the stadiums and help to pad their employers' pockets – shoot to stardom at some point while still subject to their initial contract (or, more specifically, series of renewable contracts; Major League Rule 55[49] stipulates that a Club retains the rights to its minor league players for up to seven years, after which the player must be granted free agency if he has not reached the Major Leagues. If he has, the Collective Bargaining Agreement stipulates that the player then becomes the property of the club for an additional six years, after which he has the option of declaring his free agency and shopping his services on the open market at last. In all, once under club control a player may very well be deprived of the benefits of an open market negotiation for up to 13 years).[50] By rights, §2855 should apply to these California performers as well.

But it is not that simple. For one thing, baseball players are the beneficiaries of something their acting brethren can't help but envy – perhaps the most powerful union in America. The Screen Actors Guild pales in comparison. Because of the presence of the Major League Baseball Players Association (MLBPA), even pugnacious player-agents such as Scott Boras, as mentioned above, question the fit between baseball and §2855. Since the goal of the MLBPA has always been fair treatment for all, permitting its members employed by California clubs to receive benefits not accorded to the rest of the union would cause resentment and backlash, he argues.[51] Therefore, not only would club owners push against the application of the statute to Major League Baseball, Boras

[49] The Official Professional Baseball Rules Book, Rule 55 (2017), https://registration.mlbpa.org/pdf/2015MajorLeagueRules.pdf
[50] *See generally*, The Official Professional Baseball Rules Book; The MLB Basic Agreement. Together, they spell out the combined minor/major league reserve system, which can run to 13 seasons. *See also, Major League Rules: Rule 55*, Sox Prospects.com, http://wiki.soxprospects.com/Major+League+Rules
[51] *See* Keyser.

suggested that the union would as well. The following section considers Boras's hesitations here to see if they have merit. Does §2855 apply to unionized employees? Or is it a protection designed to safeguard only those without the benefit of union representation? If it applies to all, regardless of the presence of a union, would it be contrary to the interests of unionized employees, as Boras suggests? Perhaps not. Perhaps, even, it might benefit California club owners as well.

II. PRE-EMPTION BY FEDERAL LAW AND THE EFFECT OF MLB'S ANTI-COLLUSION RULE

Initially, it must be determined whether this state statute is pre-empted by federal law. Because the MLBPA is a union recognized and governed pursuant to the National Labor Relations Act,[52] the possibility of federal pre-emption exists. Here again, due to the dearth of litigation under §2855 it is not clear how a court might rule on this precise question – the issue has never been formally broached. However, the United States Supreme Court has addressed the more general issue of potential conflict between a collective bargaining agreement and state law and its ruling perhaps provides some guidance. In the 1994 case of *Livadas v. Bradshaw*,[53] the Court held that the relevant (California) state law was not in fact pre-empted by the language of the collective bargaining agreement, suggesting that it might rule similarly here.

Livadas involved the discharge of a unionized grocery clerk, whose terms and conditions of her employment were subject to a CBA between her employer, Safeway, and her union. The CBA included a clause mandating arbitration regarding grievances arising from allegedly unjust discharge. Upon her discharge the plaintiff demanded

[52] 29 U.S.C. § 151–169
[53] 512 U.S. 107 (1994).

immediate payment of all wages owed her, citing to a California statute (California Labor Code §203) which guaranteed all terminated California workers immediate payment of wages owed and which called for a penalty of a sum equal to three days' wages for any delay between the discharge and the date when payment was received. Her employer disagreed, citing to the presence of the bargained-for arbitration clause which, in its opinion, overrode the California statute. The employee filed a claim against Safeway with the California Division of Labor Standards Enforcement (DLSE), which refused to act on her complaint, citing to a competing section of the California Labor Code (§229) which prohibited the DLSE from adjudicating any dispute concerning the interpretation or application of a CBA containing an arbitration clause. The plaintiff then filed her claim in federal court.[54]

Regarding the pre-emption issue, the DLSE alleged that §203 did not and could not apply to unionized employees because they were less "in need" of state statutory protection than their non-unionized cohorts.[55] Essentially, the DLSE's position was that because unionized employees had exercised their federal rights under the NLRA, they had, in essence, opted-out of the protections offered by the state law. The Court disagreed. Quoting an earlier decision, the Court wrote that "It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefitting from state labor regulations imposing minimal standards on nonunion employers."[56] To the contrary, "the widespread practice in Congress and in state legislatures has assumed the contrary,

[54] *Id.* at 111-14.
[55] *Id.* at 128-29.
[56] *Id.* at 129 (quoting *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 756 (1985)).

bestowing basic employment guarantees and protections on individual employees without signaling out members of labor unions (or those represented by them) for disability."[57] Moreover, the Court held that "we have never suggested that labor law's bias toward bargaining is to be served by forcing employees or employers to bargain for what they would otherwise be entitled to as a matter of course."[58] Just as numerous California courts have held with regard to §2855, the Supreme Court held that state law labor rights in general were nonwaivable, "secured by state law to all employees…" While the Court did not go so far as to hold that this was always to be the case, it did find that, here, the DLSE's decision not to act on the plaintiff's complaint had "such direct and detrimental effects on the federal statutory rights of employees that it must be pre-empted."[59]

Even if §2855 is not per se pre-empted, there remains the issue of whether it might nevertheless be pre-empted on the theory that it is regulating conduct that is arguably protected or prohibited by the NLRA. Such pre-emption does not turn on whether there exists an actual or potential conflict between federal or state law; it is enough that the state law is trafficking in an area reserved by the federal statute.[60] Here, the argument in favor of federal pre-emption would most likely be that §2855 is speaking to a topic – maximum contract length -- that is a mandatory subject of collective bargaining between MLB and the MLBPA. At first blush it might appear that it is as a Uniform Players Contract is regularly appended to all CBA's.[61] However, while the CBA spells out salary minimums it is silent as to maximum salaries or contract length.

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[57] *Id.*
[58] *Id.* at 130.
[59] *Id.* at 135. It must be noted here that the Court was referring to the DLSE's Commissioner's policy as being pre-empted.
[60] *See San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon,* 359 U.S. 236 (1959).
[61] *See* MLB 2012-2016 BASIC AGREEMENT, http://mlb.mlb.com/pa/pdf/cba_english.pdf Schedule A.

Moreover, the Supreme Court has ruled that the NLRA contemplates the application of state and local law even as to mandatory subjects of collective bargaining, provided that such state and local laws do not conflict "with any of the employee rights established or by unfair labor practices prohibited by the NLRA."[62] Given that there would not appear to be any such conflicts here, it is likely that a court would find no federal pre-emption here either.

