Major League Baseball's 'Foul Ball': Why Minor League Baseball Players Are Not Exempt Employees Under the Fair Labor Standards Act

Lucas J. Carney*

* J.D. Candidate, University of Iowa College of Law, 2016; B.A., Economics & Finance, University of Northern Iowa, 2013. I would like to extend my sincere gratitude to my friends, family, and parents, Jim and Cheryl Carney, for their continuous support of my educational pursuits and academic career. I would also like to thank the members of Volume 41 of *The Journal of Corporation Law*, especially the Editorial Board, for their exceptional efforts in bringing this Note to publication.

I. INTRODUCTION

Most fans and casual followers of Major League Baseball (MLB) are acquainted with the meteoric rise in salaries MLB franchises have been paying their major league talent over recent decades. The same cannot be said, however, regarding MLB's compensation of arguably its most valuable commodity—Minor League Baseball (MiLB) players. A lawsuit filed on behalf of current and past minor leaguers alleges that, while major league salaries have increased 2000% since 1976, minor league salaries have increased just 75% over the same period.[1] *Senne v. Office of the Commissioner of Baseball* pits representatives of the MiLB players versus MLB in a Fair Labor Standards Act (FLSA) lawsuit.[2] The minor leaguers allege that MLB—functionally operating as a cartel—has failed, and continues to fail, to pay the federal minimum wage and mandatory overtime required by FLSA.[3]

This Note will explore the core, interrelated legal aspects of the *Senne* lawsuit and examine a possible pair of MLB's FLSA defenses. Through generally analyzing these related legal issues, this Note seeks to answer whether MiLB players are statutorily exempt, non-covered employees under FLSA section 213.[4] Specifically, however, this Note will illustrate why MLB will unlikely achieve dismissal of the *Senne* complaint purely on the basis of the section 213 exemptions.

Part II begins by providing background on the structure of professional baseball's labor market, MLB's historic antitrust exemption, the corollary Curt Flood Act, the relevant FLSA protections and exemptions, and concludes by presenting the nature and factual basis for the *Senne* minor leaguers' FLSA lawsuit.[5] Part III then analyzes whether MLB can effectively defend the *Senne* claims on grounds that MiLB players are exempt employees under section 213—ultimately concluding it cannot.[6] Part IV therefore concludes by recommending that MLB "play ball" by settling the *Senne* lawsuit and work with the minor leaguers to form a MiLB player union similar to the Major League Baseball Players Association (MLBPA).[7]

II. BACKGROUND

This Part develops the foundation of interrelated legal issues essential to answering whether MiLB players are exempt from FLSA protection and, furthermore, understanding

1. *See* Complaint ¶ 8, at 2, Senne v. Office of the Comm'r of Baseball (No. 3:14CV00608) 2014 WL 545501 (N.D. Cal. Feb. 7, 2014), ECF No. 1 [hereinafter *Senne* Complaint] (alleging that the meager increase in salaries paid to minor leaguers has not even kept pace with inflation of 400% over the same period).

2. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (1938).

3. 29 U.S.C. §§ 206–07.

4. *See generally* 29 U.S.C. § 213(a)(1) & (3) (providing exemption from the FLSA minimum wage and overtime requirements for any qualifying professional or seasonal employee).

5. *See infra* Part II (providing relevant background material in answering this Note's general issue of whether MiLB players are exempt from FLSA protection under section 213).

6. *See infra* Part III (analyzing whether MiLB players are exempt professional employees under section 213(a)(1) or exempt seasonal employees under section 213(a)(3)).

7. *See infra* Part IV (arguing that MLB's interests will be best served through settlement, which should ultimately culminate in a MiLB labor union and right to collectively bargain).

why MLB should seek to settle the *Senne* lawsuit. Section II.A begins with an introduction of professional baseball's cartel-like labor market, which results in the suppression of wages paid to minor leaguers.[8] Sections II.B–C discuss MLB's judicially-created antitrust exemption[9] and Congress's subsequent attempt to limit MLB's protection under its exemption.[10] Section II.D then presents the FLSA minimum wage and overtime compensation provisions, as well as FLSA's statutory exemptions.[11] Finally, Section II.E concludes by setting forth the factual basis for the *Senne* minor leaguers' FLSA claims.[12]

A. An Overview of Professional Baseball's Labor Market

The minor leaguers allege that "MLB has a long, infamous history of labor exploitation dating to its inception."[13] An introduction into the structure of professional baseball's labor market is needed to understand the origin of this exploitation.[14] Abstractly, MLB has a "three-tiered labor market."[15] First, players with three or fewer years of professional experience are subject to the "reserve clause" system.[16] Second, players with three to six years of experience remain subject to the reserve clause system but may settle salary disputes through outside arbitration.[17] Finally, players with more than six years of experience, and not currently under contract with a team, may opt for free agency.[18]

1. The Reserve Clause

In essence, the reserve clause "perpetually ties a player to a specific team unless the owner of that team trades the player or sells the player's contract to another team."[19] No player is permitted to participate in professional baseball until the player has signed a Uniform Player Contract (UPC).[20] Until 1976, the reserve clause had been mandated in all

8. *See infra* Section II.A (laying the critical foundation that is professional baseball's labor market structure).

9. *See infra* Section II.B (introducing the Supreme Court's trinity of cases giving rise to MLB's exemption from U.S. antitrust law).

10. *See infra* Section II.C (presenting the Curt Flood Act as a congressional attempt to limit MLB's protection under its antitrust exemption).

11. *Infra* Section II.D.

12. *Infra* Section II.E.

13. *Senne* Complaint, *supra* note 1, ¶ 3, at 1.

14. This Note will not attempt to harmonize the scores of nuances in professional baseball's labor market. Section II.A will, instead, simply provide the reader with a survey of professional baseball's labor market, so as to provide adequate background on how said market contributes to the minor leaguers' allegations.

15. John Fizel & Lawrence Hadley, *Major League Baseball*, *in* HANDBOOK OF SPORTS ECONOMICS RESEARCH 99, 99 (John Fizel ed., 2006).

16. *Id.* In general, the "reserve clause" is the feature of baseball's labor market most applicable to the minor leaguers.

17. *Id.*

18. *Id.* at 99–100.

19. *See id.* at 99 ("A monopsony is granted to team owners."). In this context, a monopsony—and hence the "reserve clause"—permits the team owner to become "the one and only buyer of the player's services." Fizel & Hadley, *supra* note 15, at 99.

20. *See Major League Constitution: Professional Baseball Agreement—Major League Rules*, BIZOFBASEBALL, Rule 3(b)(4) at 21 (2008), http://www.bizofbaseball.com/docs/MajorLeagueRules-2008.pdf ("No player shall participate in [professional baseball] until the player has signed a contract in the form prescribed by this Rule 3(b) for . . . the current season.").

player contracts.[21] Since 1976,[22] however, the reserve clause has tied a player to his team but only for the first six years of his career.[23] Predictably, the wage paid to the worker (player) is therefore less than the wage that the player could earn in a competitive market.[24] The reserve clause effectively empowers "the owners [to] engage in monopolistic exploitation of the players."[25]

MiLB players do not receive benefits of collective bargaining and union representation, further suppressing the minor league wage.[26] Major leaguers, on the other hand, have enjoyed the protections of collective bargaining and unionization since 1968.[27] The MLBPA helps players negotiate collective bargaining agreements (CBA)[28] which allow MLB players to "enjoy[] increased contractual mobility and explosion[s] in salaries."[29] Minor leaguers enjoy no union representation, even though they comprise the overwhelming majority of professional baseball players.[30] The MLBPA only represents "players . . . who hold a signed contract *with a Major League Club*,"[31] and does not *directly* represent the interests of MiLB players.[32]

According to the *Senne* plaintiffs, "[e]fforts to unionize minor leaguers have been unsuccessful because minor leaguers fear retaliation by the seemingly omnipotent [League and its franchises]."[33] The reserve clause and minor leaguers' lack of union representation "enables owners to keep [minor league] players' salaries remarkably low."[34] The reserve clause is the essential feature of the MLB labor market insofar as it provides owners with a monopsony and, hence, is the fundamental basis for the minor leaguers' FLSA allegations.[35]

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21. Fizel & Hadley, *supra* note 15, at 99.

22. In 1976, "free agency" was introduced to MLB's labor market and will be discussed *infra* Section II.A.3.

23. Fizel & Hadley, *supra* note 15, at 100.

24. *See id.* ("Since the reserve clause eliminates competition on the owners' side of the labor market, it will reduce the wage . . . .").

25. *Id.*

26. *Senne* Complaint, *supra* note 1, ¶ 95, at 20.

27. *MLBPA Info*, *What Was the First Collective Bargaining Agreement Negotiated Between Players & Owners?*, MLBPLAYERS.COM, http://mlb.mlb.com/pa/info/faq.jsp (last visited Oct. 13, 2015) [hereinafter MLBPA FAQ].

28. *Id.*

29. *Senne* Complaint, *supra* note 1, ¶ 4, at 1. For example, the major league minimum salary for the 2015 season was $507,500. MLBPA FAQ, *supra* note 27.

30. *Senne* Complaint, *supra* note 1, ¶ 4, at 1.

31. MLBPA FAQ, *supra* note 27 (emphasis added).

32. *Senne* Complaint, *supra* note 1, ¶ 5, at 1.

33. *See id.* at 3, ¶ 6 (asking "[w]hat minor league player is going to jeopardize his career by challenging the system").

34. Fizel & Hadley, *supra* note 15, at 105.

35. The industry term—"service time"—matters because of the way salaries are structured and free agency is granted. *See* Neil Weinberg, *The Beginner's Guide to Service Time*, FANGRAPHS (Jun. 22, 2015), http://www.fangraphs.com/library/the-beginners-guide-to-service-time/ (noting that "service time is [] a key factor when it comes to pre-free agency salaries" because "[f]or [the] first three years of service, [players] essentially have no bargaining power . . . and have to play for the major league minimum"). In general, "teams have the rights to players for six full years . . . and can pay them the minimum for half that service time [i.e., years 1–3] and arbitration level salaries for the rest [i.e., years 4–6]." *See id.* (observing that "[p]layers who have not reached free agency are cost-controlled").

