Caught Looking! Using K Law to Ж Big League Advantage's Unconscionable Contracts

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ABSTRACT: Big League Advantage ("BLA") has capitalized on the growing trend of income-sharing agreements by expanding the agreements to Major League Baseball ("MLB"). Founded by former Philadelphia Phillies pitcher Michael Schwimer, BLA operates as an investment firm and provides resources to baseball players from a fund that has amassed at least $256 million as of 2023. However, some have raised concerns about BLA's brand agreements with Latin American players, with accusations of targeting "indigent and talented players." This Note argues that these agreements, as currently written and signed, are unconscionable under Delaware law. BLA is an appreciably more sophisticated party that unfairly profits relative to their initial investment. Delaware courts can effectively apply the pluralist theory of contract law to sustain this outcome while adequately balancing competing economic interests. Because legislative solutions fail to capture the disparity in bargaining power, Delaware courts should invalidate these brand agreements if given the opportunity to do so.

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INTRODUCTION

Major League Baseball ("MLB") is one of the largest sports leagues in the world, bringing in $10.8 billion in revenue in 2022.[1] The average MLB salary was roughly $4.9 million in 2023, up 11.1% from 2022 and over twice as much as the average salary in 2000.[2] With teams willing to hand out larger and longer contracts,[3] it is no surprise that others may want a piece of these record-setting deals.

Enter income-sharing agreements: These agreements memorialize "the practice of investing in people in exchange for a percentage of their future

1. Maury Brown, *MLB Sets New Revenue Record, Exceeding $10.8 Billion for 2022*, FORBES (Jan. 10, 2023, 11:22 PM), https://www.forbes.com/sites/maurybrown/2023/01/10/mlb-sets-new-revenue-record-exceeding-108-billion-for-2022 (on file with the *Iowa Law Review*).

2. Associated Press, *Study Shows MLB Average Salary Up 11% YOY to $4.9 Million*, ESPN (Apr. 4, 2023, 5:34 PM), https://www.espn.com/mlb/story/_/id/36070487/study-shows-mlb-average-salary-11-yoy-49-million [https://perma.cc/H4Z5-EWWQ].

3. Maury Brown, *How MLB's Business and Labor Perfect Storm Created $1.77 Billion of Player Contracts in Less Than a Week*, FORBES (Dec. 8, 2022, 11:34 PM), https://www.forbes.com/sites/maurybrown/2022/12/08/how-mlbs-business-and-labor-perfect-storm-created-177-billion-of-player-contracts-in-less-than-a-week (on file with the *Iowa Law Review*).

income" into a contract.[4] The practice is becoming increasingly popular in a variety of fields.[5]

Big League Advantage[6] is an investment firm that seeks to capitalize on this growing trend. "[F]ounded in 2016 by former [Philadelphia Phillies] pitcher Michael Schwimer,"[7] the firm "provides baseball players with the resources they need to help make their dream of playing professional league baseball a reality."[8] These "resources" are taken from investment funds that have accumulated at least $256 million as of 2023.[9] Although Schwimer is adamant that he is seeking to improve the lives of Minor League Baseball players,[10] others have criticized the company for intentionally targeting "indigent and talented players from Latin America."[11] MLB superagent Scott Boras compares BLA's cash to "candy" that it can "use[] to attract and compel players to give up huge percentages of their careers."[12]

This Note argues that BLA's brand agreements with its Latin American baseball clients are unconscionable because their terms are grossly imbalanced in

4. Victoria L. Schwartz, *The Celebrity Stock Market*, 52 U.C. DAVIS L. REV. 2033, 2035 (2019).

5. The broader concept behind income-sharing agreements is known as "human equity investing." *Id.* at 2037–38. Early players in this space include Lumni and Upstart, two companies that offer cash to students in exchange for a percentage of a student's future income. *Id.* at 2040–41. Even nonprofits are involved in the practice. *Id.* at 2042 (describing 13th Avenue Funding's business model).

6. This Note uses "BLA" as an all-encompassing acronym to refer to Michael Schwimer's brand-agreement business started in 2016. Lawsuits discussed later in the Note contain an entity known as "Big League Advance Fund I, L.P.," which is the legal entity entering into contracts with players. A Form D filed with the U.S. Securities & Exchange Commission in 2022 identifies Schwimer's business as "Big League Advance, LLC." Big League Advance, LLC, Notice of Exempt Offering of Securities (Form D) (May 18, 2022), http://edgar.secdatabase.com/2235/167262322000003/filing-main.htm [https://perma.cc/5XKQ-EEWK]. However, the company's website uses the name "Big League Advantage, LLC." *About BLA*, BIG LEAGUE ADVANTAGE, https://bigleagueadvantage.com/about [https://perma.cc/ZK4F-HXD5]. Although there is certainly a legal distinction between these entities, this Note focuses on Schwimer's overarching business practice, using "BLA" is for simplicity's sake.

7. *About BLA*, *supra* note 6; *Michael Schwimer*, BASEBALL REFERENCE, https://www.baseballreference.com/players/s/schwimio1.shtml [https://perma.cc/YLW3-E4X5].

8. Complaint at 3, Big League Advance Fund I, L.P. v. Zagunis, No. N23C-08-115 (Del. Super. Ct. Aug. 11, 2023) [hereinafter Zagunis Complaint].

9. *See* Eben Novy-Williams & Brendan Coffey, *Tatis Investor Big League Advance Seeks $250M for New Baseball Fund*, YAHOO! SPORTS (May 26, 2022), https://sports.yahoo.com/tatis-investor-big-league-advance-095355512.html [https://perma.cc/PGK8-WZPK] ("[BLA] raised $26 million in its first fund[,] $130 million in its second [fund], and . . . [has] about $100 million committed to [its] new fund.").

10. *See* Julio Ricardo Varela, *This Financial Decision Could Haunt Cincinnati Reds Rookie Elly De La Cruz*, MSNBC (June 18, 2023, 5:00 AM), https://www.msnbc.com/opinion/msnbc-opinion/elly-de-la-cruz-big-league-rcna89603 [https://perma.cc/5TWP-36FN].

11. Ronald Blum, *Moneyball: Tatis Took Cash as Prospect, Owes Part of Fortune*, ASSOCIATED PRESS (Feb. 23, 2021, 4:47 PM), https://apnews.com/article/mlb-baseball-michael-schwimer-fernando-tatis-jr-fernando-tatis-db06c151fdf5a2650414b02447509e8c [https://perma.cc/UU2E-4QUS].

12. *Id.*

favor of the company, and the players exhibit significantly inferior bargaining power. Such an outcome furthers the pluralistic theory of contract law by preventing the exploitation of Latin American baseball players who have historically been subject to predatory practices. In Part I, this Note outlines unconscionability doctrine in contract law and identifies the problematic terms in BLA's brand agreements that should be analyzed using the doctrine. Part II presents useful details about BLA's connection with MLB's history in Latin America. Then, Part III considers a judicial finding of unconscionability and its support in pluralist contract theory. Finally, this Note concludes by suggesting how courts can limit BLA's unconscionable terms.

I. A MOUND VISIT TO DISCUSS UNCONSCIONABILITY AND MAJOR LEAGUE BASEBALL

This Part provides the background information necessary to show why the contract law doctrine of unconscionability should void BLA's contracts. Section A introduces the relevant legal concepts that are integral to an unconscionability finding. Section B discusses MLB's relationship with Latin America and the league's reliance on the region's talent. Section C dissects BLA's history, business model, and a few of its notable clients. Section D identifies important terms in BLA's contracts.

A. RELEVANT LEGAL CONCEPTS

Because BLA's brand agreements are governed by Delaware law,[13] this Section will primarily draw on legal principles from Delaware. In addition, this Section will introduce unconscionability doctrine's background, U.S. Supreme Court precedent, and contract law theory.

1. Unconscionability

Unconscionability doctrine allows courts to reach an equitable result when one party possesses disparate bargaining power with "unreasonably favorable" terms.[14] Under the Second Restatement of Contracts, a court can refuse to enforce an entire contract, remove unconscionable terms, or "limit the application of an[] unconscionable term as to avoid an[] unconscionable result."[15] Courts typically rely on the doctrine to prevent "oppression and unfair surprise."[16]

Unconscionability is generally separated into two subcategories known as "procedural unconscionability" and "substantive unconscionability."[17] However,

13. Complaint at 1, Mejia v. Big League Advance Fund I, L.P., No. 18-cv-00296 (D. Del. Feb. 21, 2018) [hereinafter Mejía Complaint]; Answer, Affirmative Defs., & Counterclaim at 6, *Mejia*, No. 18-cv-00296 [hereinafter BLA Answer].

14. RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981).

15. *Id.* § 208.3.

16. *Id.* § 208 cmt. b.

17. James v. Nat'l Fin., LLC, 132 A.3d 799, 815 (Del. Ch. 2016).

Delaware law does not consider these two concepts "separate elements of a two prong test."[18] Rather, "the 'analysis is unitary, and it is generally agreed that if more of one is present, then less of the other is required.'"[19]

Procedural unconscionability focuses on how the contract was formed—the measures and approaches that led to the contract. Courts examine the parties' bargaining strength, typically by using education levels,[20] to determine if the weaker party had a reasonable opportunity to understand the contract's terms.[21] A disparity in bargaining power alone will not trigger an unconscionability finding, but unconscionability *does* exist when the stronger party uses its bargaining advantage to the detriment of the weaker party.[22] Without the doctrine of procedural unconscionability, a sophisticated party could unfairly place "important terms hidden in a maze of fine print" or engage in "deceptive sales practices."[23]

Substantive unconscionability centers on "the substance of the exchange," i.e., the specific details of the contract's terms.[24] Courts commonly ask whether the terms "shock[] the conscience," which means there must be "gross imbalance" in the outcome for one party over the other.[25] In other words, contract terms that are "unreasonably favorable to the stronger party" are substantively unconscionable.[26]

In *Williams v. Walker-Thomas Furniture Co.*—arguably the most famous unconscionability case—the court examined whether contracts allowing a furniture company to repossess all goods upon default, even if some were nearly paid off, were unconscionable.[27] Critically, "twenty-two lines of extremely fine print" confirmed that buyers would not own *any* of the purchased items until they paid *all* of them in full.[28] The appellant retained an eighth-grade education level and supported herself and her children with public assistance.[29] Although the court remanded the case for further proceedings, it sympathized

18. Chemours Co. v. DowDuPont Inc., No. 2019-0351, 2020 WL 1527783, at *12 (Del. Ch. Mar. 30, 2020) (quoting *James*, 132 A.3d at 815).

19. *Id.* (quoting *James*, 132 A.3d at 815).

20. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("considering . . . education or lack of it" as relevant to how parties enter a contract).

21. *James*, 132 A.3d at 815.

22. Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908, 912 (Del. 1989).

23. *Williams*, 350 F.2d at 449.

24. *James*, 132 A.3d at 815.

25. *Id.* (quoting Coles v. Trecothick (1804) 32 Eng. Rep. 592, 597).

26. Nino v. Jewelry Exch., Inc., 609 F.3d 191, 201 (3d Cir. 2010) (quoting Alexander v. Anthony Int'l, L.P., 341 F.3d 256, 265 (3d Cir. 2003)).

27. *Williams*, 350 F.2d at 447.

28. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1396 (2014).

29. *Id.* at 1392.

with Ms. Williams's minimal bargaining power and suggested the agreements were unconscionable.[30]

Delaware courts define unconscionability as "whether [a] provision amounts to the taking of an unfair advantage by one party over the other."[31] The Delaware Court of Chancery applies a ten-factor test to determine whether an entire contract or individual terms are unconscionable.[32] These factors are:

> (1) The use of printed form or boilerplate contracts drawn skillfully by the party in the strongest economic position, which establish industry wide standards offered on a take it or leave it basis to the party in a weaker economic position[;]
>
> (2) a significant cost-price disparity or excessive price;
>
> (3) a denial of basic rights and remedies to a buyer of consumer goods[;]
>
> (4) the inclusion of penalty clauses;
>
> (5) the circumstances surrounding the execution of the contract, including its commercial setting, its purpose and actual effect[;]
>
> (6) the hiding of clauses which are disadvantageous to one party in a mass of fine print trivia or in places which are inconspicuous to the party signing the contract[;]
>
> (7) phrasing clauses in language that is incomprehensible to a layman or that divert his attention from the problems raised by them or the rights given up through them;
>
> (8) an overall imbalance in the obligations and rights imposed by the bargain;
>
> (9) exploitation of the underprivileged, unsophisticated, uneducated and the illiterate[;] and
>
> (10) inequality of bargaining or economic power.[33]

Factors two, three, four, six, seven, and eight fall under substantive unconscionability.[34] Importantly, Delaware courts consider how "unreasonably high or exorbitant price[s]" reflect gross imbalances between the parties.[35]

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30. *Williams*, 350 F.2d at 449–50.

31. Tulowitzki v. Atl. Richfield Co., 396 A.2d 956, 960 (Del. 1978) (quoting J.A. Jones Constr. Co. v. City of Dover, 372 A.2d 540, 552 (Del. Super. Ct. 1977)).

32. James v. Nat'l Fin., LLC, 132 A.3d 799, 815 (Del. Ch. 2016) (citing Fritz v. Nationwide Mut. Ins. Co., No. 1369, 1990 WL 186448, at *4–5 (Del. Ch. Nov. 26, 1990)).

33. *Id.* at 814–15 (alterations in original) (quoting *Fritz*, 1990 WL 186448, at *4–5).

34. *Id.* at 815–16 (identifying that six of the *Fritz* factors fall under substantive unconscionability).

35. *Id.* at 816 (finding unconscionable a loan with an APR of 838.45 percent); *see also* REDUS Peninsula Millsboro, LLC v. Mayer, No. 8835, 2014 WL 4261988, at *5 (Del. Ch. Aug. 29, 2014) (suggesting an undisclosed fifty percent markup on services for a term as long as sixty-five years "permit[s] an inference" of unconscionability).

2. *Post v. Jones*

Post v. Jones is one of the most well-known duress cases in U.S. history.[36] Its admiralty law and duress origins do not strictly align with baseball contracts and unconscionability, but the decision appropriately balanced economic interests with "preventing the extortion of parties in a weak bargaining position."[37] Because courts can "limit the application of an[] unconscionable term as to avoid an[] unconscionable result,"[38] Delaware courts can balance the same interests when analyzing BLA's brand agreements.

At the center of *Post v. Jones* was a nineteenth-century cargo and whaling ship, the *Richmond*, that collided with rocks in the Bering Strait.[39] Its cargo was nearly full of whale oil and whalebone that it had collected during its journey.[40] Shortly after the incident, three other whaling ships encountered the *Richmond* and rescued its sailors.[41] With the nearest port being roughly five thousand miles away, the *Richmond*'s captain agreed to sell the ship's cargo to the rescuing ships.[42] Two captains paid seventy-five cents per barrel of whale oil, while the third captain paid one dollar per barrel.[43] In any case, the purchase prices were much lower than the current market price.[44] After safely arriving to port, the *Richmond*'s owners sued, "claim[ing] that the sale was made under duress."[45]

The U.S. Supreme Court found the "transaction . . . [had] no characteristic of a valid contract."[46] Since the *Richmond* "was hopeless, helpless, and passive . . . [with] no market, no money, [and] no competition," the rescuing ships had "absolute power" over the situation.[47] Ultimately, the Court treated the three ships as salvors under admiralty law:

> Courts of admiralty will enforce contracts made for salvage service and salvage compensation, where the salvor has not taken advantage of his power to make an unreasonable bargain; but they will not tolerate the doctrine that a salvor can take the advantage of his situation, and avail himself of the calamities of others to drive a

36. *See* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 417 (5th ed. 2013).

37. *Id.* at 418.

38. RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

39. Post v. Jones, 60 U.S. (19 How.) 150, 156–57 (1856).

40. *Id.* at 156–58.

41. *Id.* at 158–59.

42. *Id.*

43. *Id.* at 159.

44. *See* SCOTT & KRAUS, *supra* note 36, at 418 (describing how the prices paid at the ship auction were less than the prices the *Richmond* would have received at port).

45. *Id.*

46. *Post*, 60 U.S. (19 How.) at 159.

47. *Id.*

> bargain; nor will they permit the performance of a public duty to be turned into a traffic of profit.[48]

The Court applied salvage doctrine and followed the general rule that salvors can recover between one-third and one-half of the market price for a salvaged good.[49] This way, the defendants received some compensation for their rescue efforts.[50] Although the case is celebrated as a "solution to the problem of 'circumstantial' duress,"[51] we can apply these underlying principles to this Note's later discussion of judicial reformation of contracts.[52]

3. Pluralist Theory

Contract law scholars use theory as a normative justification for how the state can legally enforce promises.[53] The most relevant principle for our discussion is the pluralist theory of contract law, also known as "pluralism."[54] Pluralist theorists argue that courts pursue goals of fairness when "one party has superior information or where one party is susceptible to exploitation because of one or more systematic cognitive errors."[55] Adhering to pluralist theory will "protect[] the party who is less capable of protecting herself."[56] Thus, we can only define fairness after taking into account how each individual is situated.