Irrespective of the law, there are more practical concerns. One commentator, analyzing the possibility of the application of §2855 to the California clubs operating in the National Hockey League, concluded that despite the possibility of a player opting out of his contract after seven years successfully arguing that federal pre-emption does not exist he was unlikely to find suitors for his services given the likelihood that non-California club owners would collectively refrain from bidding for the rights of a player they nevertheless believed to still be under contract with his club.[63] Under this scenario, the commentator posited that NHL club owners might very well conspire to thwart this attempted free agency "loophole."[64] This would raise a host of other legal issues, such as whether such a conspiracy violated federal antitrust laws or whether it would be permitted pursuant to the non-statutory labor exemption (under the theory that such a conspiracy was necessary to enforce the league's "no tampering" provision – a provision that very clearly is a mandatory subject of collective bargaining).[65] While those issues might be a headache for those focused on the NHL or any other professional league with

[62] Grant Goeckner-Zoeller, *California Labor Code §2855 and Sports: Can Federal Labor Preemption Uphold the Enforceability of NHL Contracts for California Teams?,* 39 NYSBA Labor and Employment Law Journal, 33, 39 (Winter 2014).
[63] *Id.* at 41.
[64] *Id.*
[65] *See Id.*

clubs operating in California, they are not present when contemplating the application of §2855 to MLB due to the unique language of its CBA.

Specifically, although MLB is arguably exempt from federal antitrust laws, it is nevertheless subject to a collectively bargained "no collusion" rule that would quite clearly prohibit the sort of conspiratorial action discussed above and which might pass muster in the NHL and elsewhere. Ever since the 1970s the MLB-MLBPA CBA has contained the following language: "Players shall not act in concert with other Players and Clubs shall not act in concert with other Clubs."[66] The provision grew out of a joint holdout staged by Los Angeles Dodger star pitchers Sandy Koufax and Don Drysdale in 1966. In their attempt to gain leverage over Dodger management in their contract negotiations, Koufax and Drysdale announced that they would negotiate only in tandem, figuring that while the Dodgers might call either of their bluffs individually and refuse to negotiate, they would not risk losing the services of both pitchers for an extended period.[67] The tactic worked – even though Koufax and Drysdale each signed for less than the $166,000 salary they were seeking, they no doubt received more than they would have had they negotiated with Dodger management separately.[68] The power of such a conspiracy alarmed club owners across MLB and they sought to prevent it from ever happening again. While negotiating the 1977 CBA, the owners proposed a ban on player collusion. The players agreed, provided that the owners would similarly agree not to collude themselves. "I was only going to give in if it was a two-way street," said Marvin

[66] MLB Basic Agreement, Article XX (E)(1) – Individual Nature of Rights.
[67] *See* Steve Beitler, *The Empire Strikes Out: Collusion in Baseball in the 1980s*, 36 Baseball Research Journal, 58 (Fall 2007). *See also Collusion*, Baseball Reference.com, http://www.baseball-reference.com/bullpen/Collusion
[68] *See* Beitler at 58.

Miller, the Executive Director of the MLBPA. "They [the owners] yielded instantly. It wasn't a big deal."[69] It would become one, to the owners' detriment, very quickly.

By the mid-1980s the baseball world had been turned upside down. The reserve clause, which constrained salaries to the extent that radical plans such as Koufax and Drysdale's joint holdout were required just to have any hope of subverting it, was gone. In its place was a system of free agency that gave players the upper hand come negotiating time at last. Salaries rocketed skyward and owners were determined to put a stop to what they saw as the dismantling of the economic system they had benefitted handsomely from for over a century. During the 1985-86 offseason they saw their chance. That year, rather than fight amongst themselves for the top talent on the open market, driving salaries up in the process, the owners decided to collude and limit the impact of free agency.[70] Commissioner Peter Ueberroth requested and received updates on all negotiations between clubs and their players in order to disseminate among the owners information regarding individual players, club owners regularly contacted each other with updates regarding their negotiations with free agents, and the Boston Red Sox sent notes to their comrades regarding their interest in retaining catcher Rich Gedman in order to prevent Gedman from receiving competing offers for his services (Gedman received no other offers as a result and re-signed with the Red Sox).[71] As a result, of the 33 players who declared their free agency that offseason, 29 re-signed with their old club, having found few to no takers in what they thought was an open market.[72] At some point the owners even created a salary-offer databank accessible to all club owners so as to

[69] *Id.*
[70] *See Id.* at 59.
[71] *Id.*
[72] *Id.*

eliminate the possibility of a free and unencumbered free agent market.[73] Even top players, such as the Detroit Tigers' slugger Kirk Gibson, were shut out; Gibson received no competing offers at all despite a stellar season in 1985 and had no choice but to re-sign with Detroit for whatever they would offer him.[74] The scenario repeated itself the following two off-seasons with top players such as Montreal's Tim Raines and the Yankees' Ron Guidry finding no takers.[75] One player, superstar (and eventual Hall-of-Famer) Andre Dawson was so desperate that he presented the Chicago Cubs with a blank offer sheet and told them he would sign for whatever amount they were willing to pay him. The Cubs offered him $500,000 (less than a third of his open market value) and he signed on.[76] That season he won the NL MVP award and began a run of five consecutive All-Star Game appearances.

The MLBPA filed grievances after the 1986, 1987 and 1988 off-seasons, alleging collusion on behalf of the owners in violation of their CBA. They won all three cases and were awarded nearly $300 million in damages.[77] Former Commissioner Fay Vincent called the collusion cases "the most important event in baseball in the past 30 or 40 years…[t]he most egregious breaking of trust in baseball history…it destroyed any chance of civility on the part of the players."[78] Four years after the third arbitration ruling the game came to a halt when the animosity between the owners and players boiled

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[73] *See* Claire Smith, *Arbitrator Finds 3d Case of Baseball Collusion*, The New York Times, http://www.nytimes.com/1990/07/19/sports/arbitrator-finds-3d-case-of-baseball-collusion.html July 19, 1990. The owners eventually filed George Nicolau, the arbitrator. *See* Murray Chass, *Owners Fire Nicolau, Impartial Arbitrator,* The New York Times, http://www.nytimes.com/1995/08/16/sports/baseball-owners-fire-nicolau-impartial-arbitrator.html August 16, 1995.
[74] *See* Beitler at 59.
[75] *See Id; Collusion*, Baseball Reference.com
[76] *See Collusion*, Baseball Reference.com
[77] *See* Father Gabe Costa, Daniel Prial, *By The Numbers: Collusion – A Look Back*, CBS New York, http://newyork.cbslocal.com/2012/05/09/by-the-numbers-collusion-a-look-back/ May 9, 2012.
[78] *Id.*

over such that they could not agree on a new CBA. The 1994 World Series was cancelled along with the start of the 1995 season.