2. Salary Arbitration

Players become salary arbitration eligible "[o]nce [they have] been on a [40-man] roster for three seasons and [are not] locked up" with a long-term contract.[36] MLB's salary arbitration procedure—known as final offer arbitration (FOA)—was first implemented for the 1974 season, and has remained relatively unchanged since.[37] When an eligible major league player files for arbitration in FOA, both the player and team must submit final salary offers, and an arbitration hearing is scheduled.[38] Negotiations between the player and team may continue between the time offers are made and the hearing convenes.[39] A player's arbitration case will be "withdrawn from arbitration" if a negotiated settlement is agreed upon prior to the hearing.[40]

A third-party arbitrator will settle the issue of the player's salary for the next season if the team and player fail to reach a settlement prior to the arbitration hearing.[41] The arbitrator must select the player's final offer or the team's final offer as a binding salary for one season.[42] Arbitrators are not permitted to reach a compromise between the two offers.[43]

FOA is more advantageous to the players than the reserve clause because it gives them an opportunity to negotiate with their team.[44] Negotiations lead to the narrowing of salary positions, increasing the prospect of settlement.[45] In terms of earning power, however, professional baseball players' earning capacity is maximized when the player reaches "free agency."[46]

3. Free Agency

Players with six or more years of MLB service, i.e., on the 40-man roster, who have not executed a contract for the next season are eligible to become free agents.[47] In free agency, all teams have the option to "competitively bid for a player's services."[48] Understandably, free agency's competitive bidding nature is highly desirable to MLB free agents.[49]

In theory, both the player and team "benefit[] from . . . lucrative [free agency] transaction[s]."[50] That is, players strive for financial security, whereas teams crave the

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36. Scott Kendrick, *Free Agency Primer: A Rundown of the Rules About Free Agency in Major League Baseball*, ABOUTSPORTS, http://baseball.about.com/od/majorleaguebasics/a/freeagentprimer.htm (last visited Oct. 13, 2015).

37. Fizel & Hadley, *supra* note 15, at 105–06.

38. *Id.* at 106.

39. *Id.*

40. *Id.*

41. *Id.*

42. Fizel & Hadley, *supra* note 15, at 106.

43. *Id.*

44. *See id.* ("Since there is no promise of compromise, each party is likely to present reasonable salary offers out of fear that the arbitrator will select the other party's offer.").

45. *See id.* ("The results of arbitration cases . . . tend to support this assertion. Approximately 80 percent of all the arbitration cases filed are settled prior to reaching arbitration . . . .").

46. *See infra* Section II.A.3 (discussing the benefits of free agency).

47. MLBPA FAQ, *supra* note 27.

48. Fizel & Hadley, *supra* note 15, at 99–100.

49. *See* MLBPA FAQ, *supra* note 27 (noting the average MLB salary for the 2015 season of $3.38 million).

50. Tim Reuter, *The Economics of Major League Baseball Free Agency: Start It Earlier To Achieve Fiscal*

talents and services of the player.[51] However, an issue arises when players sign excessive deals in free agency:

> Free agents are invariably paid for their past, rather than their future, production. Stated otherwise, age is the central, and acknowledged, inefficiency of MLB's labor system. A glance at the list of free agents in any winter will show that most are over thirty-years old and exiting their physical prime.[52]

The current labor model is arguably flawed.[53] Despite its drawbacks, however, free agency is the best opportunity for professional baseball players—like the *Senne* plaintiffs—to make a lucrative living playing professional baseball. In fact, the cartel-like nature of the reserve clause—which dampens salaries paid to minor leaguers—has its roots in a judicial doctrine unseen in modern U.S. antitrust jurisprudence.

B. MLB's Exemption from U.S. Antitrust Law

MLB's exemption from U.S. antitrust regulation is the result of three Supreme Court decisions. The trinity of cases, which still govern today, has been the subject of much questioning and disdain. The doctrinal development of MLB's judicially-created antitrust exemption begins with the Court's *Federal Baseball* decision.[54]

1. The Origin of MLB's Antitrust Exemption: Federal Baseball

MLB's judicially-created exemption from U.S. antitrust law was born in 1922.[55] In *Federal Baseball*, the Supreme Court confronted a lawsuit pitting competing professional baseball leagues against one another.[56] Plaintiff (the less predominant league) approached the defendants (the two predominant and competing baseball leagues at the time) about a possible merger in an attempt to better compete.[57] After the defendants rejected the plaintiff's offer, the plaintiff filed a lawsuit alleging that, by not agreeing to merge, the defendants had violated sections 1 and 2 of the Sherman Antitrust Act.[58]

The Court disagreed, instead holding that the "business [of baseball] . . . [is] purely [a] state affair[]."[59] The Court reasoned: "[t]hat to which it is incident, the exhibition [of giving baseball], although made for money would not be called trade of commerce in the commonly accepted use of those words."[60] Following *Federal Baseball*, the Court did not

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Sanity, FORBES (Jan. 10, 2014, 8:00 AM), http://www.forbes.com/sites/timreuter/2014/01/10/mlb-should-start-free-agency-earlier-if-it-wants-fiscal-sanity/.

51. *Id.*

52. *Id.*

53. *See id.* ("Billy Beane, General Manager of the Oakland Athletics . . . put matters well in 2002: small-market teams [cannot] afford prime free agents. They survive[] on the *cost controlled assets* . . . .") (emphasis added).

54. Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 207 (1922).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 208. Section 1 provides that "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal." Sherman Antitrust Act, 15 U.S.C. § 1 (1890). Section 2 prohibits "attempt[s] to monopolize, or combine or conspire with any other person . . . to monopolize any part of . . . commerce among the . . . States." 15 U.S.C. § 2.

59. *Federal Baseball*, 259 U.S. at 208.

60. *Id.* at 209. The *Federal Baseball* ruling has been widely criticized given the modern understanding of

view professional baseball as "commerce among the States."[61]

The Court would not revisit its *Federal Baseball* ruling for 31 years.[62] In 1953, the Court decided *Toolson v. New York Yankees*,[63] where MLB was accused of violating U.S. antitrust laws. Yet again, however, the Court would shield MLB from an antitrust attack by striking down the plaintiffs' claim.

2. Affirming the Aberration: Toolson v. New York Yankees

In *Toolson v. New York Yankees, Inc.*, the Court addressed allegations that MLB had violated the Sherman Antitrust Act by illegally restraining trade.[64] The Court, despite the changes in the business of baseball and its interstate commerce jurisprudence, nevertheless affirmed its *Federal Baseball* ruling.[65] However, the Court's underlying rationale had changed.[66] The *Toolson* Court pronounced:

> Congress has had the [*Federal Baseball*] ruling under consideration but has not seen fit to bring such business under [antitrust] laws by legislation having prospective effect. The business [of baseball] has been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. . . . We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.[67]

According to the Court, "Congress had no intention of including . . . baseball within the scope of the federal antitrust laws."[68] The Supreme Court would not directly[69] confront MLB's antitrust exemption until 1972.[70]

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interstate commerce and professional baseball. *See, e.g.*, Samuel G. Mann, *In Name Only: How Major League Baseball's Reliance of its Antitrust Exemption is Hurting the Game*, 54 WM. & MARY L. REV. 587, 592 (2012) (illustrating why MLB's exemption from antitrust regulation is damaging to the league, its franchises, and the consumer).

61. *Federal Baseball*, 259 U.S. at 209.

62. Nathaniel Grow, *Defining the "Business of Baseball": A Proposed Framework for Determining the Scope of Professional Baseball's Antitrust Exemption*, 44 U.C. DAVIS L. REV. 557, 569 (2010).

63. Toolson v. N.Y. Yankees, Inc., 346 U.S. 356, 357 (1953).

64. *Id.* When *Toolson* reached the Court in 1953, the business of baseball had drastically changed since the days of *Federal Baseball*. *See* Grow, *supra* note 62, at 569 (stating that the most notable change was that TV stations now broadcasted baseball games across state lines). In addition, the Court had "significantly expanded its interstate commerce jurisprudence." *Id.*

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

66. Grow, *supra* note 62, at 570.

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

68. *Id.* One commentator has gone so far as to "call the *Toolson* Court's reformulation of *Federal Baseball* 'the greatest bait-and-switch scheme in the history of the Supreme Court.'" *See* Grow, *supra* note 62, at 570–71 (quoting Kevin McDonald, *Antitrust and Baseball: Stealing Holmes*, 23 J. SUP. CT. HIST. 89, 100 (1998)). Congressional intent was "never so much as mentioned" in *Federal Baseball*. *Id.* at 571.

69. The Court would, however, address its *Federal Baseball* and *Toolson* precedent in several intervening rulings, and in each instance, exempt MLB from antitrust regulation. *See generally* United States v. Shubert, 348 U.S. 222 (1955) (distinguishing *Federal Baseball* and *Toolson* from precedent that made the defendants within the Sherman Act); United States v. Int'l Boxing Club, 348 U.S. 236 (1955) (noting that none of the facts relating to *Toolson* were present); Radovich v. Nat'l Football League, 352 U.S. 445 (1957) (noting that *Int'l Boxing* did not require the Court to overrule *Toolson*); Haywood v. Nat'l Basketball Ass'n, 401 U.S. 1204 (1971) (distinguishing baseball from basketball in affirming baseball's exemption from antitrust laws).

70. Flood v. Kuhn, 407 U.S. 258, 259 (1972).

3. Leaving MLB's Antitrust Exemption Unchanged: Flood v. Kuhn

The Court again considered MLB's exemption from antitrust regulation in *Flood v. Kuhn*.[71] The Court affirmed MLB's antitrust exemption by a 5-3 vote.[72] In doing so, the Court recognized that "baseball is a business engaged in interstate commerce"[73] and MLB's antitrust exemption was "an exception and an anomaly."[74]

Nonetheless, the Court's primary rationale in affirming MLB's exception was that the exemption "was an established aberration that the Court had recognized on five separate occasions over the course of more than a half century, and one which rested 'on a recognition and acceptance of baseball's unique characteristics and needs.'"[75] The Court, continuing with its *Toolson* rationale, was "loath . . . to overturn [*Federal Baseball* and *Toolson*] judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long."[76]

C. The Curt Flood Act

Congress would intervene following the Court's decision in *Flood*. In 1998, Congress addressed MLB's antitrust status by passing the Curt Flood Act (CFA).[77] The CFA limited MLB's protection under its antitrust exemption by permitting only current *major leaguers* to bring antitrust lawsuits against MLB.[78] Section 26b(b) dictates that future courts may not rely on the CFA "as a basis for changing the application of the antitrust laws" to professional baseball.[79] Accordingly, "any then-existing precedent was unaffected by the statute" and "various judicial interpretations of the exemption [were left] untouched."[80]

Most importantly, for purposes of this Note, section 26(d)(4) provides: "[n]othing in this section shall be construed to affect the application to organized professional baseball of the non-statutory labor exemption from the antitrust laws."[81] Thus, it would seem that the scope of the CFA's protections are quite limited, only protecting current major league players.[82] This conclusion is supported by the CFA's legislative history.[83] In sum, the CFA

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71. *Id.* at 259.