Pluralist theory is particularly important to the relationship between BLA and its Latin American Minor League Baseball clients because of the unequal bargaining power between the two parties. These players are predominantly unsophisticated, impoverished, and poorly educated, and BLA is disproportionately profitable.[57]

B. MAJOR LEAGUE BASEBALL AND LATIN AMERICA

MLB and Latin America maintain a close relationship arising from the region's immense athletic talent. Some of the game's current recognizable stars, like Fernando Tatís Jr. and Jose Altuve, and past legends like Roberto Clemente, Pedro Martínez, and David Ortiz, hail from Latin America.[58] The region's

48. *Id.* at 160.
49. *Id.* at 161.
50. SCOTT & KRAUS, *supra* note 36, at 418.
51. *Id.* at 417.
52. *See* discussion *infra* Sections III.B–.C.
53. SCOTT & KRAUS, *supra* note 36, at 24.
54. *Id.* at 28.
55. *Id.*
56. *Id.*
57. *See infra* Part II.
58. Andrew Simon, *Hall Calls Growing for Latino Players*, MLB (Jan. 24, 2024), https://www.mlb.com/news/latino-players-in-baseball-hall-of-fame [https://perma.cc/6GV5X7D6]; *Roberto Clemente*, BASEBALL REFERENCE, https://www.baseball-reference.com/players/c/clemero01.shtml

influence is evident in the number of Latino players on MLB rosters. As of Opening Day 2023, 269 out of 945 players on MLB rosters—28.5 percent—were born outside the United States.[59] The vast majority of these foreign-born players are from Latin America.[60] With MLB's first-year player draft only open to domestic residents, international players must sign with a team through the international signing period.[61] The groundwork for an international signing often begins much earlier than the minimum-age requirement of sixteen.[62]

Many baseball scouts rely on local street agents—*buscones*—to find talent as young as six years old.[63] Once players are twelve or thirteen, many teams verbally agree to deals with them in the hopes of officially signing them once they turn sixteen.[64] In 2020, MLB decried the practice and explained these verbal deals are "completely unenforceable."[65] However, teams have signed underage (i.e., under sixteen years old) players from Latin America for decades.[66] The Los Angeles Dodgers were guilty of one of the most prominent violations when the club signed an underage Adrian Beltre in 1999.[67] Latin American players are particularly susceptible to manipulation because they "are typically poorer than their U.S.-born counterparts."[68] As a result, "the promise of instant money is [an] alluring" prospect.[69]

To be clear, there is no evidence that BLA signs underage players to brand agreements. This Section merely uses this information to demonstrate a history

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[https://perma.cc/J2UB-LRXB]; *Fernando Tatis Jr.*, BASEBALL REFERENCE, https://www.baseball-reference.com/players/t/tatisfe02.shtml [https://perma.cc/X5W2-UMAA].

59. *MLB International-Born Players Stable at 28% in 2023*, ASSOCIATED PRESS (Mar. 31, 2023, 11:38 AM), https://apnews.com/article/mlb-international-players-dominican-venezuela-mexico-japan-9485f38ab1051efd276ac07712d1cbe1 [https://perma.cc/JZD6-RKK4].

60. *Id.* (compiling data showing 104 players are from the Dominican Republic, 62 are from Venezuela, 21 are from Cuba, 19 are from Puerto Rico, and 15 are from Mexico).

61. Editorial team, *How Does the MLB Draft Work*, RYAN WEISS BASEBALL (June 29, 2021), https://www.ryanweissbaseball.com/blogs/news/how-does-the-mlb-draft-work [https://perma.cc/8LBX-CVCW].

62. *See* Christian Red & Teri Thompson, *In Latin America, Big League Clubs Are Exploiting Prospects as Young as 12, Whistleblower Told Feds*, USA TODAY (June 16, 2020, 5:45 PM), https://www.usatoday.com/story/sports/mlb/2020/06/16/mlb-international-free-agents-deals-underage-prospects/5334172002 [https://perma.cc/7CWY-JTGG] (detailing the process for signing young baseball players from Latin America).

63. Adam Wasch, *Children Left Behind: The Effect of Major League Baseball on Education in the Dominican Republic*, 11 TEX. REV. ENT. & SPORTS L. 99, 100–01 (2009); Red & Thompson, *supra* note 62.

64. Red & Thompson, *supra* note 62.

65. Varela, *supra* note 10.

66. *See* Angel Vargas, *The Globalization of Baseball: A Latin American Perspective*, 8 IND. J. GLOB. LEGAL STUD. 21, 26 (2000) (explaining how the Los Angeles Dodgers and other teams signed underage players).

67. *Id.*

68. Varela, *supra* note 10.

69. *Id.*

of predatory and hypercompetitive practices to lure vulnerable talent from Latin America to MLB.

C. BIG LEAGUE ADVANTAGE

BLA's Minor League Baseball business is the focus of this Note. Like a venture capitalist funding the hottest new tech start-up, BLA seeks to capitalize on a baseball player's success by investing early in their career. BLA's business model is simple. It signs Minor League Baseball players to "brand agreements," which offer an up-front cash payment "in exchange for a fixed percentage of future earnings."[70] The cash payment is not a loan; the player does not need to repay BLA unless they ascend to the Major Leagues.[71] The amount varies from player to player and is nonnegotiable.[72] In addition, the firm does not place any restrictions on how the money is spent.[73] Some players spend it on better food or a nicer apartment, while others elect to save it for the future in case injuries hamper their career.[74]

With a "proprietary predictive analytics model[]" that sounds like a magic tool, BLA claims it can find the top young players before they are widely

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70. Jeff Passan, *MLBPA Continues to Fight 'Brand Agreement' Bill*, ESPN (June 30, 2019, 11:49 AM), https://www.espn.com/mlb/story/_/id/27089441/mlbpa-continues-fight-brand-agreement-bill [https://perma.cc/ZM2G-F4SE].

71. In fact, BLA publicly says its payments are not loans. *About BLA*, *supra* note 6; *Frequently Asked Questions*, BIG LEAGUE ADVANTAGE, https://bigleagueadvantage.com/faqs [https://perma.cc/7A5G-UXKQ]. But BLA does not have the final say on this matter. The U.S. Department of Education recently concluded that income sharing agreements for higher education costs are private education loans. Press Release, Off. Postsecondary Educ., (GENERAL-22-12) Income Share Agreements and Private Education Loan Requirements (Mar. 2, 2022), https://fsapartners.ed.gov/knowledge-center/library/electronic-announcements/2022-03-02/income-share-agreements-and-private-education-loan-requirements [https://perma.cc/7Z2U-TTRN]. As a result, these agreements are subject to federal laws and regulations. *See* Gus Garcia-Roberts & Albert Samaha, *A Firm Targeted MLB Stars' Pay. Next Up: College Athletes.*, WASH. POST (Apr. 4, 2024, 10:00 AM), https://www.washingtonpost.com/sports/2024/04/04/big-league-advantage-tatis-dexter (on file with the *Iowa Law Review*). It remains to be seen whether BLA's agreements could receive similar federal treatment.

72. Joe Pompliano, *The $400 Million Investment Fund That Gives Athletes Cash in Exchange for Future Earnings*, HUDDLE UP (June 14, 2023), https://huddleup.substack.com/p/the-400-million-investment-fund-that (on file with the *Iowa Law Review*) ("For example, BLA may offer a player $50,000 for every [one percent] of his future professional earnings. If a player wanted to sign a deal for [five percent], he would receive $250,000; if he wanted to sign a deal for [ten percent], he would receive $500,000. While our offer amounts are non-negotiable, the percentage the player would like to give up is decided by the player. The exact amount of money offered for each [one percent] of future professional earnings will vary.").

73. Zagunis Complaint, *supra* note 8, at 3.

74. *Compare* Pompliano, *supra* note 72 (reporting how Fernando Tatís Jr. spent his BLA cash), *with* Jack Dickey, *Future Considerations: Why Ex-MLB Pitcher Michael Schwimer Is Investing in Minor League Longshots*, SPORTS ILLUSTRATED (Sept. 4, 2018), https://www.si.com/mlb/2018/09/04/michael-schwimer-big-league-advance-minor-league-baseball [https://perma.cc/Y4WH-PR33] (describing how a twenty-year-old, Minor League Baseball pitcher said he planned to use BLA's investment as a foundation because pitchers are susceptible to sudden injuries).

recognized by the baseball community.[75] The numbers support this proposition. As of 2018, at least seventy-five percent of BLA's Minor League clients were not ranked within MLB's top three-hundred prospects when they signed with the firm.[76] However, even with their advanced analytics, "BLA expects to lose money on the majority of athletes it invests in."[77] The firm hits a home run (and makes its money back) by finding the next superstar, like finding the next Facebook or Google from a group of tech start-ups.[78]

Almost all of BLA's contracts are private,[79] but there are a few known clients worth discussing. Players from poor Latin American countries make up at least fifty percent of BLA's signees.[80] The following players show a variety of BLA's outcomes: a success story, a superstar in the making, and two deals that went down swinging. By discussing these players, we can understand the real-world situations of BLA's clients.