Although many fans have forgotten about the collusion cases, they remember their ugly legacy – the 1994-95 work stoppage – even if they are unaware of the connection between the two events. The MLBPA, however, has not forgotten about them as collusion has continued to remain an issue in their dealings with management. In 2002 and 2003 the MLBPA once again accused the clubs of it and pointed to certain free agent contracts that suggested collusion.[79] In 2006 the owners agreed to settle the grievance with a lump-sum payout of $12 million.[80] In 2010 the MLBPA again pointed to possible collusion by the owners as the reason why several players failed to catch on with clubs after having solid seasons.[81] Although nothing came of that allegation, it is clear that collusion remains a sore spot for the MLBPA and an issue they will vigilantly pursue.

Today, the animosity of the MLBPA toward club owners might appear to be a thing of the past. Major League Baseball has experienced a surprising renaissance in the aftermath of the stoppage with both the players and owners reaping the financial rewards. All of this has been the byproduct of an unparalleled period of labor peace – no work stoppages in over two decades. While disagreements have arisen during this time both sides have repeatedly concluded that the benefits of continued labor peace outweighed the costs of litigating these disputes so they have managed to resolve all of their differences amicably. Collusion, however, remains the third rail in their relationship. If there is one issue that could break the peace this is it – the guarantee originally sought by

[79] *See Collusion,* Baseball Reference.com
[80] *Id.*
[81] *Id.*

the owners to ensure fair dealing but which they themselves have violated on numerous occasions and which cost the players untold millions of dollars. Given all that has occurred with regard to the issue of collusion over the past several decades it is difficult to imagine that the owners could collude here again – this time in an effort to thwart a player's statutory right pursuant to §2855, without serious consequence.

Accordingly, it is unlikely that the owners would collude to prevent a top-tier player such as Mike Trout from exercising his statutory rights. The downside of such an act would be far too grievous for them and injurious to their bottom lines. It hardly requires a mystic to predict what might happen if the best player in the world declared his availability on the open market and found not a single taker.

With regard to lesser players who might also attempt to exercise their rights under §2855, here as well the owners would be hard-pressed to justify a decision to risk the revenue pouring into their coffers simply to band together to prevent a pedestrian player from receiving an extra million or two on the open market. The math just doesn't make sense. Perhaps certain club owners might decide, on their own, that wading into potentially murky waters to pursue a journeyman talent isn't worth the headache of the dispute that would invariably arise with the player's former (California-based) employer but it is hard to envision the sort of league-wide collusive efforts that occurred in the mid-1980s occurring here.

For these reasons, all California-based players, and particularly top shelf talent such as Trout, might very well find far less resistance to their seemingly bold and unorthodox attempt to obtain market-level compensation. At a minimum, such an attempt would, in effect, call the bluffs of club owners such as Philadelphia's John

Middleton who enjoy preaching their whole-hearted commitment to winning to their fans. "[T]his is my message [to Phillies fans]," Middleton told a local sports talk show host in April, 2017. "I'm intent on winning. We're going to get that trophy back somehow, or I'm going to die trying. That's just the way it's going to be. The only reason professional sports teams – I shouldn't say the only reason, but the most important reason professional sports teams exist – is to win. And if you're not aiming to win, then you really don't belong owning a sports team, in my opinion."[82] The silence of owners like Middleton when confronted with the possibility of wresting away the game's top player would be deafening. The more likely scenario would be that, as distasteful as these owners might find Trout's perceived statutory end-around, more than a few of them would reach out and attempt to sign him. For the alternative would be even more costly – an almost certain collusion allegation by the MLBPA, arbitration, and the potential end of decades of labor peace. And they wouldn't even have Trout as a consolation prize for their self-inflicted wound.

III. §2855 AS A NEGOTIATING TOOL

But what about the effect of §2855 on the relationship between a player such as Trout and his current employer, the Los Angeles Angels? Here as well its impact might be significant. Even though no California-based professional baseball player has ever received judicial blessing to pursue his statutory rights pursuant to §2855, this is, ultimately, of little matter when analyzing the potential impact of the statute on the relationship between these players and their current club owners -- perhaps the statute's

[82] Jonathan Tannenwald, *Phillies' Owner Middleton: Team Will Win World Series or He'll 'Die Trying,'"* The Philadelphia Inquirer, http://www.philly.com/philly/blogs/sports/phillies/Phillies-John-Middleton-Well-win-World-Series-or-Ill-die-trying.html April 20, 2017.

most immediate value lies in the mere threat of it being employed as a sword against an employer who refuses to pay his employee market value for his or her services. Given the types of employees §2855 was designed to protect, it forces the marketplace into contract negotiations where otherwise such external pressure would be walled-off. This, the California legislature has concluded, is sound public policy with regard to employees with unique or special skills. Actors and other artists fall into this category. As this section will show, professional baseball players do as well, as even baseball's commissioner has recently conceded.

It is important to acknowledge here that not all employment contracts fall under the auspices of §2855. Rather, the statute speaks only to those contracts calling for services "of a special, unique, unusual, extraordinary, or intellectual character, which gives [the service] peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law…"[83] The individuals performing such services are deemed irreplaceable and are, at least in the eyes of the California legislature, worthy of statutory protection given their unique talents and the concern that such talents might be exploited by employers looking to profit from them without adequate compensation. In short, it is their unusual skill that renders certain individuals particularly vulnerable to mistreatment and it has become the policy of the state of California to step in and protect the bearers of these talents so as to encourage their nourishment, to the benefit of the public. It is no coincidence that it is California where such a statute has flourished most prominently as the motion picture and recording industries – both replete with individuals of "special, unique, unusual, extraordinary"

[83] Cal. Labor Code §2855(a).

skills – are centered within the state. Although Major League Baseball was a late arrival to California (the first MLB clubs – the Los Angeles Dodgers and the San Francisco Giants – did not arrive until 1958), its players fall into the statutory definition of covered individuals as well.