72. *Id.* at 285.

73. *See id.* at 282 (undermining the *Federal Baseball* holding).

74. *Id.*

75. *See* Grow, *supra* note 62, at 575 (quoting *Flood*, 407 U.S. at 282). The *Flood* opinion emphasizes that MLB has evolved in reliance on the assumption that its operations were exempt from antitrust regulations and feared that reversing the Court's prior decisions would lead to "retroactivity problems." *Flood*, 407 U.S. at 283.

76. *Id.* at 283–84.

77. Curt Flood Act of 1998, 15 U.S.C. § 26b (1998). The Curt Flood Act was, unsurprisingly, named after the MLB player-plaintiff in *Flood v. Kuhn*. For a fascinating review of Curt Flood's contribution to free agency and the game of baseball, see BRAD SNYDER, A WELL-PAID SLAVE: CURT FLOOD'S FIGHT FOR FREE AGENCY IN PROFESSIONAL SPORTS (2007) (portraying Curt Flood's influence on sports history in the same league as the contributions of both Jackie Robinson and Muhammad Ali).

78. *Id.* Prior to passage of the CFA, MLB had been *entirely* shielded from an antitrust attack. *See supra* Section II.B (discussing the history of MLB antitrust cases).

79. *See* 15 U.S.C. § 26b (providing a limitation that "[n]o court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws to any conduct, acts, practices, or agreements").

80. Grow, *supra* note 62, at 576.

81. 15 U.S.C. § 26(d)(4).

82. Grow, *supra* note 62, at 576.

83. *See* 144 CONG. REC. S9621-01 (July 31, 1998) ("The bill does not change current law . . . with respect to any other person or entity.").

only slightly altered the scope of MLB's antitrust exemption, leaving the future application of prior judicial precedent unchanged, save for a narrow class of cases.[84]

Sections II.A–C illustrate how three interrelated issues—baseball's labor market structure, MLB's antitrust exemption, and the Curt Flood Act—jointly contribute to the allegedly unlawful compensation practices MLB affords its minor leaguers. The *Senne* lawsuit alleges that MLB's collusive behavior results in MiLB players not being paid minimum wage or compensated for overtime work.[85] These allegations would be direct violations of FLSA and, accordingly, Section II.D introduces the FLSA protections under which the minor leaguers allege injury.

D. Fair Labor Standards Act Protections and Exemptions

Congress enacted the FLSA in 1938.[86] In passing FLSA, Congress found "that the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[,]" leads to numerous, undesirable results.[87] FLSA's two chief protective provisions ensure that each covered employee is paid at least the federal minimum wage[88] and is compensated for overtime work.[89]

Section 206 seeks to ensure that each employee receives compensation at a wage level not below the federal minimum wage.[90] Section 206 provides: "Every employer shall pay to each of his employees who . . . is engaged in commerce . . . wages at [the federal minimum wage of $7.25 an hour]."[91] Section 207 seeks to ensure that employees are compensated, at 1.5 times their normal rate, for each additional hour worked over the standard 40-hour workweek.[92] The *Senne* complaint alleges violations of both sections 206 and 207.[93]

While sections 206 and 207 provide broad protection for covered employees, Congress and FLSA have also provided for, among other things, exempt status for employees based on their type of work and the nature of the employer's business.[94] As it pertains to the *Senne* lawsuit, MLB is likely to defend on a multitude of grounds.[95] This Note, however, is only concerned with answering whether MLB can achieve dismissal of the lawsuit on grounds that MiLB players are exempt employees under FLSA. Specifically,

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84. *See* 15 U.S.C. § 26(b) (providing that only *major league* players may sue MLB for alleged antitrust violations).

85. *See generally Senne* Complaint, *supra* note 1 (stating that minor league players have no power to combat the MLB cartel).

86. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (1938).

87. *See* 29 U.S.C. § 202(a) (noting that industries with sub-standard labor practices "constitute[] an unfair method of competition in commerce" also "lead[ing] to labor disputes burdening and obstructing commerce").

88. 29 U.S.C. § 206.

89. 29 U.S.C. § 207.

90. 29 U.S.C. § 206.

91. *Id.* The business of baseball has been determined to be interstate commerce. *See supra* note 73 and accompanying text (discussing the holding in *Flood v. Kuhn*).

92. 29 U.S.C. § 207.

93. *See infra* Section II.E.1 (presenting the factual basis for the minor leaguers' alleged sections 206 and 207 violations).

94. *See generally* 29 U.S.C. § 213 (providing for the exempt status of certain non-covered employees).

95. *See infra* note 232 (predicting on what grounds MLB is likely to defend the *Senne* allegations).

MLB will likely argue that minor leaguers are non-covered "professional"[96] or "seasonal"[97] employees.

Section 213 of FLSA governs the exempt status of certain employees and provides in relevant part:

> (a) The provisions of section 206 [minimum wage requirement] . . . and section 207 [overtime compensation requirement] of this title shall not apply with respect to—(1) any employee employed in a . . . professional capacity . . . [or] (3) any employee employed by an establishment which is an amusement or recreational establishment . . . if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 [1/3%] of its average receipts for the other six months of such year . . . .[98]

If either the "professional" employee exemption of section 213(a)(1), or the "seasonal" employee exemption of section 213(a)(3) applies, MLB is not required to meet the FLSA minimum wage or overtime compensation requirements.

To successfully defend on grounds of section 213, MLB has the burden of proving that the minor leaguers satisfy the conditions set forth therein.[99] At the motion-to-dismiss stage, a FLSA claim may be dismissed on the basis of an exemption only if the exemption "*appears on the face* of the complaint."[100] Thus, a motion to dismiss will not be granted unless the complaint contains allegations that unequivocally qualify an employee as exempt from FLSA's protective provisions. Before analyzing the merits of the *Senne* allegations in Part III, Section II.E provides the factual background for the *Senne* allegations.

E. Senne v. MLB *Alleged FLSA Violations*

According to the minor leaguers' allegations, the structure of MLB's minor league labor market and "MLB's longstanding exemption from the U.S. antitrust laws allows [MLB] to openly collude on the working conditions for the development of its chief commodity: young baseball players."[101] The *Senne* complaint alleges two counts of FLSA violations.[102] The first count alleges FLSA minimum wage and overtime compensation violations, thus falling within the purview of this Note.[103]

1. FLSA Minimum Wage and Overtime Violations

The *Senne* complaint alleges that: "[MLB] constructed, implemented, and engaged in

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96. 29 U.S.C. § 213(a)(1).

97. 29 U.S.C. § 213(a)(3).

98. 29 U.S.C. § 213(a)(1) & (3).

99. *See, e.g.*, Brennan v. S. Prod., Inc., 513 F.2d 740, 744 (6th Cir. 1975) (noting that an employer has burden of proving that it is within terms and spirit of claimed exemption).

100. Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 74 (2d Cir. 1998) (emphasis supplied).

101. *Senne* Complaint, *supra* note 1, ¶ 2, at 1. Of importance to this Note, however, is that the *Senne* complaint does not allege antitrust violations. *Id.* ¶ 2 n.2, at 1. *See infra* notes 265–66 (highlighting the recent failed attempts to pierce MLB's shield under its antitrust exemption).

102. *Id.* ¶ 164, at 30–31. However, the second count alleging FLSA record keeping violations falls outside the purview of this Note. *Id.* ¶ 174, at 32.

103. *Id.* at 52.

a policy and/or practice of failing to pay [p]laintiffs . . . the applicable minimum wage for the hours the minor leaguers worked on behalf of [the] [d]efendants, and continue to engage in such a policy and practice."[104] In support of their section 206 claim, the plaintiffs allege that minor leaguers only earn between $3000 and $7500 for an entire year, despite workweeks often exceeding 50 hours per week.[105] Furthermore, according to the complaint, MLB has "conspired to pay no wages at all for significant periods of minor leaguers' work."[106] According to the complaint, these wage violations force many minor leaguers to live in poverty.[107] According to the minor leaguers, these facts, if true, give rise to section 206 minimum wage violations.[108]

The minor leaguers relatedly allege that "[MLB] constructed, implemented, and engaged in a policy and practice that failed to pay [p]laintiffs . . . the applicable overtime wage for all hours minor leaguers worked beyond the normal, forty-hour workweek, and continue to engage in such a policy and practice."[109] In support of this claim, the minor leaguers allege that they receive "no overtime pay" despite regularly working over 50 hours per week—and as many as 70 hours per week—during the five-month championship season.[110] Furthermore, during spring training, "[m]inor leaguers normally work seven days a week . . . unless rain renders the baseball fields unplayable."[111] In essence, the minor leaguers allege that several aspects of working as a minor leaguer, paired with MLB's unfair MiLB compensation practices, result in minor leaguers going uncompensated for overtime work—a section 207 violation.[112]

It is important to note that at the lawsuit's early stage of litigation there has been little—if any—factual development. Many of the yet-to-be disputed facts have not been developed through witness depositions, interrogatories, etc. As such, this Note will use the *Senne* complaint as the factual basis in analyzing the merits of MLB's section 213 defenses.

III. ANALYSIS

Section 213 of FLSA generally dictates that certain employees are not covered by the minimum wage and overtime compensation protections.[113] This Part addresses the defenses MLB is likely to raise under section 213.[114] Section III.A first analyzes the merits of MLB's likely defense that MiLB players are exempt from FLSA protection because they

104. *Senne* Complaint, *supra* note 1, ¶ 167, at 31 .

105. *See id.* ¶ 9, at 2 (arguing that MLB's "collective exercise of power" has suppressed minor leaguers' wages in violation of federal law); *see also id* ¶ 141, at 29 (demonstrating an example of an over-worked minor league player).