1. Fernando Tatís Jr.

Audacious. Energizing. Slick. These words all describe San Diego Padres outfielder and former shortstop Fernando Tatís Jr., a household name for any baseball fan. At the age of twenty-two, he led the National League with forty-two home runs and finished third in National League Most Valuable Player voting.[81] Just before that superstar season, Tatís Jr. signed a fourteen-year, $340 million contract with the Padres, the longest contract extension in MLB history.[82]

In 2017—long before he lit up scoreboards and sprinted around MLB diamonds—Tatís Jr. and BLA signed a brand agreement for an unknown amount of cash and percentage of his future earnings.[83] BLA founder Michael

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75. *See* Pompliano, *supra* note 72 (discussing how BLA client Fernando Tatís Jr. was not a top fifty prospect when he signed with the company).

76. Dickey, *supra* note 74.

77. *Frequently Asked Questions*, *supra* note 71.

78. Pompliano, *supra* note 72.

79. Elizabeth Strom, *Big League Advance "Invests" in Prospects. Some Find that Problematic.*, SB NATION (Sept. 3, 2018, 4:18 PM), https://www.draysbay.com/2018/9/3/17814788/big-league-advance-invests-in-prospects-some-find-that-problematic [https://perma.cc/APF6-FNBV]; *see* Exhibit A at 13–14, Mejia v. Big League Advance Fund I, L.P., No. 18-cv-00296 (D. Del. Feb. 21, 2018) [hereinafter Mejía Exhibit A]; Exhibit A at 6, Big League Advance Fund I, L.P. v. Zagunis, No. N23C-08-115 (Del. Super. Ct. Aug. 11, 2023) [hereinafter Zagunis Exhibit A].

80. HBO, *Real Sports Podcast: "Big League Advance" with Producer Nick Dolin | Episode 11 | HBO*, YOUTUBE, at 20:13 (June 25, 2021), https://www.youtube.com/watch?v=JkK2KXalOic [https://perma.cc/4VKQ-V4AD].

81. *Fernando Tatis Jr.*, *supra* note 58.

82. AJ Cassavell, *14-Yr. Deal! Tatis in SD for Long Haul*, MLB ADVANCED MEDIA (Feb. 22, 2021), https://www.mlb.com/news/fernando-tatis-jr-padres-deal [https://perma.cc/AE4D-BGE7].

83. Pompliano, *supra* note 72; *see* Jared Diamond, *The Padres Owe Fernando Tatís Jr. $340 Million. He Owes an Investment Fund Millions from His Payday.*, WALL ST. J. (Mar. 2, 2021), https://w

Schwimer has previously stated the firm's average stake in players is eight percent, meaning Tatís Jr. would owe BLA $27.2 million of his megadeal if his agreement tracks the average.[84] Even more remarkable, if BLA received its eight-percent average, then its return from Tatís Jr.'s earnings would cover at least the amount it invested in its first fund.[85] Tatís Jr. never elaborated on his deal with the company other than to say, "It was just a family decision."[86]

2. Elly De La Cruz

The same description of Fernando Tatís Jr. applies to Elly De La Cruz, another Dominican shortstop who burst into the Majors in 2023. De La Cruz, a predominantly Spanish-speaking player,[87] left home at age six to play baseball and later moved to Santo Domingo when he was ten to play in a competitive league.[88] He had a historic start to his career[89] and dazzled fans with incredible feats, like hitting 450-foot home runs and throwing the ball across the infield at ninety-six miles per hour.[90] These accomplishments illustrate the makings of a superstar with the potential to earn millions of dollars, if not hundreds of millions, playing baseball.[91] But BLA will share in his success. Although his precise deal is unknown,[92] De La Cruz will be

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ww.wsj.com/articles/fernando-tatis-jr-340-million-investment-fund-padres-11613732572 (on file with the *Iowa Law Review*) (pointing out that "[Michael] Schwimer declined to" share the details of Tatís Jr.'s contract).

84. Diamond, *supra* note 83.

85. *See* Pompliano, *supra* note 72 (stating that BLA's first fund invested in seventy-seven players for $26 million).

86. Blum, *supra* note 11.

87. Katie Kapusta, *Reds Translator Provides Voice for Big Stars*, SPECTRUM NEWS 1 (July 26, 2023, 9:00 AM), https://spectrumnews1.com/oh/columbus/news/2023/07/21/reds-translator-voice-for-big-stars [https://perma.cc/42PC-6GQY]. As of the 2024 season, De La Cruz now conducts full press conferences in English after practicing the language with teammates. Mark Sheldon, *Another Feat for Elly: Giving Press Conferences in English*, MLB (Mar. 29, 2024), https://www.mlb.com/news/elly-de-la-cruz-on-learning-to-speak-english [https://perma.cc/7J6A-JMA9].

88. Joey Held, *Reds Rookie Elly De La Cruz Will Pay 10% of His Career Earnings to a Payday Loan Company*, CELEBRITY NET WORTH (June 14, 2023), https://www.celebritynetworth.com/articles/sports-news/reds-star-elly-de-la-cruz-will-have-to-pay-a-company-10-percent-of-his-career-earnings [https://perma.cc/CWU6-BQ4V].

89. *See* Varela, *supra* note 10 ("[H]e also became only the second player in at least 123 years to homer, get a single, double, triple and a stolen base in his first three games." (emphasis omitted)).

90. *See* Varela, *supra* note 10.

91. *See generally Largest MLB Contracts*, BASEBALL REFERENCE, https://www.baseball-reference.com/leaders/leaders_contract.shtml [https://perma.cc/XEG8-X5HA] (identifying the fifty largest contracts in MLB history based on total dollar amount, with all fifty being over $100 million).

92. *See* Darren Rovell, *A Conversation with CEO of BLA, a Firm That Invested in Elly De La Cruz, Fernando Tatis' Career Earnings*, ACTION NETWORK (June 9, 2023, 1:46 PM), https://www.actionnetwork.com/mlb/a-conversation-with-ceo-of-bla-a-firm-that-invested-in-elly-de-la-cruz-fernando-tatis-career-earnings [https://perma.cc/YUZ7-36G7] (asking Michael Schwimer if he could share the details of De La Cruz's contract with BLA).

required to repay a fixed percentage of his earnings to the firm over the course of his career.[93]

3. Mark Zagunis

Mark Zagunis, an American outfielder drafted by the Chicago Cubs in 2014,[94] faced a lawsuit from BLA over his alleged breach of contract.[95] According to BLA, Zagunis signed two brand agreements with the firm, exchanging fourteen percent of his future earnings for a total of $206,661.[96] Because Zagunis played in MLB during the 2017, 2018, and 2019 seasons, BLA claimed it was entitled to a percentage of his earnings under their agreements.[97] The company alleged Zagunis had not made any payments since December 2018.[98]

Although BLA is clear that their agreements are not loans,[99] the lawsuit still exemplifies how BLA's actions are predatory. Zagunis, drafted out of Virginia Tech,[100] is probably less vulnerable than BLA's Latin American clients given his advanced education and American upbringing. Nevertheless, BLA sought to recover from someone who was likely still overwhelmed by the prospect of playing professional baseball and possibly unaware of the repercussions of signing BLA's brand agreements. If an American player with collegiate experience signs with BLA, what is stopping the firm from targeting those with humbler backgrounds and inferior education levels? A deeper factual record is needed to fully assess Zagunis's situation, but the lawsuit showed that BLA will come after players who fail to pay.

4. Francisco Mejía

Likely the most infamous deal in BLA's portfolio is its contract with former Tampa Bay Rays catcher Francisco Mejía.[101] The parties signed a trio of contracts in 2016 that exchanged ten percent of Mejía's future earnings for $360,000.[102] Mejía, then a top prospect in Cleveland's farm system, sued the company in 2018 over its brand agreement for alleged "unconscionable

93. Varela, *supra* note 10.

94. *Mark Zagunis*, BASEBALL REFERENCE, https://www.baseball-reference.com/players/z/zagunma01.shtml [https://perma.cc/5TS6-ZKCD].