If there ever was any doubt as to this (not that there reasonably could be given the age-old maxim that the most difficult feat to accomplish in sports is hitting a round ball with a round bat, along with the reality that even the game's best hitters fail seven out of every ten at-bats), commissioner Rob Manfred is on-record comparing ballplayers with their brethren in the arts. In his effort to provide support for a proposed bill that would have exempted minor league ballplayers from the Fair Labor Standards (FLSA)'s minimum wage and overtime laws, Manfred referenced a category of workers – artists and musicians – who are so exempt and contended that minor league ballplayers are no different. "Minor League Baseball players always have been salaried employees similar to artists, musicians and other creative professionals who are exempt from the Fair Labor Standards Act," he alleged.[84] While the bill – the foolhardy "Save America's Pastime Act"[85] – was ultimately withdrawn and disavowed by the California Congresswoman who proposed it, Manfred nevertheless continued to make the comparison, stressing that ballplayers are, in essence, artists.[86] What works for Manfred and MLB when it comes to the FLSA puts them in the crosshairs of §2855, however, as artists of various stripes are

[84] *See* Patrick Redford, *MLB Argues that Minor Leaguers Are Creatives, Like Artists And Musicians,* Deadspin.com, http://deadspin.com/mlb-argues-that-minor-leaguers-are-creatives-like-arti-1782927981 June 30, 2016.
[85] H.R. 5580 – 114th Congress (2015-16), https://www.congress.gov/bill/114th-congress/house-bill/5580/text?format=txt
[86] *See* Hannah Keyser, *Rob Manfred On Not Paying Minor Leaguers A Living Wage: "It's Not Really About The Money,"* Deadspin.com, http://deadspin.com/rob-manfred-on-not-paying-minor-leaguers-a-living-wage-1787446916 October 5, 2016.

precisely the class of employees contemplated within the language of the statute. It is not inconceivable that a ballplayer seeking jurisdiction under §2855 might quote Manfred's words right back at him should he or anyone else associated with MLB attempt to argue that while ballplayers are artists with regard to the FLSA they are something else entirely with regard to §2855.

Such an allegation need not have judicial approval to have teeth and produce immediate results. Indeed, the mere threat of invoking §2855 is sometimes enough to provide the leverage necessary to compel an otherwise hesitant employer to consider the marketplace when negotiating with an employee otherwise under contract. Recently, the cast of the hit situation comedy "Modern Family" threatened to litigate under the statute in order to compel their employer, Twentieth Century Fox, to renegotiate their contacts even though they had not even reached the seven-year mark.[87] Shortly after filing their complaint Twentieth Century Fox blinked and the desired negotiations took place and were rapidly concluded, to the satisfaction of the "Modern Family" cast.

A notable allegation contained within the "Modern Family" complaint was the one that contended that the success of the show "has been built upon a collection of illegal contracts: The *Modern Family* cast's employment agreements with Twentieth Century Fox Television ("Fox"), the production company behind the show, violate the "Seven-Year Rule" under California Labor Code section 2855(a)."[88] The complaint was one for declaratory relief, asking the court to hold that because their contracts called for employment beyond the seven-year limit, they "are illegal and wholly void" immediately,

[87] Vergara, et. al. v. Twentieth Century Fox, et. al. Superior Court of the State of California, Central District, No. BC488786, filed July 24, 2012.
[88] *Id*, at ¶ 14.

even though the seven-year mark had not yet been reached ("An illegal contract is void; it cannot be estopped to deny its validity…The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void.").[89] Although most commentators agree that §2855 only comes into play once a covered personal services contract reaches the seven-year mark, the "Modern Family" cast possessed significant leverage due to the popularity of the show; enough leverage that Twentieth Century Fox ultimately decided that it was not worth alienating the cast to argue a point it most likely had some level of confidence it would win.[90] Then again, what if it lost? The stakes were far too high for Twentieth Century Fox to risk everything simply to prove a point to actors it ultimately wanted to continue working with. So it returned to the bargaining table and hammered out renegotiated contracts with the cast. In the end, it was the threat of §2855 that drove it to do what it otherwise had no interest in doing.

Such a threat is not unique to Hollywood. During their joint 1966 holdout, Sandy Koufax and Don Drysdale allegedly threatened to file suit under §2855 in order to motivate Dodger owner Walter O'Malley and general manager Buzzie Bavasi to negotiate with them despite the presence of the reserve clauses in their contracts that rendered the players perpetual Dodger employees and which otherwise removed all impetus on behalf of management to negotiate with their players as they were continually under contract. In his autobiography, Drysdale recalled the threat:

> Bill [Hayes – the attorney for Koufax and Drysdale] and his friends unearthed this statute late in March and somewhere along the line, Mervin LeRoy, a prominent

[89] *Id*, at ¶ 71.
[90] *See* Ramer.

> film producer who was a friend of Mr. O'Malley, got wind that Hayes had been checking into the personal-services contract issue…And I think Mr. O'Malley must have realized we were on to something, because it wasn't a week after Bill Hayes made his discovery that our holdout ended. I'm convinced that was the major reason why the Dodgers moved, because we knew they had found out about Bill Hayes's little discovery.[91]

Although Koufax claimed that the threat to sue under §2855 was never a serious one,[92] that misses the point. It was the mere threat that garnered the result, here as well as with the cast of "Modern Family" nearly a half-century later. There is little reason to believe that it wouldn't be similarly effective within MLB today. Indeed, it is likely that the potential applicability of the statute has been at least a brief topic of conversation in at least a few contract negotiation sessions between a California club and the agent for a pre-free agent-eligible ballplayer.

IV. THE RECORDING ARTIST EXCEPTION TO §2855

Although §2855 rose to prominence as a tool wielded by movie actors, as the Hollywood studio system faded by the 1960s it became less necessary in that industry (but not in television, as evidenced by the 2012 "Modern Family" complaint). Taking its place, along with television, was the recording industry, which was increasingly centered in Los Angeles and where long-term recording contracts looking very much like the old Hollywood studio contracts abounded. One significant difference, however, lay in how the terms of these contracts were determined. Rather than a contract spelled out in years (like the old seven-year studio contracts), the typical recording industry contract was defined by the number of recordings the artist was required to produce in order to fulfill

[91] Don Drysdale & Don Verdi, *Once a Bum, Always a Dodger*, 129-30 (1990)
[92] *See* James R. Devine, *The Legacy of Albert Spalding, The Holdouts of Ty Cobb, Joe DiMaggio, and Sandy Koufax/Don Drysdale, and the 1994-95 Strike: Baseball's Labor Disputes are as Linear as the Game*, 31 Akron L. Rev. 1, 39 (1997).

his or her end of the bargain.[93] Ordinarily, such contracts called for the artist to deliver seven albums.[94] While the frenetic pace of moviemaking during the studio-system years could easily see an actor complete seven films within his or her seven-year studio contract (Olivia DeHavilland appeared in 26 films released between 1935 and 1942), it was far less often the case that a recording artist produced seven albums within that same time frame. At best, most recording artists produced perhaps an album once every other year, reserving the time between releases for tours and other forms of promotion in support of their previous recording. As such, and as the music industry evolved in the 1980s (with necessary time taken from recording new songs to producing music videos promoting their current ones) it became nearly impossible for recording artists to satisfy the terms of their contracts without their contracts running afoul of §2855.