106. *Id.* ¶ 10, at 2. *See id.* ¶¶ 142–46, at 29–30 (noting that MLB franchises, in accordance with MLB rules, are not required to pay minor leaguers during spring training—when they often work over 50 hours per week—as well as during other training periods, such as instructional leagues and winter training).

107. *See id.* ¶ 66, at 14–15 (claiming that minor leaguers sometimes cram five or six players—some with wives and children—into small apartments, often using air mattresses or couches as beds).

108. 29 U.S.C. § 206 (1938).

109. *Senne* Complaint, *supra* note 1, ¶ 168, at 31.

110. *See id.* ¶ 116, at 25 (arguing that, when taking into account games, strength and conditioning work, and travel, minor leaguers work between 60–70 hours per week).

111. *Id.* ¶ 118, at 25.

112. 29 U.S.C. § 207.

113. 29 U.S.C. § 213.

114. *See* 29 U.S.C. § 213 (providing for the professional employee exemption in section 213(a)(1) and the seasonal employee exemption in section 213(a)(3)).

are employed in a "professional capacity."[115] Section III.B then analyzes the merits of MLB's other likely FLSA defense—that MiLB players are exempt seasonal employees, employed by an "amusement or recreational establishment."[116]

A. FLSA Section 213(a)(1): "Creative Professional" Exemption

Employees "in a bona fide . . . professional capacity" are not covered by FLSA's protections.[117] The rationale "behind the exemption[] for . . . professional employees has been that these employees do not need the [minimum wage and overtime] protections . . . because of their higher base pay and greater job security."[118] Additionally, "the value to the employer" of the work done by these employees "is thought to be generally unrelated to the number of hours worked by those employees."[119]

The section 213(a)(1) exemptions do not apply to "manual laborers or other 'blue collar' workers."[120] Instead, the section 213(a)(1) exemptions are "commonly referred to as the 'white-collar'" employee exemptions.[121] Since FLSA's inception, these "so called 'white-collar' employees have been exempted from" the FLSA minimum wage and overtime protections.[122] FLSA does not provide definitions for those white-collar employees not covered by FLSA,[123] but instead tasks the Department of Labor (DOL) with "promulgat[ing] rules delineating and defining the white-collar exemptions."[124] Initially, the DOL's white-collar exemptions were easy to administer because of the clear distinction between blue-collar and white-collar employment.[125] In a "service oriented economy,"[126] however, exempt white-collar employees are more similar to blue-collar employees "[i]n income and life style."[127] This blurred distinction "muddied the regulatory waters."[128] Accordingly, the DOL's regulations governing the white-collar exemptions were revised in 2004.[129]

In general, "[t]here are two types of exempt professional employees: learned professionals and creative professionals."[130] As the general professional employee

115. 29 U.S.C. § 213(a)(1).

116. 29 U.S.C. § 213(a)(3).

117. 29 U.S.C. § 213(a)(1).

118. L. Camille Hébert, *"Updating" the "White-Collar" Employee Exemptions to the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL'Y J. 51, 56 (2003).

119. *Id.* at 56–57.

120. 29 C.F.R. § 541.3(a) (2004). The regulations highlight that "blue-collar workers" performing tasks "involving repetitive operations with their hands, physical skill and energy" are not exempt employees. *Id.*

121. Jay P. Lechner, *The New FLSA White-Collar Regulations—Analysis of Changes*, 79 FLA. B. J. 20, 20 (2005).

122. Regan C. Rowan, *Solving the Bluish Collar Problem: An Analysis of the DOL's Modernization of the Exemptions to the Fair Labor Standards Act*, 7 U. PA. LAB. & EMP. L. 119, 119 (2004).

123. These white-collar employees include those employed in an "executive, administrative, or *professional* capacity." 29 U.S.C. § 213(a)(1) (1938) (emphasis added).

124. Rowan, *supra* note 122, at 120; *see also* 29 U.S.C. § 204 (noting that FLSA provides for the creation of the Wage and Hour Division of the Department of Labor).

125. *See* Rowan, *supra* note 122, at 119 ("[W]hite-collar workers had clearly defined decision making responsibilities, were closer to management, and were paid better than they are today.").

126. *Id.* at 120.

127. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 33 (2001).

128. Rowan, *supra* note 122, at 121.

129. *Id.* at 121–22.

130. U.S. Department of Labor, Wage and Hour Division, *Fact Sheet #17D: Exemption for Professional*

exemption pertains to the *Senne* minor leaguers, MLB is likely to argue that its MiLB players are exempt from the FLSA protections because they are "creative professionals."[131] An employee must satisfy three requirements to fall within this exemption: "(1) that the employee must be compensated on a salary basis; (2) that the employee be paid not less than a specified minimum salary level; and (3) that the employee's duties meet the conditions set forth in the applicable exemption."[132] Accordingly, MLB must prove[133] all three of these requirements to achieve dismissal on grounds that the minor leaguers are "creative professionals."

1. The "Salary Basis" Test

Under the salary basis test, "[a]n exempt employee . . . must be paid a fixed and predetermined salary, which is not subject to reduction based on the quantity or quality of work . . . ."[134] Employees "will be considered to be paid on a 'salary basis' . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation . . . ."[135] Additionally, the employee "must receive his full salary for any week in which he performs any work without regard to the number of days or hours worked."[136]

The DOL regulations do, however, permit an employer to deduct from an employee's salary through disciplinary suspensions.[137] Nonetheless, "[i]f the employee is ready, willing and able to work, deductions may not be made for time when work is not available."[138] An exemption may be lost when the employer "has an actual practice of making improper deductions."[139] Factors to consider in determining whether an employer has such a practice include: "the number of improper deductions, the time period of such deductions, and the number and geographic location of employees whose salaries were improperly reduced."[140]

Within this regulatory framework, and the facts alleged by the minor leaguers, it seems unlikely that MLB would prevail in establishing that its minor leaguers satisfy the salary basis test. The minor leaguers are not compensated for offseason and spring training

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Employees Under the Fair Labor Standards Act (FLSA) (revised July 2008), http://www.dol.gov/whd/overtime/fs17d_professional.pdf [hereinafter DOL Fact Sheet]. As this Note pertains to MiLB players, the learned professional exemption is inapplicable. The spirit of the learned professional exemption exempts those whose primary duty is the "performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction." 29 C.F.R. § 541.301 (2004).

131. The term "creative professional" is a term of art, exempting employees whose duties are creative or unique in nature.

132. Hébert, *supra* note 118, at 57.

133. *See supra* note 99 and accompanying text (highlighting that an employer has burden of establishing that it is entitled to benefit from a particular exemption) (quoting Brennan v. S. Prod., Inc., 513 F.2d 740 (6th Cir. 1975)).

134. Lechner, *supra* note 121, at 22.

135. 29 C.F.R. § 541.602(a).

136. Hébert, *supra* note 118, at 57.

137. *See* Lechner, *supra* note 121, at 22 (noting the regulations permit "unpaid disciplinary suspensions of a full day or more" when imposed in good faith for workplace conduct infractions).

138. 29 C.F.R. § 541.602(a).

139. Lechner, *supra* note 121, at 22.

140. *Id.*

work, which is a direct benefit to the profit-making motive of MLB.[141] This, in essence, could amount to MLB having an actual practice of making improper deductions.[142] Furthermore, as employees of MLB, minor leaguers may be willing to "work", i.e., play games, during the offseason. Under the regulations, it is of no consequence to the players that MLB has not made games available during the offseason. MLB may not deduct their salary during the offseason or spring training if the players are ready, willing, and able to work and MLB does not provide work (games) for them.[143] For these reasons, MLB will unlikely be able to successfully argue that its minor leaguers are compensated on a salary basis.

2. The "Salary Level" Test

To qualify as an exempt professional employee under section 213(a)(1), an employee is required to be compensated on a salary basis[144] "at a rate of not less than $455 per week . . . exclusive of board, lodging or other facilities."[145] The phrase "'exclusive of board, lodging, or other facilities' means 'free and clear' of any claimed credit for non-cash items of value that an employer may provide to an employee."[146] Therefore, any costs incurred by an employer in providing employees with board, lodging, or other facilities cannot count towards the $455 minimum salary requirement.[147]

Within the regulatory framework under this test, it will be challenging for MLB to establish that it satisfies the salary level test. The minor leaguers, under the salary level test, must be compensated at least $455 per week, or roughly $23,600 per year. According to the *Senne* complainants, MiLB salaries range from $3000 to $7500 for the entire five-month championship season.[148] Minor leaguers also go uncompensated during the offseason, further contributing to the conclusion that the salary paid by MLB does not satisfy the salary level test.

3. The "Duties" Test

The key inquiry in determining whether minor leaguers fall within the section 213(a)(1) exemption is whether their duties fall within the understanding of a "creative professional."[149] An employee may qualify for the "creative professional exemption" if

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141. MLB organizations would be unable to profit off the players' in-season performance without a well-trained labor force.

142. 29 C.F.R. § 541.602.

143. *Id.*

144. *See supra* Section III.A.1 (discussing the salary basis test).

145. 29 C.F.R. § 541.600(a). Importantly, for the purposes of the *Senne* plaintiffs, "[t]he $455 a week may be translated into equivalent amounts for periods longer than one week." 29 C.F.R. § 541.600(b). Thus, employees may be compensated biweekly on a salary basis of $910, or monthly on a salary basis of approximately $1970. *Id.*

146. 29 C.F.R. § 541.606(a).

147. *See id.* ("Such separate transactions are not prohibited . . . but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.").

148. Based on a twenty-two week season, this equates to roughly $136 per week (on the low-end) and $341 (on the high-end).

149. *See* DOL Fact Sheet, *supra* note 130 (noting the "creative professional" subset of the general "professional" exemption).

the employee's primary duty[150] satisfies certain qualitative aspects.[151] An employee may qualify for the exemption if his or her primary duty is:

> [T]he performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.[152]

In addition, "the work performed must be 'in a recognized field of artistic or creative endeavor.'"[153] The "invention, imagination, originality or talent" requirement distinguishes creative professions from work that "primarily depends on intelligence, diligence and accuracy."[154] Significantly, "[d]etermination of exempt creative professional status . . . must be made on a *case-by-case basis*."[155] The new DOL regulations promulgated in 2004 may properly be read to have expanded FLSA's creative professional exception.[156]

Understanding how MiLB players' duties fall within the definition of a "creative professional" requires thinking abstractly about the spirit and purpose of the exemption, rather than specifics of the duties test.[157] It is plausible that the *Senne* plaintiffs fall within the spirit of the exemption because professionals—such as artists, musicians, and arguably MiLB players—perform acts that require a great degree of originality and talent.[158] These employees' duties are not those of a typical laborer—"[t]he nature of their labor isn't fungible, because not everyone can do it and do it well."[159] Because the work done by MiLB players arguably requires a great degree of original talent, a court could find that their duties fall within FLSA's understanding of a "creative professional."[160] To date, however, this question has not been addressed by the courts.