95. *See generally* Zagunis Complaint, *supra* note 8 (describing the allegations against Mark Zagunis). The court entered default judgment against Zagunis on January 10, 2023.

96. *See id.* at 4.

97. *Id.* at 1.

98. *Id.* at 2.

99. *Id.* at 3; *see also About BLA*, *supra* note 6 (illustrating how BLA publicly claims its agreements are not loans).

100. *Mark Zagunis*, *supra* note 94.

101. *Francisco Mejía #21*, MLB, https://www.mlb.com/player/francisco-mejia-642336?stats=career-r-hitting-mlb&year=2024 [https://perma.cc/2KBC-49W3].

102. Mejía Complaint, *supra* note 13, at 4.

terms and conditions," "unconscionable conduct, . . . breaches of the duty of good faith and fair dealing, and unjust enrichment" by BLA.[103] It is important to note that Mejía dropped the lawsuit after six months and issued a formal apology to the company.[104] In any event, Mejía's allegations, although unproven, depict a predatory business practice with bargaining terms heavily skewed in BLA's favor.

Francisco Mejía, originally from the Dominican Republic, speaks only Spanish and has the equivalent of a ninth-grade education level.[105] In fall 2016, Mejía's mother became "ill and the family needed significant funds to pay for her medical treatment."[106] Around the same time, a BLA agent allegedly approached Mejía to discuss a brand agreement.[107] After Mejía signed the first contract, BLA's agents allegedly encouraged him to pursue additional funding from the company.[108] Both parties agreed that no English to Spanish translator was present when Mejía signed the second brand agreement.[109] In addition, Mejía did not have access to his own personal legal counsel; BLA hired the attorney that "represent[ed]" Mejía.[110] Taken together, these allegations suggest BLA used its prowess as a multimillion dollar company to exert undue pressure on Mejía to sign away rights to his future earnings.

D. BIG LEAGUE ADVANTAGE'S BRAND AGREEMENTS

Francisco Mejía's lawsuit against BLA and BLA's subsequent lawsuit against Mark Zagunis gave the public its first look into BLA's baseball brand agreements. At first glance, the contracts seem fairly standard. They contain recitals, a forum selection clause, definitions of terms, and a severability clause.[111] Mejía's

103. *Id.* at 1.

104. Jerry Crasnick, *Padres Catcher Francisco Mejia Drops Lawsuit over Earnings Cut*, ESPN (Aug. 30, 2018, 11:37 AM), https://www.espn.com/mlb/story/_/id/24523401/padres-catcher-francisco-mejia-drops-lawsuit-disputed-payment [https://perma.cc/4628-XCHH] ("I apologize to BLA for filing the complaint and I have agreed to pay a portion of their legal fees as a result of my actions. I am happy to be putting this entire situation behind me and I am looking forward to focusing on baseball and continuing my professional baseball career.").

105. Mejía Complaint, *supra* note 13, at 2.

106. *Id.* at 3.

107. *Id.*

108. *Id.*

109. *Id.* at 4; BLA Answer, *supra* note 13, at 5.

110. Mejía alleged the attorney present at the meeting "served as BLA's lawyer, not [his]." Mejía Complaint, *supra* note 13, at 4.

111. *See generally* Mejía Exhibit A, *supra* note 79 (providing BLA's brand agreement with Francisco Mejía); Zagunis Exhibit A, *supra* note 79 (providing BLA's first brand agreement with Mark Zagunis); Exhibit B, Big League Advance Fund I, L.P. v. Zagunis, No. N23C-08-115 (Del. Super. Ct. Aug. 11, 2023) [hereinafter Zagunis Exhibit B] (providing BLA's second brand agreement with Mark Zagunis).

contract is twenty pages long,[112] and Zagunis's agreements are nine pages each.[113] Aside from the variations in length and specific financial terms, the contracts contain no meaningful differences.[114]

On a basic level, BLA sends an up-front payment to the player in exchange for a fixed percentage of the player's "Professional Baseball Earnings."[115] As the term may suggest, Professional Baseball Earnings include the player's major league salary, minor league salary, and various bonuses, such as for making the playoffs or All-Star Game.[116] But a player's Professional Baseball Earnings are not limited to baseball in the United States. BLA defines "Major League" to include "United States Major League Baseball, Japan's Nippon Professional Baseball, and South Korea's KBO League."[117] Additionally, a player's Professional Baseball Earnings must be earned in the "Field," which BLA defines as "activities in or substantially related to . . . the sport of baseball . . . [or] personal services performed by Player which are of the type typically performed by individuals in baseball because of their status as professional athletes in that sport."[118] The contract provides a few examples: "sports casting, sports hosting, coaching, [and] participating in sports camps."[119]

Besides paying a portion of their Professional Baseball Earnings, BLA clients must also share a fixed percentage of their "Brand Earnings."[120] Brand Earnings largely focus on a player's identity. They include "all future earnings . . . for [a] Player's name, nickname, likeness, voice, live or recorded performance, photograph, signature or facsimile thereof, and biographical materials," along with any future earnings from a player's trademarks, copyrights, or designs.[121] It is unclear if BLA and prospective clients negotiate the Brand Earnings percentage beforehand. Both Francisco Mejía's and Mark Zagunis's contracts allocate 2.5% of their Brand Earnings to BLA.[122] As with Professional Baseball Earnings, Brand Earnings are those earned in the "Field."[123]

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112. *See* Mejía Exhibit A, *supra* note 79, at 21 (showing Francisco Mejía's contract with BLA is twenty pages long, not including supplemental exhibits).

113. Zagunis Exhibit A, *supra* note 79, at 9 (showing Mark Zagunis's first contract with BLA is nine pages long, not including supplemental exhibits); Zagunis Exhibit B, *supra* note 111, at 9 (showing Mark Zagunis's second contract with BLA is nine pages long, not including supplemental exhibits).

114. I will discuss specific contract terms in this Section and beyond. Unless otherwise noted, the contract terms I refer to are present in both Francisco Mejía's and Mark Zagunis's brand agreements.

115. Zagunis Exhibit A, *supra* note 79, at 1.

116. *Id.* at 9.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 1–2.

121. *Id.* at 8.

122. Mejía Exhibit A, *supra* note 79, at 19; Zagunis Exhibit A, *supra* note 79, at 8; Zagunis Exhibit B, *supra* note 111, at 8.

123. Zagunis Exhibit A, *supra* note 79, at 8.

The brand agreements impose additional obligations on clients. Most significantly, BLA can collect a portion of a player's "Equity Earnings" from contracts made pursuant to their baseball activities.[124] These earnings consist of "options, warrants or other similar rights to acquire stock."[125] The player gives up the same percentage of Equity Earnings as the percentage of Professional Baseball Earnings.[126] For example, Francisco Mejía must offer BLA ten percent of his Equity Earnings.[127] In addition, BLA's brand agreements require players to autograph one hundred items per year if they make it to the Major Leagues.[128] Once signed, BLA retains "all right, title[,] and interest in such autographed items."[129]

Although its contracts last for twenty-five years,[130] BLA has protections in place to ensure it recoups its investments. A clawback provision applies to players who retire within two years of the contract's effective date.[131] If retirement is due to anything other than injury, players must repay BLA an amount equal to the firm's upfront payment, minus all payments already made.[132]

The contract terms discussed above are the most relevant to this Note. Collectively, these terms excessively tip the scale in BLA's favor at the expense of a party in an inferior bargaining position. This Note argues that is unconscionable.[133]

II. "*TE VENDEN UN SUEÑO*": BIG LEAGUE ADVANTAGE ADDS TO MAJOR LEAGUE BASEBALL'S TROUBLED HISTORY WITH LATIN AMERICA

Francisco Mejía's allegations, BLA's publicly available contracts, and the firm's clientele and history suggest a predatory business practice with heavily skewed bargaining terms between a sophisticated company and unsophisticated individuals.

By signing Latin American baseball players to brand agreements, BLA perpetuates MLB's troubled history with Latin America. The region, full of incredible talent, is also a breeding ground for dubious actors who sell players

124. *Id.* at 3–4.

125. *Id.*

126. *See id.*

127. *See* Mejía Exhibit A, *supra* note 79, at 8–9.

128. Zagunis Exhibit B, *supra* note 111, at 4; *see also* Mejía Exhibit A, *supra* note 79, at 11. Notably, Zagunis's first brand agreement required him to autograph only twenty items per year. Zagunis Exhibit A, *supra* note 79, at 4. Given the limited number of publicly available BLA contracts, it is unclear if BLA increases the amount when a player signs multiple brand agreements or if the firm simply increased the number of autographed items for all its contracts.