Faced with an increasing number of unenforceable contracts the recording industry began lobbying the California legislature to amend §2855 to exempt the recording industry from the statute's seven-year rule. Without such an exemption, the record labels argued, they faced financial hardships as artists could easily "sit out" the last few years of their contracts in order to become free of their contractual obligations.[95] After all, "sitting out" three years of a recording industry contract oftentimes merely meant failing to deliver one album. Such tactics would limit the labels' ability to maximize the profit generated by a rising star.

In 1987 their lobbying paid off when the statute was amended to add §2855(b) which states:

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[93] *See* Ramer; Goeckner-Zoeller, 36-37.
[94] *Id.*
[95] *Id.*

(b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, may not invoke the provisions of subdivision (a) without first giving written notice to the employer in accordance with Section 1020 of the Code of Civil Procedure, specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a).

(2) Any party to a contract described in paragraph (1) shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.

(3) If a party to a contract described in paragraph (1) is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action that, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.[96]

Clause (3) of this section appears to have been drafted to compel settlement between record labels and their artists.[97] In its wake, typical recording industry contracts now contain liquidated damages clauses which set forth the penalty for an artist walking away from his or her contractual obligation.[98] Sitting out one's recording contract now comes with a price, one many recording artists choose not to pay. As a consequence, today many recording contracts last beyond seven years and are enforceable in toto. Despite the fierce opposition of the Recording Artists Coalition, which argued that the amended statute's effect of tying an artist to contracts for the number of albums recorded irrespective of the seven-year rule was "unfair and anticompetitive," the amendment

[96] Cal. Labor Code §2855(b).
[97] *See* Ramer.
[98] *Id.*

passed and was signed into law.[99] At the end of the day, the legislature sided instead with the Recording Industry Association of America which argued that the amendment was necessary "because recording companies needed a remedy to prevent artists from sitting out their contracts and to enable the companies to recoup their significant investments in the artists."[100]

In 2007 a similar exemption for professional athletes based in California was proposed but, unlike the recording artists' exemption, this one failed to garner sufficient support.[101] The proposed amendment grew out of frustration arising out of the failure of two California clubs (the Angels and the Oakland A's) to sign the previous off-season's marquee free agent, Alfonso Soriano. Rather than accept the seven-year contracts offered by the Angels and A's, Soriano signed an eight-year deal with the Chicago Cubs. Contending that §2855 was to blame for the home-state nines' inability to land Soriano, the authors of the amendment attempted to remedy this perceived disadvantage to ensure that, going forward, no California club would ever again be so hampered: "in this salary-cap era, [§2855] puts California clubs at a significant disadvantage when it comes to free agency, forcing them to pay out more money over less time in order to attract high-profile players to their teams…[T]his bill would…level[] the playing field for these teams in this era of free agency."[102] Setting aside the misstatement that MLB operates under a salary cap, supporters of the amendment ignored the reality that there was, in fact, nothing

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[99] *See Bill Analysis: Assembly Committee On Labor And Employment, AB 465* http://leginfo.ca.gov/pub/07-08/bill/asm/ab_0451-0500/ab_465_cfa_20070327_130510_asm_comm.html March 28, 2007.
[100] *Id.*
[101] *See* Pat Iversen, *An Obscure California Law Could Let These NHL Stars Opt Out Of Contracts Right Now*, SB Nation, http://www.sbnation.com/nhl/2017/1/5/14177334/anaheim-ducks-los-angeles-kings-san-jose-sharks-california-law-contract-opt-out-perry-burns-kopitar January 5, 2017.
[102] *See Bill Analysis.*

stopping the Angels or A's from matching the Cubs' offer or even bettering it – the statute doesn't prevent the making of personal services contracts longer than seven years, it merely provides the performer with a statutory opt-out clause after that point. Indeed, the next few years would see the Angels sign Albert Pujols to a 10-year contract, the Dodgers sign Matt Kemp to an eight-year contract and the Giants sign Buster Posey to a nine-year contract. Moreover, well before the proposed amendment, the Los Angeles Lakers signed superstar point guard Magic Johnson to a 25-year personal services contract. At the time of the 1981 signing, all sides acknowledged the potential applicability of §2855 but claimed not to be bothered by it. "The law [§2855] was taken into consideration during the negotiations," Johnson's agent said upon the signing, "but [Johnson's] relationship with Dr. Buss [the owner of the Lakers] and the Laker fans are so strong that Magic felt that's the only place he wanted to play."[103]

While perhaps the fear of Soriano's ability to opt-out of his contract down the road played some part in the Angels' and A's' hesitance to offer him a longer contract, in retrospect it is clear that any such reticence would be unfounded. Soriano was going into his age-31 season when he signed with the Cubs and by the time he had reached the seventh year of his contract (when he was 37) he was far into the downside of his career. He was traded during that season and retired the following year. By that point he was clearly no longer worth the $18,000,000 he was being paid that year[104] and if anybody had the option to opt-out of Soriano's contract it would have been the Cubs if only they had had the ability to do so.

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[103] *See* Sam Goldpaper, *Long Contract Gives Johnson an Option*, The New York Times, June 27, 1981, 16.
[104] *See Alfonso Soriano*, Baseball Reference.com, http://www.baseball-reference.com/players/s/soriaal01.shtml

As Soriano's predictable decline suggests, it is not the open market free agents who are most likely to exercise their statutory rights and opt-out of their lengthy contracts after seven seasons. Because most of these players don't hit the open market until they're well into their athletic primes, they're likely to play out their contracts regardless of their statutory rights given their rapidly declining market leverage as they age. For example, Pujols signed his 10-year contract as he was entering his age-32 season. By the start of the eighth year of his contract with the Angels, Pujols will be 39, hardly an optimal age for a ballplayer seeking maximum value on the open market. During that season the Angels will be paying him $28,000,000.[105] It is unfathomable that he would be able to better that, or even come close to matching that, should he decide to exercise his statutory rights and opt-out of his contract at that point.

For this reason, the rationale behind the proposed 2007 professional sports exemption was fatally flawed. Contrary to the assertions made in support of the amendment, open market free agents are more likely to be paid above-market wages than below-market wages by the completion of the seventh year of their contracts and, accordingly, are unlikely to assert their statutory rights to become free agents once again. In truth, the Angels or the A's were unable to sign Alfonso Soriano not because of §2855 but because they simply failed to offer him more money than did the Chicago Cubs. As the subsequent signings of Pujols, Kemp and Posey demonstrated, §2855 is largely irrelevant when it comes to these types of ballplayers.