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150. "The term 'primary duty' means the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a). Determining an employee's primary duty must be based on the facts of individual circumstances. *Id.* Factors to consider include: importance of exempt duties in relation to other types of duties; the amount of time spent conducting exempt work; the employee's freedom from direct supervision; and the relation between the employee's salary and the wages paid to other employees for the sort of nonexempt work performed by the employee. *Id.* "[E]mployees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement." 29 C.F.R. § 541.700(b).

151. 29 C.F.R. § 541.302(a).

152. *Id.*

153. *See* 29 C.F.R. § 541.302(b) (noting these recognized fields include "music, writing, acting and the graphic arts").

154. 29 C.F.R. § 541.302(c). The exemption for creative professionals depends "on the extent of the invention, imagination, originality or talent exercised by the employee." *Id.*

155. *Id.* (emphasis added). Relevant to this point is that job titles alone are insufficient to establish employees as exempt. 29 C.F.R. § 541.2.

156. *See, e.g.*, Lechner, *supra* note 121, at 24 (noting that the new regulations "expand[ed] the creative professional exemption to include work requiring 'originality' in a recognized field"); *but see* Rowan, *supra* note 122, at 133 (noting that certain portions of the newly promulgated regulations have had their "overly broad" requirements removed).

157. Chris Chrisman, *What To Know About the Minor League Lawsuit*, SBNATION (Mar. 7, 2014, 10:01 AM), http://www.purplerow.com/2014/3/7/5481324/minor-league-baseball-lawsuit-federal-state-wage-laws-violation.

158. *Id.*

159. *Id.*

160. 29 C.F.R. § 541.302; 29 U.S.C. § 213(a)(1) (1938).

A FLSA Employee Handbook Exemption Newsletter offers a similar question in the context of recreational clubs offering services of tennis and golf professionals.[161] According to the newsletter, "[g]olf or tennis pros [] *may qualify* for the FLSA's professional exemption" because their work is "original and creative in character."[162] However, "an argument can be made that a pro is not engaged in original or creative work when he or she coaches a player at a club."[163] This sort of reasoning would be used in determining whether MiLB player duties are similar enough to qualify under the understanding postulated by the regulations.

It is inherently challenging to categorize the duties of MiLB players as those falling within the "creative professional" exemption. MiLB players—and professional athletes in general—do not perform work in a "recognized field of artistic or creative endeavor"[164] like the recognized fields of actors, musicians, painters, and novelists.[165] While an argument can be made as to the creative and not "routine mental [and] manual"[166] nature of the players' work, exempting those playing professional sports is unlikely to be what the DOL intended.

MLB faces a steep uphill battle in proving that its minor leaguers' duties fall within the understanding of the duties performed by "creative professionals" for two reasons. First, the question will be a matter of first impression—no court has considered whether professional athletes are exempt "creative professionals." The lack of precedent will make for a burdensome defense—specifically in attaining dismissal. Second, a federal court would need to considerably expand its understanding of exempt "creative professionals" to include professional athletes.

Furthermore, and perhaps most importantly, MLB's interests are likely best served by achieving dismissal or settling the lawsuit.[167] But it is improbable that an employer could achieve dismissal on grounds that its employees are exempt under section 213. Courts have typically been unwilling to grant dismissals in finding that employees are statutorily exempt as a matter of law.[168] Furthermore, the FLSA "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit."[169] MLB will be hard-pressed to achieve dismissal on such grounds because courts typically let section 213 questions reach the trier of fact and narrowly construe section 213 exemptions. It is unlikely that MLB will be able to successfully argue, and achieve dismissal, on grounds that the minor leaguers fall within the scope of the "creative professional" exemption.

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161. *Classification Focus: Recreational Clubs and Their Employees*, 9 No. 3 FLSA Emp. Exemption Handbook Newsl. 1 (Dec. 2003).

162. *Id.* (emphasis added).

163. *Id.*

164. 29 C.F.R. § 541.302(a).

165. 29 C.F.R. § 541.302(c).

166. 29 C.F.R. § 541.302(a).

167. *See infra* Part IV (discussing the proposed reasons why MLB should seek dismissal or settlement of the *Senne* lawsuit).

168. *See, e.g.*, Brennan v. S. Prods., Inc., 513 F.2d 740, 744 (6th Cir. 1975) ("Whether employees are within an exemption from the provisions of the Act is primarily a question of fact."); Pugh v. Lindsay, 206 F.2d 43, 46 (4th Cir. 1953) ("It is well settled that the question of . . . exemption is a factual one, to be resolved by a consideration of the circumstances shown in the record of the individual case.").

169. Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960).

B. FLSA Section 213(a)(3): The "Seasonal Employee" Exemption

Under section 213(a)(3) of FLSA, an employee will be exempt from the minimum wage and overtime compensation protections if they are:

> [E]mployed by an establishment which is an amusement or recreational establishment . . . if (A) it does not operate for more than seven months in any calendar year, *or* (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33[%] of its average receipts for the other six months of such year.[170]

MLB will likely raise an argument that the *Senne* MiLB players are seasonal employees, thus falling within the section 213(a)(3) exemption. There have been three relevant cases to date addressing the section 213(a)(3) seasonal employee exemption in the context of professional baseball.[171]

1. Bridewell v. Cincinnati Reds

In *Bridewell v. Cincinnati Reds*, the Sixth Circuit decided whether a MLB franchise qualified for the section 213(a)(3) "seasonal employee" exemption.[172] Plaintiffs—team maintenance workers—filed suit against the organization, alleging that the team had violated FLSA by failing to pay a wage premium for overtime work.[173] The Reds moved for summary judgment,[174] arguing they were exempt from the FLSA wage premium requirement because they qualified for the section 213(a)(3)(A) condition for "recreational and amusement establishments that do not operate for more than seven months in a calendar year."[175] Entities "seeking to invoke the [section 213(a)(3)(A)] exemption must both be an amusement or recreational establishment and operate for fewer than eight months per year."[176] The proper focus, according to the court, is "on the duration of the Reds' overall operation."[177] Thus, the question is "assuming *arguendo* that the Reds are an amusement or recreational establishment, whether the Reds operate for more than seven months per year."[178]

According to the court, the fact that the Reds employed 120 year-round employees "compels the conclusion that they 'operate' year-round."[179] "Because the Reds operate for

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170. 29 U.S.C. § 213(a)(3) (1938) (emphasis added).

171. Bridewell v. Cincinnati Reds, 68 F.3d 136, 138 (6th Cir. 1995); Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590, 594 (11th Cir. 1995); Adams v. Detroit Tigers, 961 F. Supp. 176, 180 (E.D. Mich. 1997).

172. *Bridewell*, 68 F.3d at 138. Note that in the 1995 *Bridewell* decision, the court remanded the case for further findings, but the case was again appealed to the Sixth Circuit. *See* Bridewell v. Cincinnati Reds, 155 F.3d 828, 829 (6th Cir. 1998) (noting that the 1995 *Bridewell* decision reversed the employer's grant of summary judgment, and the district court on remand found in favor of the employee and the employer appealed).

173. *Bridewell*, 68 F.3d at 138.

174. *Id.* Note that the Reds moved for summary judgment only on the basis of the exemption condition in section 213(a)(3)(A), and in the 1995 lawsuit, did not raise an argument as to the exemption condition in section 213(a)(3)(B).

175. *See id.* (stating that the district court granted summary judgment in favor of the Reds).

176. *See id.* ("The Reds would have us conflate these separate requirements and instead ask whether the Reds are an establishment that stages amusement activities for fewer than eight months per year. There is nothing in the Act that would suggest that this is the correct approach.").

177. *Id.*

178. *Bridewell*, 68 F.3d at 138.

179. *Id.*

more than seven months in a calendar year" the court concluded that the district court had erred in granting summary judgment based on the section 213(a)(3)(A) condition and remanded the case to the district court for further proceedings.[180]

On remand, the Reds presented the court with a different argument.[181] The team argued that it was exempt from FLSA pursuant to section 213(a)(3)(B) because its average receipts from the six-month offseason did not amount to more than 33% of its average receipts during the six-month season.[182] The district court ruled against the Reds, holding that, for section 213(a)(3)(B) exemption purposes, "'receipts' means money when it is received."[183]

On appeal, the Sixth Circuit then determined the narrow question of whether "for the purposes of [section] 213(a)(3)(B), 'receipts' refers to money that is actually received by the amusement establishment, regardless of which accounting method that establishment uses to keep track of those receipts."[184] The court agreed with the district court's interpretation, but found the result of doing so "illogical."[185] The court reasoned that "[t]here is no question that the accrual method best reflects the nature of the income accruing to the [] Reds, but the plain language of the statute does not refer to 'income.'"[186] The Reds cited two decisions[187] in which a court has applied the section 213(a)(3) exemption to exempt professional baseball teams from FLSA requirements.[188] The court, however, aptly noted that "these cases contain no analysis on the issue of what constitutes a 'receipt.'"[189] The court reasoned that "it is not the duty of the courts to correct the oversights or perfect the schemes of Congress."[190] The Sixth Circuit thus affirmed the district court's ruling, finding that the Reds did not qualify for the section 213(a)(3)(B) exemption.[191]

2. Jeffery v. Sarasota White Sox, Inc.

While the *Bridewell* case was on remand, the Eleventh Circuit decided *Jeffery v.*

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180. *Id.* Following the Sixth Circuit's reversal and remand, the Reds appealed the ruling to the Supreme Court, but its request for certiorari was denied. Bridewell v. Cincinnati Reds, 516 U.S. 1172, 1172 (1996).

