

THERE'S NO LAWSUITS IN BASEBALL: HOUSTON ASTROS' LIABILITY FOR SIGN STEALING

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“There are interested parties with financial stakes in the issue who have lawyers circling around like a Bram Stoker vampire who smells blood.”¹

INTRODUCTION

On February 10, 2020, former Major League Baseball (MLB) pitcher Michael Bolsinger filed suit against the Houston Astros for alleged damages that resulted from the Astros' sign-stealing scheme.² The five causes of action in the complaint are unfair business practices, negligence, intentional interference with contractual relations, intentional interference with prospective economic relations, and negligent interference with prospective economic relations.³ This essay briefly covers the events leading up to the lawsuit as well as issues of causation, assumption of risk, and damages.

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¹ Everything You Need to Know About MLB's Sign-Stealing Scandal, ESPN (Feb. 13, 2020), https://www.espn.com/mlb/story/_/id/28476282/everything-need-know-mlb-sign-stealing-scandal.

² Complaint, *Bolsinger v. Houston Astros, LLC*, No. 20STCV05242 (Sup. Ct. L.A. Cty. Feb. 10, 2020).

³ *Id.* at 9–13.

BACKGROUND

The Houston Astros employed a sign-stealing scheme during their home games in the 2017 season.⁴ They used a camera to record the opposing team's catcher's signals, the signals were then decoded and relayed to someone who would strike a trash can to communicate to Astros batters which pitch to anticipate.⁵ MLB fined the Astros \$5 million and revoked their first- and second-round picks in the 2020 and 2021 drafts.⁶

Bolsinger was drafted by the Arizona Diamondbacks in 2010.⁷ After pitching in the minor leagues ("the minors"), Bolsinger was called up to the major leagues ("the majors") in 2014.⁸ He was traded to the Los Angeles Dodgers and went back and forth from the majors to the minors, at one time winning the Dodgers' MLB Pitcher of the Month Award.⁹ In 2016 he made the opening day roster for the Dodgers but then suffered an injury that sent him back to the minors.¹⁰ After being traded to the Toronto Blue Jays and pitching relief in five games, his sixth performance was against the Astros on August 4, 2017.¹¹ Although he only pitched twenty-nine pitches, Bolsinger gave up four runs, four hits, and three walks—a very poor performance.¹² Audio files from that game show that the Astros were engaging in the trash-can-banging scheme during Bolsinger's pitches.¹³ After this performance, Bolsinger was sent down to the minors and has never played in the majors since.¹⁴

After he was cut from the majors, he made the tough decision to play in Japan while his wife was pregnant in the United

⁴ James Dator, *The Astros Sign-Stealing and Cheating Scandal, Explained*, SBNATION (Jan. 13, 2020, 4:40 PM), <https://www.sbnation.com/mlb/2020/1/13/21064250/astros-sign-stealing-suspensions-fines-mlb>.

⁵ *Id.*

⁶ *Id.*

⁷ Complaint, *supra* note 2, at 4.

⁸ *Id.*

⁹ *Id.* at 5.

¹⁰ *Id.*

¹¹ *Id.* at 2.

¹² *Everything You Need to Know*, *supra* note 1.

¹³ *Id.*

¹⁴ Complaint, *supra* note 2, at 5.

States.¹⁵ He performed well in Japan and was selected to play in the 2018 Japanese All-Star game.¹⁶ Bolsinger is currently a free agent trying to play in the United States for the 2020 season.¹⁷

A week before Bolsinger's lawsuit was filed, a class action lawsuit by more than one hundred DraftKings fantasy sports contestants was filed against the MLB, Houston Astros, and Boston Red Sox (who were also caught stealing signs in 2017).¹⁸

CAUSATION

The complaint alleges that Bolsinger's performance was "due to the Houston Astros' sign stealing scheme"¹⁹ and that "this ultimately cost him his job . . ."²⁰ Additionally, the complaint alleges that the Astros' sign-stealing scheme "result[ed] [in their] winning the World Series."²¹ Although never explicitly stated, the complaint also insinuates that—but for the Astro's sign stealing—Bolsinger would have continued to have a career in the majors after 2017.²² Counterfactual claims such as this are often difficult to dispositively prove. In Bolsinger's case, there is evidence the Astros can present to contradict the claim that it was the sign stealing that caused Bolsinger's fate and the Astros' World Series win.