As stated earlier, this does not mean that the statute is wholly irrelevant, however. There is a class of players who are, indeed, potentially impacted to a significant degree

[105] *See Albert Pujols*, Sportrac.com, http://www.spotrac.com/mlb/los-angeles-angels-of-anaheim/albert-pujols-795/

by the applicability of §2855. These are players like Mike Trout – homegrown talent who have excelled at the Major League level but who have not accrued enough service time (six major league seasons) to exercise their free agent rights under MLB's CBA. These players (the Dodgers' star pitcher Clayton Kershaw and the Giants' star catcher Buster Posey being earlier examples), once their minor league service is also taken into account, have exceeded the seven-year mark in their relationship with their employers but remain under contract with them. These are the players – young players just entering the primes of their careers -- who are the most likely to be paid below-market wages and who §2855 seems designed to protect. As stated above, under MLB's current rules, a player can remain the property of a club for up to 13 seasons (minor and major league combined) before being eligible for free agency[106] -- six years beyond the limit set by §2855. Might the statute speak to them? The following section argues that it does and offers a suggestion as to how MLB might tweak its rules so as to comply with §2855 while not inflicting damage on its California clubs in the process.

V. SALARY ARBITRATION AND THE RIGHT OF FIRST REFUSAL

Beyond potential superstar talent such as Trout, Kershaw and Posey, there exists a significant contingent of quality major league players who are toiling for below-market Major League wages. These are the boatload of players who are on the upside of their careers yet are not eligible for free agency. Accounting for their minor league years (which, pursuant to *De La Hoya*, must be accounted-for under §2855), these players at least arguably fall under the auspices of the statute. Yet, to date, not a single such California-employed player has demanded free agency. Much of this is most likely due

[106] *See generally*, The Official Professional Baseball Rules Book; The MLB Basic Agreement.

to ignorance of the law or a fear of making waves. But some of it surely is due to the presence of salary arbitration which has, to a degree, brought the market into contract negotiations with these pre-market players. And it is here where MLB can perhaps tweak the system a bit to bring it into compliance with §2855.

Briefly, salary arbitration first became part of MLB's CBA in 1973.[107] At first the owners considered it a minor concession to the increasingly agitated Players Association, which was becoming vocal about the continued presence of the game's reserve system (the owners had narrowly dodged a fatal bullet the year earlier when the Supreme Court ruled in their favor in *Flood v. Kuhn,*[108] which would have stripped them of their antitrust exemption and brought the reserve clause down with it). In an effort to ameliorate the players, the owners agreed to include a salary arbitration provision in the 1973 CBA in the hope that this would satisfy them and dissuade the MLBPA from continuing to press the issue of the legality of the reserve clause.[109] More concretely, the owners hoped that salary arbitration would eliminate the sorts of salary disputes and holdouts that were becoming increasingly common and contentious. Rather than engage in drawn-out contract negotiations with their players every spring, salary arbitration offered the option of speedy resolutions to such disputes. Of course, arbitration brought with it salary decisions made by a neutral arbitrator, which represented some measure of a loss of control on behalf of the owners. However, this was outweighed by its efficiency as well as the reality that salaries across baseball's universe were depressed due to the reserve

[107] *See MLBPA History: The 1970s*, MLB Players.com, http://www.mlbplayers.com/ViewArticle.dbml?DB_OEM_ID=34000&ATCLID=211157624
[108] 407 U.S. 258 (1972).
[109] *See* Jonathan M. Conti, *The Effect of Salary Arbitration on Major League Baseball,* 5 Sports Law J. 221, 228 (1998).

clause; there appeared to be little chance that an arbitrator would be able to shake things up all that much.

Within three years this last assumption was blown out the window.

At that point, in 1976, free agency at last had come to MLB. After an independent *grievance* arbitrator ruled that the Uniform Players Contract, as drafted by the owners, only preserved the owners' right to unilaterally renew a player's contract for one additional year after his contract had expired, the reserve clause was effectively dead; the 1976 CBA contemplated free agency for the first time.[110] It was at this moment when the small concession made by the owners three years earlier suddenly transformed into a gigantic one. For the arbitration rules, as agreed-upon within the 1973 CBA and renewed in 1976, now linked arbitration-eligible players with those who had exercised their free-agent rights. In the process the salaries of the arbitration-eligible players skyrocketed.

Pursuant to the CBA, a salary arbitrator was (and is)[111] empowered to take the following factors into consideration in determining a player's salary: the player's overall performance, special qualities of leadership, special qualities of public appeal, length and consistency of the player's career contribution, the record of the player's past compensation, *comparative baseball salaries*, the existence of physical or mental defects on the part of the player, and recent performance record of the Club, including but not limited to: league standing and attendance (emphasis added).[112] Most importantly, the CBA states the following:

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[110] *See MLBPA History: The 1970s.* Free agency didn't officially become part of MLB until July 12, 1976, when the CBA was finally agreed-upon after the owners had exhausted their legal options to overturn independent grievance arbitrator Peter Seitz's 1975 ruling.
[111] Since 1997 there has been a three-person arbitration panel rather than a single arbitrator.
[112] Basic Agreement, art. VI(E)(10)(a).

> The arbitration panel shall…give particular attention, for comparative salary purposes, to contracts of players with Major League Service not exceeding one annual service group above the Players' annual service group. *This shall not limit the ability of a player or his representative, because of special accomplishment, to argue the equal relevance of salaries of players without regard to service, and the arbitration panel shall give whatever weight to such argument as is deemed appropriate.* (emphasis added).[113]

Pursuant to this language any large free agent contract will invariably have an impact on salary arbitration awards in subsequent years. As such, the marketplace entered the salary arbitration process, at least to a degree, creating something of a "fictional labor market" where there otherwise would be no market at all.[114] Although not a true market (in that, given its limitations, it necessarily disregards the supply of labor throughout the league)[115] the bootstrapping of arbitration-eligible players to their comparable free-agent peers brought at least a whiff of the open market to a salary negotiation initially designed to shut the market out altogether.

Although salary arbitration was initially available only to players who had completed three (but fewer than six) full Major League seasons, the rules were tweaked after the owners were caught manipulating them – the MLBPA noticed that many clubs were maximizing the value of their young players and depressing their salaries by keeping them in the minors for the beginning of their rookie seasons and then promoting them shortly after Opening Day, thereby essentially squeezing a full season out of the player without that season triggering the arbitration process three years hence. In order to remedy this, the concept of the "Super Two" was introduced into the CBA. A "Super

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[113] *Id.*
[114] *See* Conti, at 239-40 (quoting John B. LaRocco, *Reforming Salary Arbitration,* Arbitration 1994, Proceedings of the 47th Annual Meeting, National Academy of Arbitrators 213-14 (Gladys W. Gruenberg ed.).
[115] *See* Conti, at 240.