181. Bridewell v. Cincinnati Reds, 155 F.3d 828, 829 (6th Cir. 1998).

182. *See id.* ("[T]he Reds stipulated that their argument could be successful only if they were allowed to calculate their 'receipts' not according to when the cash was received, but according to when the Reds organization recorded the money as income."). The Reds' preferred means of calculation is known as the *accrual* method of accounting, rather than the *cash* method.

183. *See id.* (noting the district court's conclusion that the statute's plain language was understood to subject establishments to the *cash* method of accounting).

184. *Id.* at 829.

185. *Id.*

186. *See Bridewell*, 155 F.3d at 830 ("If Congress had wanted the operation of [section] 213(a)(3)(B) to hinge upon the method of accounting used by an establishment or on the income accruing to that establishment, then it should have chosen appropriate statutory language.").

187. *See generally* Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590 (11th Cir. 1995) (holding employer was an amusement or recreational establishment and therefore exempt); Adams v. Detroit Tigers, Inc., 961 F. Supp. 176 (E.D. Mich. 1997) (holding the Detroit Tigers exempt from state wage law provisions). The *Jeffery* and *Adams* decisions were decided while the *Bridewell* case was on remand.

188. *Bridewell*, 155 F.3d at 831.

189. *See id.* (finding both *Jeffery* and *Adams* unpersuasive as to the issue of applying the exemption on the basis of section 213(a)(3)(B)).

190. *Id.* at 832.

191. *Id.*

Sarasota White Sox, Inc.[192] In *Jeffery*, the plaintiff was a groundskeeper employed by a MiLB team defendant.[193] The defendant owned a MiLB franchise, a subsidiary of the Chicago White Sox,[194] and used a baseball complex owned by the City of Sarasota.[195] The defendants used the complex on a seasonal basis—the Chicago White Sox held spring training at the complex every March.[196] Once the major league season began in April, the defendant minor league team began play, which continued through the end of August.[197]

The plaintiff filed suit against the minor league franchise, alleging the defendant had violated FLSA by failing to compensate him for overtime hours worked.[198] The team moved for summary judgment on grounds that the FLSA overtime compensation requirement did not apply to its employees who were employed by an "amusement or recreational establishment" whose average receipts in any six-month period did not exceed 33% of its receipts for the other six months of the year.[199] The district court granted the team's motion for summary judgment.[200]

In determining whether the defendant's business falls within the section 213(a)(3) exemption, "the critical question is whether or not [the] [d]efendant's business is truly seasonal."[201] Quoting the district court's ruling from the 1995 *Bridewell* decision, the court reasoned that "'[s]ports events' are among those types of recreational activities specifically considered by Congress to be covered by the exemption."[202] Accordingly, the court found that the minor league organization was an amusement and recreational establishment pursuant to section 213(a)(3).[203] The court then addressed whether the organization satisfied either of the conditions set forth in section 213(a)(3)(A) or (B).[204]

The court first addressed whether the team satisfied the section 213(a)(3)(B) average receipts condition.[205] During the relevant years,[206] "[v]irtually all of [d]efendant's receipts [were] derived from spring training games played at the complex in March and minor league games played . . . from April through August."[207] For the years which defendant provided evidence of receipts,[208] the organization's receipts for the six-month season (March–August) never exceeded one-third of the receipts from the six-month offseason (September–February).[209] Thus, the organization satisfied the section 213(a)(3)(B)

192. Jeffery v. Sarasota White Sox, Inc., 64 F.3d 590 (11th Cir. 1995).
193. *Id.* at 593.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Jeffery*, 64 F.3d at 593.
198. *Id.* at 592.
199. *Id.* at 593; 29 U.S.C. § 213(a)(3)(B) (1938).
200. *Jeffery*, 64 F.3d at 593.
201. *See id.* at 594 (citing Brock v. Louvers and Dampers, Inc., 817 F.2d 1255, 1259 (6th Cir. 1987)).
202. *Id.* at 595.
203. *Id.*
204. *Id.* at 595–97.
205. *Jeffery*, 64 F.3d at 595.
206. Plaintiff sought recovery of uncompensated overtime for work performed in 1990, 1991, 1992, 1993, and 1994. *Id.* at 595–96.
207. *See id.* at 595 (noting that the organization's receipts were generated from ticket sales, concession and parking revenues, promotional sponsorships, etc.).
208. The defendant offered evidence of receipts only as it related to work performed in 1992, 1993, and 1994. *Id.* at 595–96.
209. *See id.* at 595–96 (explaining that because the defendant did not offer evidence of receipts as it related

requirement.[210]

Because the defendant had not shown it was entitled to summary judgment as to the overtime wages for 1990 and 1991, the court next addressed whether the minor league team qualified for the exemption via section 213(a)(3)(A).[211] The court granted summary judgment as to 1990 and 1991 because it found the defendant's "operation [did] not last for more than seven months in any calendar year."[212] That the plaintiff was employed in the offseason did not alter the court's finding that the minor league organization's operation did not last more than seven months.[213] The court reasoned, again citing the district court's 1995 *Bridewell* decision, that the "focus is on [the] length of the [d]efendant's seasonal operation."[214] The section 213(a)(3)(A) condition does not require the organization to shut down or terminate every employee at the end of each baseball season.[215] Because the court found that the organization had satisfied the section 213(a)(3)(B) for 1992, 1993, and 1994, and the section 213(a)(3)(A) condition for 1990 and 1991, the team was entitled to summary judgment on the entirety of the plaintiff's claim.[216]

3. Adams v. Detroit Tigers, Inc.

While the 1995 *Bridewell* decision was on remand and prior to the 1998 decision, a federal district court in Michigan decided *Adams v. Detroit Tigers*.[217] In *Adams*, former Detroit Tiger "batboys" filed a FLSA lawsuit against the organization.[218] The organization moved for summary judgment arguing they were exempt under either the section 213(a)(3)(A) condition, or in the alternative, the section 213(a)(3)(B) condition.[219]

The court began by noting the Tigers had shown it was an amusement or recreational establishment.[220] Citing *Jeffery*, the court reasoned that "[MLB] teams may properly be considered 'recreational' establishments, or establishments designed for 'amusement.'"[221] In addition, the court noted that the DOL Wage and Hour Division has stated that the section 213(a)(3) exemption may properly apply to activities such as "sports events."[222] The court concluded that the organization was a recreational or amusement establishment.[223]

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to work performed in 1990 or 1991, the defendant was not entitled to summary judgment on section 213(a)(3)(B) grounds as to those years).

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

211. *Id.*

212. *Id.*

213. *Id.*

214. *See id.* at 595 ("It is the revenue-producing operation of the . . . [MiLB] baseball franchise which affords it the protection of the exemption."). Note that this understanding is inconsistent with that of the Sixth Circuit in the 1995 *Bridewell* decision. *See generally* Bridewell v. Cincinnati Reds, 68 F.3d 136 (6th Cir. 1995) (ruling that the Reds were not eligible for exemption under the FLSA).

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

216. *Id.* at 597.

217. Adams v. Detroit Tigers, Inc., 961 F. Supp. 176, 181 (E.D. Mich. 1997).

218. *Id.* at 177.

219. *See id.* (noting that the district court granted the team's motion for summary judgment).

220. *See id.* at 179 ("An 'establishment' is a 'distinct physical place of business'—in [*Adams*], the Tigers' establishment at Tiger Stadium, and not the Tigers' organization as a whole.").

221. *Id.*

222. *Adams*, 961 F. Supp. at 179

223. *Id.* at 180.

The court, turning to the section 213(a)(3)(A) condition, began by noting that "it is undisputed that Tiger games are not played during the months of November through March, limiting batboys' employment to only seven months of the year."[224] Citing the Sixth Circuit's 1995 *Bridewell* decision, the court pertinently noted that "[s]imilar evidence was insufficient to entitle the Cincinnati Reds to an exemption."[225] Rather, the proper question was "whether the [Tigers] operate for more than seven months per year, not whether they are an entity that provides amusement or recreation for its customers for more than seven months per year."[226] Since the Tigers were a year-round operation, according to the court, they could not qualify for the exemption on the basis of section 213(a)(3)(A).[227]

Nonetheless, the court, on evidence provided by the team comptroller, found that the team satisfied the section 213(a)(3)(B) condition—the average receipts condition.[228] Accordingly, the Tigers had adequately shown that they were an establishment qualifying for the section 213(a)(3) exemption and entitled to summary judgment.[229]

On its face, the district court's conclusion as to the availability of the section 213(a)(3)(B) condition would seem inconsistent with the 1998 *Bridewell* court's contrary conclusion on the same issue under similar circumstances. The 1998 *Bridewell* court, however, aptly noted: "In *Adams*, the comptroller of the Detroit Tigers showed that the Tigers met the second prong of the seasonality test under [section] 213(a)(3)(B) by presenting the baseball club's receipts using the accrual method. The plaintiff did not challenge the figures and the court accepted them without discussion."[230]

Thus, it may be reasonably concluded that the *Adams* and *Bridewell* decisions are consistent with one another due to the arguments raised in each case. The *Adams* court did not address an accounting method argument like the 1998 *Bridewell* court did. Hence, it would seem the 1998 *Bridewell* reasoning and conclusion would control any attempt by a MLB organization to avail itself of the section 213(a)(3)(B) condition.

The current state of the law would not appear to favor MLB's section 213(a)(3) defense. Both the 1995 and 1998 *Bridewell* decisions—the likely current state of the law—provide authority that MLB franchises are not exempt under section 213(a)(3). First, the 1995 *Bridewell* decision, cited positively in *Adams*, establishes the proposition that MLB teams are not recreational establishments that operate for less than seven months per year. Second, the 1998 *Bridewell* decision establishes that, regarding the section 213(a)(3)(B) condition, organizational receipts accrue when the cash is received; thus, the *Bridewell* court found that the Cincinnati Reds organization could not avail itself of the section 213(a)(3) exemption. These two principles stand to obstruct any attempt by MLB to obtain dismissal on grounds that the *Senne* minor leaguers are "seasonal employees" under section 213(a)(3).

Due to the fact-intensive nature of the section 213(a)(1) exemption, and that courts generally disfavor deciding section 213(a)(1) exemption questions as a matter of law, it is

224. *Id.*

225. *Id.*

226. *See id.* at 180 (quoting Bridewell v. Cincinnati Reds, 68 F.3d 136, 138–39 (6th Cir. 1995)).

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

228. *See id.* ("[T]he Tigers['] . . . average [] six months of off-season receipts is less than [33%] of the average of in-season receipts . . . .").