129. Mejía Exhibit A, *supra* note 79, at 11.

130. Zagunis Exhibit A, *supra* note 79, at 7.

131. *Id.* at 2.

132. Mejía Exhibit A, *supra* note 79, at 6.

133. *See infra* Section III.B.

false dreams.[134] Take, for example, young baseball players from Cuba who are smuggled out of the country for a chance to play professional baseball in the United States. Known as the "Cuban market" by MLB insiders, Cuban baseball players can automatically become free agents if they establish residency outside the United States or Canada.[135] Shady characters help players off the island in exchange for up to thirty percent of the player's first contract.[136] Since 2009, Cuban players have signed at least $800 million worth of contracts, so these operations may have netted upwards of $240 million.[137]

Even though Michael Schwimer believes he is helping players by offering them brand agreements,[138] BLA is merely another actor that is adding to a vicious cycle of Latin American baseball players being lured by the prospect of instant money. As MLB's largest international recruiting market, the Dominican Republic highlights a troubling picture for many international players. The country falls "in the bottom half of educational statistics" worldwide.[139] For example, "30.5 percent of Dominicans fall below the poverty line," making baseball an attractive option to escape poverty.[140] Only 58.9 percent of Dominican boys reach the fifth grade,[141] and many more leave school as young as twelve to pursue baseball.[142] MLB officials acknowledge the problem across Latin America;[143] they estimate most children entering baseball academies in the region possess a middle school education level.[144] As a whole, this statistical evidence suggests major league stardom incentivizes young players to abandon their education in favor of wealth. BLA's promise to "provide[] baseball players with the resources they need to help make their dream of playing professional league baseball a reality"[145] appears as an offer

134. Former Cuban baseball players are particularly aware of this. *See* Scott Eden, *The Lost Prospects of Cuba*, ESPN (June 20, 2017), http://www.espn.com/espn/feature/story/_/id/19678696/mlb-prospects-cuba-trapped-dream [https://perma.cc/UZ3K-HRU2] ("'*Te venden un sueño*,' says one Cuban player. (They sell you a dream.) . . . 'At the end of the day, [Cuban] players are the victims.'").

135. *Id.*

136. *Id.*

137. *Id.*

138. *See* Varela, *supra* note 10.

139. Wasch, *supra* note 63, at 107.

140. Ryan Sharp, *Dominican Players Face Difficulties on the Road out of Poverty and into MLB*, GLOB. SPORT MATTERS (Mar. 26, 2019), https://live-global-sport-matter.ws.asu.edu/culture/2019/03/26/dominican-players-face-difficulties-on-the-road-out-of-poverty-and-into-mlb [https://perma.cc/8BZD-MWF5].

141. Wasch, *supra* note 63, at 107.

142. Sharp, *supra* note 140.

143. Diana L. Spagnuolo, Comment, *Swinging for the Fence: A Call for Institutional Reform as Dominican Boys Risk Their Futures for a Chance in Major League Baseball*, 24 U. PA. J. INT'L ECON. L. 263, 281 n.101 (2003).

144. Wasch, *supra* note 63, at 104.

145. Zagunis Complaint, *supra* note 8, at 3.

to help struggling youth aspiring for greatness. Instead, BLA seems to profit[146] off poorly educated, Spanish-speaking clients by drafting contracts that shift a disproportionate amount of the players' future benefits to itself.

BLA promotes a vision of turning dreams into reality, but it suggests in litigation against its former clients that this "reality" is limited to *playing* professional baseball.[147] Considering BLA's contracts extend to all earnings from a player's "activities in or substantially related to" baseball, players will share their earnings with BLA well past their playing days.[148] The average MLB playing career is just 5.6 years.[149] So with contracts lasting twenty-five years, BLA will continue to profit if players shift to other careers in baseball.

BLA's contract terms are also problematic because when the company succeeds, it can siphon away excessively large amounts of earnings from players that are possibly unaware of the true extent of the brand agreements. The provision entitling BLA to earnings beyond an individual's playing career is buried towards the end of the contract, away from the player's obligations under the agreement.[150] To illustrate this point, let's create a hypothetical scenario.

Player A signs a brand agreement with BLA, exchanging ten percent of his future earnings for $200,000. He plays in MLB for five years, earning $5 million from Team B. Over the same five years, he also licensed his trademarked nickname to another company for $5 million. After retiring from playing after five years (just under the average MLB playing career), Player A elects to coach with Team B for the next twenty years. Team B pays Player A $20 million over this time frame. In total, Player A earned $30 million over the life of the contract, but this amount does not include his obligations to BLA or his tax liabilities. BLA will earn $3 million dollars off an initial $200,000 investment. So while Player A has certainly cashed in on his talent, he has also paid BLA fifteen times as much money as it gave him. This hypothetical does not even assess Player A's obligation to autograph 2,500 items over the course of the agreement or his possible Equity Earnings, which themselves hold untold value. Even without these additional duties, BLA has stacked the contract to disproportionally benefit itself.

Latin American baseball players lack the requisite bargaining power needed to level the terms of BLA's agreements more in their favor. First, Latin

146. In response to Delaware's efforts to limit financial returns from brand agreements, discussed in Section III.B, *infra*, Michael Schwimer said that "capping the multiple on a rate of return could ruin his business." Passan, *supra* note 70.

147. *See* Zagunis Complaint, *supra* note 8, at 3.

148. *See* Zagunis Exhibit A, *supra* note 79, at 9; *see also supra* Section I.D (identifying, for example, how players may owe BLA portions of their sports casting or coaching earnings).

149. This figure is taken from a 2007 study that examined the careers of 5,989 MLB players across the twentieth century. William D. Witnauer, Richard G. Rogers & Jarron M. Saint Onge, *Major League Baseball Career Length in the 20th Century*, 26 POPULATION RSCH. & POL'Y REV. 371, 379–80 (2007). Although the study is several years old, we can reasonably assume the average MLB career has not grown nearly five times as long since the study's publication.

150. *See* Zagunis Exhibit A, *supra* note 79, at 7, 9.

American players lack access to lawyers who could adequately inform them of the risks of signing a BLA brand agreement.[151] BLA, as a sophisticated company with at least $256 million in assets, has its own legal counsel and has hired legal counsel to "represent" prospective clients.[152] Second, Latin American players start in a disadvantageous position simply by not being from the United States. Latin American players regularly accept signing bonuses that are far lower than what their American counterparts sign.[153] U.S.-born players can often use the prospect of playing in college to negotiate higher signing bonuses when teams select them in the MLB Draft.[154] In contrast, Latin American players are more desperate to earn money because of severe income inequality and an urgent desire to help their families.[155] BLA's brand agreements will continue to place Latin American baseball players in vulnerable positions until a player seeks judicial redress to invalidate the agreements.

III. DELAWARE COURTS SHOULD INVALIDATE BLA'S BRAND AGREEMENTS

A judicial finding of unconscionability, rather than a legislative solution, furthers the pluralistic theory of contract law by protecting Latin American Minor League Baseball players with disparate bargaining power. Given the intricacies of the legislative process and competing legislative interests,[156] Delaware courts are the best equipped to apply common law unconscionability principles to BLA's brand agreements. Judicial decisions may also promote efficiency better than legislative actions given their broader principles.[157] Although a deeper factual analysis may be warranted, Francisco Mejía's and Mark Zagunis's publicly available contracts and BLA's position as a well-funded investment firm provide adequate grounds for analyzing unconscionability.

151. *See* Mejía Complaint, *supra* note 13, at 4 (alleging Francisco Mejía, a native of the Dominican Republic, lacked his own legal counsel when dealing with BLA).

152. *See id.* (alleging the attorney present in contract discussions actually represented BLA).

153. Spagnuolo, *supra* note 143, at 278–79.

154. *See id.* at 279 (quoting Alex Rodriguez saying, "You should not treat someone unfairly because they don't have the leverage some of these high-school kids have here. Just because they don't have the opportunity to go to Stanford or the University of Miami.").

155. *See id.* at 278, 279 n.94 (highlighting how remittances are extremely important to the Dominican Republic's economy).

156. *See generally* Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765 (2021) (identifying legislative relationships between legislators and constituents, interest groups, and political party leaders).

157. Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 113 (2006) (discussing an empirical study on unconscionability doctrine that found case law based on broad principles led to faster and more predictable decisions than detailed legislative solutions).