Two" is a player who has not quite accumulated three years of Major League service time but who ranks within the top 22% of service time among players between two and three years of big league service.[116] This effectively prevents clubs from benefitting financially by delaying the arbitration process through holding young players in the minors as had become their practice. Of course, clubs could still put off the arbitration process for another year if they hold a player down long enough such that he is unable to rank among the top 22% in service time but this requires holding the player down for approximately two months of his rookie season, thereby depriving the Big League club of his service for a significant chunk of the season. In the end, all of this is about money and the club owners' never-ending attempt to hold on to as much of it as possible by shutting their players out of the open market. A seemingly benign concession at first, arbitration has come to frustrate them in this regard and they have regretted it ever since.

From the owners' perspective, an arbitration system that is linked to the free agent market is inherently unfair in that it results in rapidly-escalating player salaries.[117] Of course they are correct that arbitration invariably boosts salaries but their contention that this is unfair ignores the fact that prior to arbitration, player salaries are below-market and unfair to the player.[118] To the extent that club owners contend that arbitration imperils the viability of their businesses, one might reply that any business that depends upon the exploitation of its workforce in order to remain solvent is contrary to the public interest and precisely the sort of business §2855 was designed to regulate. In any event,

[116] Basic Agreement, art. VI(E)(1)(b).
[117] *See* Conti, at 236.
[118] *See* Note, *Albert Pujols: Major League Baseball Salary Arbitration From A Unique Perspective*, 22 Cardozo Arts & Ent. L.J. 219, 238 (1997), noting that arbitration awards inevitably push contract negotiations for arbitration-eligible players towards market level. Without such a push, these contracts would invariably be well below-market.

there is no evidence that salary arbitration has damaged the owners' finances; to the contrary, the game today is many times more profitable than it was in 1973. Despite this, the owners attempted to unilaterally eliminate the salary arbitration provision of the CBA during the 1994 work stoppage.[119] Since salary arbitration is a mandatory subject of bargaining, a federal court subsequently prevented them from doing so.[120]

Today it is clear that salary arbitration is here to stay in MLB. And while it does bring the market somewhat into play it is likely that this, alone, would not be enough for a court to conclude that the requirements of §2855 have been met. After *De La Hoya*, any mid-term extension or superseding contract (such as a salary arbitration award) pursuant to MLB's current rules will almost certainly be considered merely a continuation of the initial contract because even with a measure of market pressure applied, the resulting extension is still signed under some duress (after all, the player does not have the option to consider offers from other clubs and ultimately has no choice but to continue to work for his present employer). Once the California legislature failed to enact the proposed statutory reforms in the wake of the *Manchester* decision the law clarified and became set in granite: an actual, full and free, open market break is required to sever an initial contract from a subsequent one. Absent this break, §2855's seven-year clock will not reset.

Therefore, in order for MLB to come into compliance with §2855 some tweaks are in order. One which might do the trick would be for MLB to adopt something similar to the arbitration wrinkle the NHL employs – the "walk away, walk back" provision. Under the NHL's CBA club owners have the option of rejecting the arbitrator's decision,

[119] *See* Conti, at 222.
[120] *Id.*

thereby enabling the player to become a free agent (this is in contrast to MLB's arbitration rules which consider the player "a signed player upon the submission of the salary issue to arbitration…"[121]). The player then is free to negotiate with any club but if he fails to receive a satisfactory offer he may then "walk back" to his former employer and accept the last pre-arbitration offer made by the club.[122] Clearly, this progression of events would restart the clock as far as §2855 is concerned. However, those players who were not subjected to the "walk away, walk back" option would still most likely be considered on their initial contracts after their arbitration award (or contract settlement prior to arbitration).

Building on this model, perhaps MLB might borrow from the NHL's approach and insert, as discussed earlier, a "right of first refusal" into its arbitration process. Under this approach, arbitration-eligible players would, if the club chooses, remain tied to their current employers prior to their free-agent years. However, they would receive the benefit a salary reflecting their value on the marketplace because post-arbitration hearing either the club or the player would have the option of "walking away" from the ruling. If the club was not satisfied with the arbitration panel's ruling it would be under no immediate obligation to the player; it could set him free to negotiate a better deal on the open market. The player would have the same option if he was not satisfied with the panel's ruling. In either case, however, the club would retain a right of first refusal with regard to all subsequent offers that exceeded the arbitration award (the player would likewise maintain the right to "walk back" and accept the club's last pre-arbitration

[121] Basic Agreement, art. VI(E)(4).
[122] *See generally*, Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 Sports Lawyers J. 189, 205-06 (2003); Stephen J. Bartlett, *Contract Negotiations and Salary Arbitration in the NHL: An Agent's View,* 4 Marq. Sports L.J. 1 (1993).

offer). Provided that arbitration was triggered *either* upon the completion of the player's third Major League season (or second if he was a "Super Two") *or* upon the completion of his seventh professional season with the same organization, whichever came first, it is likely that the requirements of §2855 will have been met. As for those players who settle prior to the arbitration ruling (the vast majority of them, given that only 7-8% of all arbitration-eligible cases reach a decision by the panel[123]) it is indeed the case that their settlements most likely would not satisfy the strictures of §2855 and restart the seven-year clock. In order for clubs to come into compliance with these players their settled contracts must contain a player-triggered arbitration provision that would enable the player to opt-out of his contract after the seven-year mark (of professional baseball within the organization at any level, not merely Major League service time) and file for the above-described arbitration process. While this might at first glance appear to be disadvantageous to the club owners it must be remembered that by triggering the opt-out provision the player is, in effect, cancelling his contract in toto. Should he miscalculate his market power he might very well wind up with a less favorable deal, and one lasting for perhaps only one season rather than the multi-year security he enjoyed under his former contract. In short, exercising the opt-out provision involves significant risk on the player's behalf. Most players would perhaps not choose to exercise it. The few who do, and who end up with improved terms as a result, will be the ones who, necessarily, were playing under a contract paying them sub-market wages. These are the precise category of performers §2855 was designed to protect.

[123] *See* Matthew Mitten, et. al, *Sports Law and Regulation,* 551, Wolters Kluwer Law and Business (2009).

VI. THE BENEFITS TO CALIFORNIA CLUBS OF COMPLYING WITH §2855

Failing a tweak to the CBA's arbitration rules California clubs are at the mercy of §2855 should it ever be applied to them. Which begs the obvious question: what, practically-speaking, might happen if a California-employed player attempted to exercise his statutory rights? This section first takes a stab at answering it and then argues that the baseball world wouldn't end should the statute be formally applied to the California clubs. In fact, these clubs may even benefit from it.