229. *Id.* at 180–81.

230. Bridewell v. Cincinnati Reds, 155 F.3d 828, 831 (6th Cir. 1998).

unlikely that MLB will attain dismissal on such grounds. Also, it is similarly unlikely that MLB could achieve dismissal on section 213(a)(3) grounds because existing precedent, in the context of professional baseball, generally disfavors MLB. For these reasons, Part IV continues by recommending MLB settle the *Senne* lawsuit and attempt a restructuring of the MiLB labor market.

IV. RECOMMENDATION

MLB is likely to defend the *Senne* plaintiffs' allegations through the section 213(a) and (a)(3) exemptions.[231] While MLB may—and likely will—defend on several other grounds,[232] this Note is only concerned with the merits of MLB's FLSA statutory exemption defenses. Section IV.A begins by recommending that MLB strongly consider settling the *Senne* lawsuit because it will have a difficult task obtaining dismissal under the FLSA exemptions for creative professionals[233] or seasonal employees.[234] Section IV.B concludes by recommending that, following the proposed settlement, MLB permit the restructuring, i.e., collective bargaining and unionization, of its minor league labor force.

A. MLB Should Settle the Senne v. MLB *Lawsuit*

If the *Senne* minor leaguers can survive the early stages of litigation—when MLB is highly likely to seek dismissal on any of the grounds previously noted[235]—MLB's incentive to settle and resolve the *Senne* plaintiffs' claims increases. MLB is no stranger to protracted and inimical legal battles.[236] Ultimately, however, MLB will be forced to weigh the long-term expenses of litigating a highly contentious and polarizing legal issue against the benefits of settling for short-term stability while negotiating and implementing a structural remedy. MLB would almost surely incur significant, direct monetary costs through protracted litigation. Direct monetary expenses, however, might pale in comparison to two key indirect costs: (1) fear of a federal court—or Congress—stepping in and abrogating, or even abolishing, its antitrust exemption; and (2) fear of how its public perception might suffer if the "inner-workings" of the MiLB labor market are revealed to the public.

231. *See supra* Part III (analyzing the merits of MLB's section 213(a)(1) and (a)(3) exemption defenses).

232. MLB's chief defense will likely be that it is exempt from the federal FLSA employment protection requirements due to its antitrust exemption. *See supra* Section II.B (introducing MLB's judicially-created antitrust exemption). MLB might also raise a contract theory defense, arguing "that minor league players voluntarily agreed to the terms of their employment as reflected in a signed contract." *See* Michael McCann, *In Lawsuit Minor Leaguers Charge They Are Members of 'Working Poor'*, SPORTS ILLUSTRATED, http://www.si.com/mlb/2014/02/12/minor-league-baseball-players-lawsuit (last visited Oct. 13, 2015) (presenting several other theories of defense).

233. 29 U.S.C. § 213(a)(1) (1938).

234. 29 U.S.C. § 213(a)(3).

235. *See supra* note 232 (noting MLB's possible defense theories).

236. These protracted legal disputes include, but are not limited to, several legal battles stemming from the Biogensis performance enhancing drugs scandal, the Alex Rodriguez suspension and appeal, and City of San Jose v. Office of the Comm'r of Baseball, No. C–13–02787 RMW, 2013 WL 5609346, at *1 (N.D. Cal. Oct. 11, 2013).

1. Protecting MLB's Antitrust Exemption

MLB has enjoyed exemption from U.S. antitrust laws since 1922,[237] providing nearly 100 years of league evolution without interference from antitrust regulation. Reasonable minds could see that MLB might look vastly different had a court or Congress abolished its antitrust exemption. The Supreme Court has stated that abolition of MLB's antitrust exemption should come from Congress.[238] But several commentators,[239] and even the Supreme Court in *Flood*,[240] have urged that MLB's antitrust exemption should be abrogated by the Court or Congress.

Therein lies the major incentive for MLB to settle with the *Senne* minor leaguers: to avoid a federal court or Congress interfering and abrogating, or even abolishing, its exemption from U.S. antitrust regulation. The Curt Flood Act was Congress's attempt to limitedly abolish MLB's antitrust exemption by allowing current *major leaguers* to bring antitrust lawsuits against MLB.[241] Opponents to the continued existence of the Curt Flood Act have criticized the Act for failing to totally abolish MLB's antitrust exemption.[242]

MLB should not risk interference with its antitrust exemption—given the general distaste towards the exemption—and consider settling with the minor leaguers. Like MLB, the *Senne* plaintiffs have an incentive to settle. Because "[n]o one is saying that minor leaguers should be getting rich,"[243] according to Garrett Broshuis,[244] the minor leaguers have incentive to settle and negotiate a restructuring of the MiLB labor market. It would seem that the minor leaguers' primary objective in bringing the lawsuit—aside from receiving past damages—would be an overhaul and restructuring of the minor league labor market. A protracted legal dispute between MiLB and MLB would prevent the negotiated restructuring.

MLB, acting in its best interests, should not give a federal court or Congress reason or an opportunity to disturb its exemption from U.S. antitrust law. Federal courts have never been confronted with a novel FLSA claim involving MLB's treatment of its workers—specifically, its minor leaguers. MLB must ask itself whether a court would be willing to overlook MLB's alleged labor wrongs and FLSA violations, affecting more than

237. Fed. Baseball Club of Balt. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 209 (1922).

238. Flood v. Kuhn, 407 U.S. 258, 283–84 (1972).

239. *See, e.g.*, Larry C. Smith, *Beyond Peanuts and Cracker Jack: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113, 140 (1996) (concluding that the courts and Congress should "prevent further injustices by eliminating the [antitrust] exemption entirely").

240. *See Flood*, 407 U.S. at 281 (noting that MLB's "exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly").

241. *See supra* Section II.C (highlighting the Curt Flood Act's partial abolishment of MLB's antitrust exemption).

242. *See, e.g.*, Brett J. Butz, Note, *Grounding Into a Double Standard: Understanding and Repealing the Curt Flood Act*, 8 U. MASS. L. REV. 302, 329 (2014) ("The repeal of the [Curt Flood] Act would put MLB under the same rules as any other professional sports leagues . . . . In addition, repeal would foster greater competition between the clubs . . . ."); *but see* Nathaniel Grow, *Reevaluating the Curt Flood Act of 1998*, 87 NEB. L. REV. 747, 758 (2008) (concluding that "by increasing the antitrust risk to MLB owners . . . the [Curt Flood Act] has helped alter the tenor of labor negotiations between the owners and the MLBPA").

243. Tony Dokoupil, *Major League Baseball's 'Working Poor': Minor Leaguers Sue Over Pay*, NBC NEWS (July 15, 2014), http://www.nbcnews.com/news/sports/major-league-baseballs-working-poor-minor-leaguers-sue-over-pay-n156051.

244. Garrett Broushuis is a former MiLB player turned attorney who assisted in building the *Senne* lawsuit. *Id.*

6000 current and recent minor leaguers,[245] purely on the basis of the generally disfavored antitrust exemption. MLB would be unwise to give a court the opportunity to answer this question—it should reach a settlement agreement with the minor leaguers to ensure protection of its antitrust exemption.

2. Protecting MLB's Public Image

In addition to protecting its antitrust exemption, MLB should settle to protect its public image. MLB, as an industry, generated $7.9 billion in revenue in 2014.[246] The average team value in 2014 was $1.2 billion.[247] It would be pure conjecture to speculate how much failing to settle the *Senne* lawsuit might cost MLB due to a "public perception" crisis.[248] If MLB fails to dismiss the *Senne* lawsuit and the case proceeds to trial, the underpinnings of the MiLB labor market will become public. Given the minor leaguers' description of the typical life for a minor leaguer, this could damage MLB's public image on a national scale.[249]

While the lifestyle and living circumstances of minor leaguers vary across the board, it is not uncharacteristic for minor leaguers to live in poverty-like conditions. Most minor leaguers live in such circumstances "due to the strain of low salaries."[250] On one personal account, according to Broshuis, six minor leaguers crammed into a small two-bedroom apartment, with each player forced to sleep on an air mattress.[251] Other minor leaguers stay with "host families," where living conditions are, in some instances, no better. As one host family attested: "[w]e had 12 players, two wives, and a baby staying with us all at once . . . . We didn't charge them a dime. One month we had a $5,800 food bill and we tried collecting $20 from each, but some of them couldn't even afford that."[252]

Many minor leaguers—some in their mid-twenties, believing they will become rich—ultimately must ask their parents for help.[253] Describing his own experience in the minor leagues, a recent San Francisco Giants' minor leaguer stated that his parents paid his phone and car payment, while also providing help with rent.[254] The same player stated he would

245. Dokoupil, *supra* note 243.

246. *Industry Statistics Sports & Recreation Business Statistics Analysis: Sports Industry Overview*, PLUNKETT RES., LTD., https://www.plunkettresearch.com/statistics/sports-industry/ (last visited Oct. 13, 2015).

247. *Id.*

248. Admittedly, the adverse impact may be minimal because MLB's value is derived from its major league teams. MLB's fan base might be unconcerned with MLB's treatment of the minor leaguers.

249. This is especially important because many believe MLB has a declining fan base and a public interest issue. *See* Eric Goldschein, *As Baseball Becomes Less Popular in America*, *MLB Plans Regular Season Games in Europe*, SPORTS GRID (Aug. 13, 2014), http://www.sportsgrid.com/mlb/as-baseball-becomes-less-popular-in-america-mlb-plans-regular-season-games-in-europe/ (noting that, on a national level, the country's interest in MLB has gradually declined since the mid-1990s). Opponents to this viewpoint note MLB's increasing popularity on a regional basis. *See* Matt Snyder, *MLB a Regional TV Ratings Monster*, CBS SPORTS (Aug. 5, 2014), http://www.cbssports.com/mlb/eye-on-baseball/24649044/mlb-a-regional-tv-ratings-monster (noting that "of the 29 U.S.-based clubs in the league, 12 of them are the #1-rated programming in prime time since the start of the season in their home markets, beating both broadcast and cable competition").

250. Garrett Broshuis, *Playing for Peanuts: Many Minor Leagues Scrimp and Save To Survive*, BASEBALL AMERICA (Mar. 31, 2010), http://www.baseballamerica.com/today/minors/season-preview/2010/269689.html.