A. PREVIOUS LEGISLATIVE SOLUTIONS HAVE FAILED

Contract law is primarily governed by state law.[158] As a result, state legislatures can enact legislation to regulate BLA and its brand agreements.[159] However, two meaningful attempts to do so failed. Both Delaware and Maryland proposed legislation titled the "Professional Athlete Funding Act" ("PAFA") in 2019 and 2021, respectively, which would have established requirements for brand agreements between professional athletes and investors.[160] Because BLA's contracts are governed by Delaware law,[161] Delaware's proposed legislation is the most relevant to this discussion. The Delaware House and Senate passed PAFA in June 2019, but the bill died without Governor John Carney's signature.[162]

The Delaware Legislature found that current Delaware law does not shield professional athletes from being taken advantage of "by unscrupulous investors."[163] Given the differing terms across brand agreements, the legislature sought to "codify the best practices that protect the professional athlete."[164] Delaware's proposed PAFA would have imposed five conditions, among others, on brand agreements:

> (1) Is written in the professional athlete's native language or a language in which the professional athlete is fluent.
>
> (2) Specifies the percentage of future income or earnings that the professional athlete is obligated to pay to the investor and that said percentage was chosen by the professional athlete.
>
> (3) Identifies the specific categories or kinds of future income or earnings to be used for purposes of calculating the obligation of the professional athlete under the player brand agreement.

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158. *See, e.g.*, Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 630–31 (2009) (applying state law to "issues concerning the validity, revocability, and enforceability of contracts" (quoting Perry v. Thomas, 482 U.S. 483, 493 n.9 (1987))); Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 267 n.4 (2015) ("Because contract law is state law, the unconscionability doctrine . . . varies across states."); Stephen A. Plass, *Federalizing Contract Law*, 24 LEWIS & CLARK L. REV. 191, 198 (2020) ("Contract law is generally understood as common law rules developed by state courts and supplemented by state statutes . . . .").

159. Future legal scholarship in this area could examine a federal legislative solution akin to other federal securities laws and regulations.

160. H.B. 180, 150th Gen. Assemb., Reg. Sess. (Del. 2019); S.B. 512, 2021 Leg., 442d Sess. (Md. 2021); H.B. 596, 2021 Leg., 442d Sess. (Md. 2021).

161. *See, e.g.*, Mejía Exhibit A, *supra* note 79, at 17; Zagunis Exhibit A, *supra* note 79, at 8.

162. Garcia-Roberts & Samaha, *supra* note 71; *see House Bill 180*, DEL. GEN. ASSEMB., https://legis.delaware.gov/BillDetail?LegislationId=47605 [https://perma.cc/L3VS-R5XA]; *see also DE HB180*, BILL TRACK *50*, https://www.billtrack50.com/billdetail/1131723 [https://perma.cc/7ZHY-BZW3] (showing the bill's most recent status as "dead").

163. Del. H.B. 180.

164. *Id.*

> (4) Does not require the professional athlete to pay more than [fifteen percent] of the professional athlete's future income or earnings exclusively, however the professional athlete has the opportunity to choose to receive less of an investment in exchange for a lower percentage of the athlete's future income or earning.
>
> (5) Does not require the professional athlete to share future income or earnings earned beyond the professional athlete's professional career.[165]

Contract signings would also need to take place in the athlete's native language, or a translator would have to be present.[166] The bill's fifteen percent cap on future earnings is a noteworthy move that would protect vulnerable signees, but investors like BLA could still make vastly more money than their initial payment. Restricting the brand agreement's length to only a professional athlete's professional career is perhaps the most striking aspect of the bill. Because BLA's brand agreements last for twenty-five years,[167] PAFA would amend current Delaware law to prevent BLA from offering such lengthy and broad agreements.

The Maryland Legislature failed to pass its version of PAFA; the law never made it out of committee.[168] Maryland's proposed PAFA was largely similar to Delaware's bill. The most notable difference centers on the percentage of earnings and the length of agreements. Maryland would have allowed brand agreements to stretch as long as thirty years, with players being able to share up to thirty percent of their future earnings.[169]

These two proposed legislative solutions would inadequately address the problem with BLA's brand agreements. Both bills would allow the practice to continue, subjecting additional Latin American baseball players to BLA's predatory behavior. Additionally, neither bill struck at the heart of the issue: Latin American baseball players "are typically poorer than their U.S.-born counterparts,"[170] so they are more susceptible to bad actors. Moreover, the bills did not limit which terms could be in a brand agreement, so BLA could continue to stack terms in its favor. The contracts' Professional Baseball Earnings, Brand Earnings, Equity Earnings, and autograph requirements would still

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165. *Id.*

166. *Id.*

167. Zagunis Exhibit A, *supra* note 79, at 7.

168. *See HB0596*, MD. GEN. ASSEMB. (Apr. 1, 2021, 4:41 PM), https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB0596?ys=2021RS&search=True [https://perma.cc/5GWS-RUXK]; *see also SB0512*, MD. GEN. ASSEMB., https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/sb0512?ys=2021RS [https://perma.cc/S8BA-STVF] (showing the legislators most recently referred the bill to committee).

169. S.B. 512, 2021 Leg., 442d Sess. (Md. 2021).

170. *See* Varela, *supra* note 10.

maintain "an overall imbalance in the obligations and rights imposed by the bargain."[171]

B. BIG LEAGUE ADVANTAGE'S BRAND AGREEMENTS ARE UNCONSCIONABLE

BLA's brand agreements with Latin American baseball players, as currently written and signed, are unconscionable under Delaware law. Most of the previous discussion, particularly in Section I.D of this Note, focused on specific terms in BLA's agreements, i.e., "the substance of the exchange."[172] This focus is warranted because Delaware's unconscionability standard permits its courts to consider the balance between procedural unconscionability and substantive unconscionability: "If more of one is present, then less of the other is required."[173] Further, decisions from other jurisdictions illustrate how courts will only briefly scrutinize procedural unconscionability "if the substantive element is deemed to be demonstratively unfair."[174]

Still, this Note's earlier procedural unconscionability analysis supports a finding of unconscionability. Although additional, more specific facts may be needed in an actual case against BLA, it appears there is disparate bargaining power among the parties. BLA, as a complete investment fund, has accumulated at least $256 million as of 2023.[175] Meanwhile, the firm seeks out baseball players from a region with a 32.3 percent poverty rate.[176] As a result, BLA is approaching "the underprivileged, unsophisticated, [and the] uneducated."[177] BLA—a multi-million dollar company with financial officers, data scientists, and legal counsel—displays raw economic power and crafts agreements to its benefit.[178]

Procedural unconscionability also asks whether a player understands the terms of the contract. There is an extremely low chance these players can retain adequate representation to help them understand the terms of the agreement. Even if the contract is in their native language, the agreement's terms are complex and confusing; they deal with equity investments and variations in earnings, and they bury important requirements in definitional

171. James v. Nat'l Fin., LLC, 132 A.3d 799, 815 (Del. Ch. 2016) (citing Fritz v. Nationwide Mut. Ins. Co., No. 1369, 1990 WL 186448, at *4–5 (Del. Ch. Nov. 26, 1990)).

172. *Id.*

173. Chemours Co. v. DowDuPont Inc., No. 2019-0351, 2020 WL 1527783, at *12 (Del. Ch. Mar. 30, 2020) (quoting *James*, 132 A.3d at 815).

174. Blake D. Morant, *The Salience of Power in the Regulation of Bargains: Procedural Unconscionability and the Importance of Context*, 2006 MICH. ST. L. REV. 925, 949. For examples of this analysis, see *id.* at 948–51.

175. *See* Novy-Williams & Coffey, *supra* note 9.

176. Press Release, United Nations ECLAC, Poverty Rates in Latin America Remain Above Pre-Pandemic Levels in 2022, ECLAC Warns (Nov. 24, 2022), https://www.cepal.org/en/pressreleases/poverty-rates-latin-america-remain-above-pre-pandemic-levels-2022-eclac-warns [https://perma.cc/7TS2-4BDG].

177. *James*, 132 A.3d at 815.

178. *About BLA*, *supra* note 6.

clauses.[179] Arguably the most damaging provisions, the clawback clause and the definition of "Field," are conveniently missing from the agreements' main obligations in a clear, identifiable manner.[180] The Equity Earnings clauses, while conspicuously in the beginning of the contract, are full of complex jargon that is difficult for even a native English speaker to understand.[181] Furthermore, players cannot negotiate how much they value each percent of their future earnings. BLA offers its exchange "on a take it or leave it basis to [players] in a weaker economic position."[182]

BLA's contracts are also substantively unconscionable because there is "an overall imbalance in the obligations and rights imposed by the bargain."[183] BLA can draw from a player's salary well after he concludes his playing career.[184] A player only receives the initial up-front payment from BLA; any subsequent earnings from baseball arrive because of his hard work on the field. In other words, the player is not directly providing BLA a benefit. Instead, the professional baseball team compensates the player, who is only required to share his success because of an inopportune bargain. Thus, BLA disproportionately benefits from the brand agreements in relation to their up-front cost.