First, contrary to Scott Boras's assumption, it is unlikely that the matter would be litigated in federal court. Rather, it seems as if the CBA's grievance arbitration procedure would be triggered, at least as a first step in resolving the dispute that would surely arise. And the arbitration process would get complicated quickly – to the point where the player's employer, as well as all of the other clubs, would most likely seek an amicable resolution rather than prolonged and protracted litigation. Assuming that the player in question is Mike Trout, here is one guess as to the probable procession of events.

Rather than seeking permission to declare his free agency, all Trout would be required to do is notify the Angels that he is exercising his statutory right under §2855 to opt-out of the remaining years of his contract. He would then notify all other clubs that he is a free agent and willing to listen to any bids for his services. The Angels would most likely respond by filing a grievance pursuant to the CBA. Meanwhile, Trout's agent, Craig Landis, would be by the phone awaiting a bevy of offers for his client, the undisputed best player in the game. Given that it is inconceivable that such a player

would not receive any offers on a truly open market (Landis might even remind folks of Phillies owner John Middleton's soliloquy on a responsible owner's sole focus on winning or dying trying), should none be forthcoming (unlikely, as discussed above) he might very well file a grievance of his own alleging collusion on behalf of the owners, thus harking back to the dark days of player-management relations. These twin grievances would barrel toward hearings in a matter of months or even weeks, not the four-plus years alleged by Boras. Neither of these hearings would be ones the owners would want to argue. The collusion hearing would imperil the détente with the MLBPA that has helped to line the owners' pockets with gold; the contractual hearing carries with it the risk that the arbitrator would rule that the CBA is subject to state and local law – an issue that has already been affirmatively resolved by the Supreme Court.[124] While the Angels might choose to override the arbitration process and take their case to court instead, they'd be put in an odd position should they do so – they'd initially have to argue that the CBA is pre-empted by state law just to establish jurisdiction. If they were successful here they'd then surely lose on the merits (for if state law applies, then so does §2855). None of this would end well for them. Given the probability of defeat along with the collateral damage inflicted in the process it is likely that the Angels, pressured by the other club owners, would seek to resolve the issue before the hearings ever took place. What that resolution would look like is anybody's guess but one thing is for certain – Mike Trout would walk away from it with a significantly larger paycheck, one that more accurately reflects his true market value.

[124] *See Lividas.*

Things needn't end so poorly for the Angels, though. By embracing §2855 rather than fighting it the Angels should recognize that the statute puts them in a superior bargaining position relative to their non-California-club brethren when competing for open-market free agents such as Alfonso Soriano. This is because any long-term offer made to such players made by a California club comes with it something not automatically included in the offers made by their rivals – the seven-year opt-out option. As such, and with the financial terms being otherwise equal, a 10-year contract offer from the Los Angeles Dodgers is superior to one made by the New York Mets due to the applicability of §2855. If the Mets hoped to compete with the Dodgers here they'd have little choice but to match them with an opt-out clause of their own. In the end, as far as traditional open-market free agents are concerned, §2855 would most likely have no impact on a California club's ability to sign top talent given that all it would do is compel their rivals to match it in their offers.

§2855 would play a more significant role in a California club's ability to retain its younger, pre-free agent players, as discussed above. The arbitration tweak explored earlier would help to eliminate any competitive disadvantage suffered by the five California clubs with regard to these players and would, moreover, be in keeping with the arc in MLB (to the owners' perpetual chagrin, but an unmistakable arc nonetheless) towards bringing the market into play ever-earlier in the contract negotiation process.[125] Free agency, arbitration and, most recently, the "Super Two" exception all have the same goal – to apply market pressure where previously there was none. The recent proliferation of player-activated "opt out" clauses in open market free agent signings has

[125] *See, e.g.,* the "Super Two" provision in the Basic Agreement along with arbitration rules generally.

only accelerated it, with the result being that while players might be signing longer contracts than ever before, the market remains a powerful governing force going forward even though these players are technically under contract for the foreseeable future and, in some cases, for the likely duration of their careers.[126] The proposed "walk-away, walk-back, right-of-first-refusal" modification to the current arbitration rules is little more than a continuation of this four-decade long trend.

Shortly after free agency was established in MLB in 1976, while most owners were apoplectic over the prospect of allowing the market to dictate player salaries, fearing as they did the end of baseball as they knew it, one owner saw things differently. All of the players should be declared free agents at the conclusion of every season, said maverick Oakland A's owner Charlie Finley. Let the market dictate salaries for everybody rather than create an artificial market that would only raise them for the few declared "free agents" by the rules then being hammered out by the owners and the MLBPA.[127] This would ultimately inure to the benefit of the owners, he argued, as no one player could ever receive an above-market salary in such an environment.[128] His fellow owners scoffed and laughed at Finley, as they liked to do. But he was right. What Finley understood, and what most owners today still don't, is that an open market is ultimately a fair and just market. Nobody will overpay in such a market and no player

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[126] *See* Anthony McCarron, *OPT-OUT CRAZY: First used to lure Jack Morris to Twins, Yoenis Cespedes-Mets deal demonstrates how clause has become fad in baseball* , New York Daily News, http://www.nydailynews.com/sports/baseball/opt-out-clause-fad-baseball-article-1.2514793 January 30, 2016; Cliff Corcoran, *How newly popular opt-outs can be a team-friendly contract tool,* Sports Illustrated, https://www.si.com/mlb/2016/03/07/opt-out-clause-contract-david-price-jason-heyward March 7, 2016; Jon Terbush, *Meet the Opt-Out Clause: A Baseball Player's Best Friend,* The Week, http://theweek.com/articles/452507/meet-optout-clause-baseball-players-best-friend January 22, 2014.

[127] *See* Nick Acocella, *Finley Entertained and Enraged,* ESPN Classic: Sportscentury Biography, http://www.espn.com/classic/biography/s/Finley_Charles.html

[128] *Id.*

will be unjustly rewarded. For the market is the market. Arm-twisting, monopolistic leverage and intimidation play no roles. In the end everybody ends up with what they deserve. §2855, as well, is designed to bring the market into play so as to enable performers with special skills to receive the compensation their talents merit. Applying it to California baseball organizations cannot hurt the game; it can only make it better. The owners have cried wolf seemingly every time their business model was altered over the past several decades, alleging each time that the change would ruin the game once and for all. Instead, the game itself has remained as it has been for over a century and the business model has only become more lucrative for them with every adjustment. Compelling them to comply with §2855 would very well cause them to cry "Trout" this time around. But history suggests it will only make them richer in the end.