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

be unable to pursue his dream of playing baseball if he did not have the help of his parents.[255] These sorts of personal accounts are not uncommon for minor leaguers—they are common and, arguably, deplorable for those employed by a $7 billion industry.

Personal accounts such as these will almost assuredly come to light through protracted litigation. The facts of the *Senne* FLSA claim will play a large role in resolving the legal dispute.[256] Because the facts are essential,[257] vigorous discovery will most certainly reveal similar personal accounts.[258] MLB will be forced into producing documents, answering interrogatories, and deposing witnesses. The personal accounts just described would not only be damning to MLB's legal defenses but also to its public image. Many casual baseball fans are unaware of MLB's financial treatment of its minor leaguers. If the minor leaguers' stories gain publicity, MLB would face some degree of public backlash in addition to backlash they have already dealt with. For these reasons, in preservation of its public perception, MLB would be wise to settle with the *Senne* plaintiffs and restructure the minor league labor market.

B. Minor Leaguers' Right to Collectively Bargain and Unionize

Ultimately, the *Senne v. MLB* lawsuit and proposed settlement should culminate in an incremental restructuring of the MiLB labor market. A MiLB union would effectively force MLB and team owners to collectively bargain with the minor leaguers. From the minor leaguers' standpoint, collective bargaining and union representation should result in higher wages, overtime compensation, and better working conditions. As noted above, the 2015 minimum salary paid to major leaguers was $507,500. This minimum salary is a direct result of MLBPA union representation. If MLB can afford to pay a minimum major league salary of $500,000, then so too can it afford to pay minor leaguers the federal minimum wage.

Commentators have discussed the negative side effects of minor league unionization.[259] These viewpoints in light of modern professional baseball, however, are misguided. While a collective bargaining agreement allowing MLB teams to maintain their cost-controlled minor league talent, and still pay higher MLB salaries, might seem like an insurmountable objective, reaching a compromise is both essential and achievable.

Minor leaguers should be able to sell their services on an open labor market—if not

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255. Broshuis, *supra* note 250.

256. *See supra* note 168 and accompanying text (noting that federal courts rarely find a section 213 exemption as a matter of law).

257. *See supra* Section II.E.1 (noting that application of the section 213 exemptions are inherently factual).

258. Indeed, on July 13, 2015, the United States District Court for the Northern District of California denied the franchises' motion to dismiss the minor leaguers' suit. *See generally* Order Denying Amended Motion to Dismiss, Senne v. Kansas City Royals Baseball Corp. (No. 14–cv–00608–JCS) 2015 WL 4240716 (N.D. Cal. July. 13, 2015) (highlighting Chief Magistrate Judge Joseph Spero's denial of the franchises' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim); *see also* Keith L. Hammond & Gregg E. Clifton, *Minor League Baseball Players' Minimum Wage, Overtime Claims Proceed to Class Certification Stage*, NAT'L L. REV. (July 20, 2015), http://www.natlawreview.com/article/minor-league-baseball-players-minimum-wage-overtime-claims-proceed-to-class-certific (noting that the dismissal effectively permits the players to proceed towards discovery "to determine whether [class] certification is appropriate and whether the proposed class representatives have standing to represent the various proposed classes").

259. *See, e.g.*, Stanley M. Brand & Andrew J. Giorgione, *The Effect of Baseball's Antitrust Exemption and Contraction on its Minor League Baseball System: A Case Study of the Harrisburg Senators*, 10 VILL. SPORTS & ENT. L. J. 49, 55 (2003) (noting the adverse impact that subjection to antitrust law might have on MiLB).

from the very beginning—at least sooner than at present and not only after team-control of at least six years. One possibility is that "contracts for players signed out of colleges should be four years instead of seven."[260] A "market-easing" of this nature would provide minor leaguers with mobility and the right to provide their services to the buyer who values their services most. This, in turn, would put upward pressure on the wages paid across MiLB.

Base salary increases can be negotiated. As a nearly $8 billion industry, teams are willing to dish out record-shattering $325 million contracts.[261] There is little doubt that MLB can afford to pay minor leaguers minimum wage. In fact, "a modest increase in wages of thirty percent over a five-year period" for only 150 (out of 6000) minor leaguers would cost less than the major league minimum salary for a single player.[262] MLB has the money—the issue is negotiating a fair method by which to flatten the compensation structure of professional baseball as a whole.

The poverty-like lifestyle can be redressed through collective bargaining. Even though minor leaguers are high-valued commodities, MLB does not provide them many protections. Exceedingly long, uncompensated hours and poor living and board conditions are the current norm for many minor leaguers. "Requirements for such things as subsidized apartments for players during the season and better food before and after games could" be negotiated.[263] There is no reason why minor leaguers—those with purportedly high value to MLB—should, for example, be effectively forced to live in overcrowded apartments.

These sorts of agreements are possible remedies for the unfortunate state of the MiLB labor market. Other sports have recognized the importance of affording adequate labor representation to its minor league talent.[264] To this author, it seems absurd that an industry flush with cash can—and is permitted to—violate FLSA's protective provisions. Remedying these MiLB labor market issues through incremental changes, via collective bargaining and unionization, is a step towards giving minor leaguers the protection they deserve.

V. CONCLUSION

This Note concludes that MLB cannot continue to avoid paying its MiLB players federal minimum wage and overtime on grounds that the minor leaguers are non-covered, statutorily exempt employees under FLSA sections 213(a)(1) and (3). It is unlikely that MLB will be able to convince a court to dismiss the *Senne* lawsuit, which would arguably be in MLB's best interest, because of the fact-intensive nature of a section 213(a)(1) inquiry and the lack of precedential support for a section 213(a)(3) dismissal. It is for these reasons that MLB should settle with the *Senne* minor leaguers to protect its historical antitrust

260. Garrett R. Broshuis, Note, *Touching Baseball's Untouchables: The Effects of Collective Bargaining on Minor League Baseball Players*, 4 HARV. J. SPORTS & ENT. L. 51, 99 (2013).

261. Jon Heyman, *Marlins' Stanton Megadeal Is in Place: $325M, 13 Years, Early Opt Out*, CBS SPORTS (Nov. 17, 2014, 9:44 AM), http://www.cbssports.com/mlb/writer/jon-heyman/24816967/marlins-stanton-mega-deal-is-in-place-325m-13-years-early-opt-out.

262. Broshuis, *supra* note 260, at 99 n.323.

263. *Id.* at 100.

264. *See id.* at 101 ("Minor league hockey players, for instance, have a union. Despite the fact that the National Hockey League (NHL) gains far lower revenue than MLB, minor league hockey players earn much higher salaries than minor leaguers. The latest CBA for the AHL—a top minor league—requires a minimum salary of $40,500 for the 2012-2013 season. . . . Compare that with minimum Triple-A baseball salaries of $2150 per month for the five-month season . . . .").

exemption[265] and its public image. This Note recommends that, following the proposed settlement, MLB negotiate a restructuring of the MiLB labor market. MiLB players deserve the benefits of collective bargaining and unionization.[266] It is time MLB afford its purportedly valued commodities the minimum protections given to most workers under FLSA.

265. On October 5, 2015, however, the Supreme Court denied certiorari to the City of San Jose's attack on MLB's antitrust exemption. City of San Jose v. Officer of the Comm'r of Baseball, No. C–13–02787 RMW, 2013 WL 5609346, at *1 (N.D. Cal. Oct. 11, 2013), *aff'd*, 776 F.3d 686 (9th Cir. 2015), *cert. denied*, 83 U.S.L.W. 3820 (U.S. Oct. 5, 2015) (No. 14-1252); *see also* Nathaniel Grow, *San Jose Strikes Out at the U.S. Supreme Court*, FANGRAPHS (Oct. 5, 2015), http://www.fangraphs.com/blogs/san-jose-strikes-out-at-the-u-s-supreme-court/ [hereinafter Grow, *San Jose Strikes Out*] (noting that the Court's rejection of San Jose's lawsuit is unsurprising in light of the fact that it was the Court itself that shielded MLB from antitrust attacks in the past, as well as its insistence that "any change in the law must come from Congress, and not the courts"); *see also supra* note 236 (noting MLB's protracted legal battle with San Jose regarding its allegedly unlawful practice of restricting the freedom of franchise relocation, particularly as it applies to the Oakland Athletics). In addition, on September 14, 2015, the United States District Court for the Northern District of California dismissed a similar antitrust attack. *See generally* Order Granting Motion to Dismiss, Miranda v. Office of the Comm'r of Baseball (No. 14–cv–05349–HSG) 2015 WL 5357854 (N.D. Cal. Sept. 14, 2015), *appeal docketed*, No. 15-16938 (9th Cir. Sept. 29, 2015) (granting MLB's motion to dismiss on grounds that the *federal antitrust causes of action* involved in *Miranda* were barred by baseball's historic antitrust exemption); *see also* Nathaniel Grow, *Tossed: Court Dismisses Minor League Wage Increase*, FANGRAPHS (Sept. 15, 2015), http://www.fangraphs.com/blogs/tossed-court-dismisses-minor-league-wage-increase/ (noting the dismissal of *Miranda*—which asserted that MLB's minor league pay practices violated the Sherman Antitrust Act—on grounds of the Ninth Circuit's January 2015 affirmation of the dismissal of San Jose's antitrust attack). The *Miranda* court found that minor league pay practices "were . . . clearly encompassed by [MLB's] antitrust exemption." *Id.*

266. As of October 14, 2015, the *Senne* lawsuit remains alive and well. *See supra* note 258 (noting that the district court denied MLB's motion to dismiss, and the case is proceeding towards class certification). The *Senne* lawsuit is novel and unique—when compared to the failed and dismissed antitrust suits discussed *supra* note 265—in the sense that it presents the court with a FLSA claim, rather than an antitrust claim. *See supra* note 101 (noting that the *Senne* complaint only alleges FLSA violations, making no mention of U.S. antitrust violations). Viewed in this light, then, it is possible that the *Senne* lawsuit will not be dismissed under MLB's antitrust exemption. *See* Grow, *San Jose Strikes Out*, *supra* note 265 (discussing the Supreme Court's possible viewpoints of MLB's antitrust exemption—namely, the possibility that the Court does not, in fact, approve of MLB's antitrust exception, and merely dismissed the *San Jose* lawsuit due to a major procedural defect on the part of the city).