The clawback provision is the most controversial term on its own because of the circumstances many Latin American baseball players find themselves in. A minor league player would irreparably harm himself if he, believing BLA's upfront payment does not need to be repaid unless he makes the majors, decides to retire on his own volition within two years of signing the agreement. He is suddenly responsible for repaying an extraordinary sum despite his lack of education, no English language skills, and poverty in his home country.[185]

The Second Restatement of Contracts says that courts can "limit the application of an[] unconscionable term as to avoid an[] unconscionable result."[186] Delaware adopted the same language in its Uniform Commercial Code.[187] Despite the law applying to the sale of goods, Delaware courts have extended it to other contracts.[188] Delaware courts and other jurisdictions interpret the Restatement's text to allow courts to sever unconscionable

179. *See* Zagunis Exhibit A, *supra* note 79, at 8–9.

180. *Id.* at 7, 9.

181. *See id.* at 3. Admittedly, it took me a few reads to understand BLA's Equity Earnings clauses. Check them out yourself!

182. *James*, 132 A.3d at 815 (quoting Fritz v. Nationwide Mut. Ins. Co., No. 1369, 1990 WL 186448, at *4–5 (Del. Ch. Nov. 26, 1990)).

183. *Id.*

184. *See supra* Part II.

185. Zagunis Exhibit A, *supra* note 79, at 7.

186. RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981).

187. DEL. CODE ANN. tit. 6, § 2-302 (West 2006).

188. *See James*, 132 A.3d at 814 n.10 (explaining how Delaware courts have applied section 2-302 in cases involving restrictive covenants on land and insurance contracts).

terms or clauses so the remainder of the contract can be enforced.[189] A court analyzes whether the unconscionable terms constitute "an essential part of the agreed exchange."[190] If the terms are not essential to the exchange, courts may sever them to preserve the rest of the agreement.[191]

Professional Baseball Earnings, Brand Earnings, Equity Earnings, the autograph requirement, and the contract's clawback provision collectively constitute essential parts of BLA's brand agreements because they maximize the entity's returns. Severing one provision on its own would not cure the blatant imbalance that exists in these contracts because BLA could still disproportionately profit from the remaining obligations. Delaware courts must invalidate the entire agreement to prevent BLA from benefitting from Latin American baseball players' more vulnerable position.

C. Balancing Economic Interests and Furthering the Pluralistic Goals of Contract Law

An outcome favoring unconscionability appropriately balances the parties' economic interests and advances ideals of fairness. Even though courts sparingly apply unconscionability doctrine,[192] Delaware courts should apply the doctrine to BLA's brand agreements because "it serves an important role of protecting humanity's . . . sense of 'fairness.'"[193]

Invalidating the current iteration of BLA's contracts will hopefully create a more balanced exchange, reminiscent of *Post v. Jones*.[194] There, the U.S. Supreme Court capped the amount salvors could recover to between one-third and one-half of the market price for the salvaged oil.[195] The Court left intact an economic incentive to rescue, but it prevented a disadvantaged party from being taken advantage of.[196] Here, BLA's current brand agreements could see, for example, a return of nearly $30 million in exchange for a much smaller initial investment.[197] If Delaware courts void BLA's contracts, the company could work to create a more balanced exchange, drawing on the

189. UBEO Holdings, LLC v. Drakulic, No. 2020-0669, 2021 WL 1716966, at *11 (Del. Ch. Apr. 30, 2021); *cf.* Nino v. Jewelry Exch., Inc., 609 F.3d 191, 206 (3d Cir. 2010) ("Our final task in addressing [the] unconscionability challenge to the arbitration agreement is to determine whether the unconscionable terms may be severed from the agreement such that the remainder of its terms may be enforced.").

190. *Nino*, 609 F.3d at 206 (quoting RESTATEMENT (SECOND) OF CONTS. § 184(1) (AM. L. INST. 1981)).

191. *Id.*

192. Ketler v. PFPA, LLC, 132 A.3d 746, 748 (Del. 2016) ("Unconscionability is a concept that is used sparingly.").

193. Schmitz, *supra* note 157, at 74.

194. Post v. Jones, 60 U.S. (19 How.) 150, 160–61 (1856).

195. *Id.* at 161.

196. *Id.* at 160.

197. *See, e.g.*, Diamond, *supra* note 83.

principles enunciated in *Post* and "preventing the extortion of parties in a weak bargaining position."[198]

Unconscionability originated out of an innate sense for fairness in contract law.[199] It is a shift away from contract "formalism," or the belief that a parties' written contract trumps fairness ideals.[200] And as a flexible doctrine, courts can use their discretion when applying unconscionability.[201] All told, unconscionability doctrine is a "safety net" that "promotes contractual liberty by increasing bargaining equality . . . for disadvantaged parties."[202]

Some contractual relationships are between parties "who owe one another different levels of play depending on their *histories* and *circumstances*."[203] As a result, courts should adapt their procedural unconscionability study to reflect these differing histories and circumstances in a stronger contextual analysis.[204] Because at least half of BLA's signees are from poor Latin American countries,[205] the players' desire to escape poverty is a relevant consideration under this framework. A player's motivation to play in MLB—the highest level of professional baseball in the world—may blind him from assessing the realities of the contracting process. BLA surely realizes these talented players are desperate to succeed, so attaching itself to them is a surefire path to profits when it signs enough of these vulnerable prospects.

This Note primarily focused on BLA's brand agreements with Latin American baseball players because of MLB's troubled history with Latin America. But BLA also signs American baseball players, such as Mark Zagunis, discussed in Section I.C.3, and Bailey Ober, a standout pitcher for the Minnesota Twins.[206] The same earnings provisions, autograph requirements, and clawback provisions exist in these players' contracts, but Delaware courts will need to balance these concerns against the agreements' procedural process. Over ninety percent of Americans have at least a high school diploma,[207] so the impact of an individual's education level on their bargaining power is probably lower. Moreover, American baseball players must complete at least high school to be eligible for the MLB Rule 4 Draft, so there is less

198. SCOTT & KRAUS, *supra* note 36, at 418.

199. Schmitz, *supra* note 157, at 76–77.

200. Meredith R. Miller, *Party Sophistication and Value Pluralism in Contract*, 29 TOURO L. REV. 659, 664–65 (2013).

201. Schmitz, *supra* note 157, at 83, 113–14.

202. *Id.* at 76, 113.

203. *Id.* at 103 (emphasis added).

204. *See id.* at 103–04, 116.

205. HBO, *supra* note 80, at 20:13.

206. *See generally* Zagunis Complaint, *supra* note 8 (showing BLA signed Mark Zagunis to a brand agreement); *Athletes*, BIG LEAGUE ADVANTAGE, https://bigleagueadvantage.com/athletes [https://perma.cc/E7LG-2EZY].

207. Press Release, U.S. Census Bureau, Census Bureau Releases New Educational Attainment Data (Feb. 24, 2022), https://www.census.gov/newsroom/press-releases/2022/educational-attainment.html [https://perma.cc/Q3LZ-LE3U].

concern that players lack the English skills necessary to navigate BLA's complex agreements.[208] Thus, Delaware courts should examine the facts of each BLA agreement with American players before invalidating the contract based on unconscionability.

CONCLUSION

Latin America is undeniably home to monumental baseball talent. Some of the most recognizable past and present MLB stars call the region home. The possibility of earning millions of dollars to escape poverty inspire many to pursue baseball full-time, usually forgoing school to achieve the dream.[209] From *buscones* who recruit players early in life, only to demand part of their signing bonus,[210] to operatives who convince players to leave their homes,[211] many players are taken advantage of from a young age.

BLA has joined the long list of entities seeking to profit off the success of Latin American baseball players. But as shown in this Note, BLA's current brand agreements with its Latin American baseball clients are unconscionable. Their terms are grossly imbalanced in favor of the BLA, and the players display significantly inferior bargaining power. Delaware courts can consider the economic interests at stake in this contractual relationship but should defer to the pluralist theory of contract law and elevate principles of fairness. By doing so, Delaware courts can prevent BLA from continuing MLB's troubled history with Latin America.

208. *See Rule 4 Draft*, MLB, https://www.mlb.com/glossary/transactions/rule-4-draft [https://perma.cc/V7KR-5U86].

209. Wasch, *supra* note 63, at 105.

210. *Id.* at 100; Sharp, *supra* note 140.

211. *See* Eden, *supra* note 134.