Regardless of the sign stealing, Bolsinger's pitches simply were not that good in his inning against the Astros. According to Statcast, the expected batting average for the quality of his pitches in that game was .560²³—more than double the MLB

¹⁵ Mike Bolsinger, *The Astros' Cheating Derailed My Career. So I'm Suing.*, WASH. POST (Feb. 14, 2020, 10:52 AM), https://www.washingtonpost.com/opinions/why-im-suing-the-houston-astros-over-their-cheating/2020/02/13/c15bef00-4e9f-11ea-bf44-f5043eb3918a_story.html.

¹⁶ Complaint, *supra* note 2, at 6.

¹⁷ *Id.*

¹⁸ Michael McCann, *Why Daily Fantasy Players Are Suing MLB over Sign Stealing*, Sports Illustrated (Feb. 7, 2020), <https://www.si.com/mlb/2020/02/07/daily-fantasy-lawsuit-sign-stealing>. Relevant to this lawsuit is the MLB's ongoing financial relationship with DraftKings.

¹⁹ Complaint, *supra* note 2, at 5.

²⁰ *Id.*

²¹ *Id.* at 2.

²² *Id.* at 5–6. The inning is described as "the death knell" to Bolsinger's career. *Id.* at 5.

²³ *Everything You Need to Know*, *supra* note 1.

average.²⁴ Also, the cheating scandal is now known by every MLB scout. This begs the question—if the only thing keeping Bolsinger from playing in the majors today is his one performance against a cheating Astros team, then why is he currently not signed by a major league team?

As for what caused the Astros' 2017 World Series win, the owner claims that it was not sign stealing. As recently as February 2020, he said that the sign-stealing scheme “didn't impact the game. We had a good team.”²⁵ While the Astros' owner is clearly a biased source, there is evidence to suggest the Astros may have won regardless. The practice of sign stealing did not occur in a bubble. Leading up to the 2017 season, the Astros were being praised for “[b]rilliant draft picks and front-office algorithm strategizing . . .”²⁶ And the 2017 Astros' roster was “loaded with talent.”²⁷ Also, the division the Astros play in was relatively weak in 2017.²⁸

To further complicate the causation issue regarding what led to the Astros' 2017 World Series win, their away game win percentage of 0.654 was greater than their home game win percentage of 0.593. But the Astros only engaged in sign stealing during their home games.²⁹ Bolsinger will have to show that the Astros' conduct caused him harm—mainly his termination and inability to gain employment playing baseball in the MLB. For example, to prevail on the negligence claim, he will have to prove

²⁴ *Batting Average AVG*, SPORTINGCHARTS, <https://www.sportingcharts.com/dictionary/mlb/batting-average-avg.aspx> (last visited Feb. 15, 2020) (“The league-wide batting average has generally ranged between .250 and .275.”).

²⁵ Bolsinger, *supra* note 15.

²⁶ Roger Angell, Long Wait, Great Win, NEW YORKER: SPORTING SCENE (Nov. 2, 2017), <https://www.newyorker.com/sports/sporting-scene/long-wait-great-win-houston-astros-los-angeles-dodgers-world-series-game-seven>.

²⁷ Barry Svrluga & Dave Sheinin, The World Just Learned of the Astros' Cheating. Inside Baseball, It Was an Open Secret, WASH. POST (Feb. 11, 2020, 3:44 PM), https://www.washingtonpost.com/sports/mlb/astros-cheating-open-secret/2020/02/11/1830154c-4c41-11ea-9b5c-eac5b16dafa_story.html.

²⁸ The other four teams in the American League West all had losing records in 2017. 2017 Regular Season Standings, MLB.COM, <https://www.mlb.com/standings/2017> (last visited Feb. 17, 2020).

²⁹ Lamond Pope & Tim Bannon, 8 Things to Know About the Astros' Sign-Stealing Scandal, Including a Former White Sox Pitcher's Early Suspicions, CHI. TRIB. (Jan. 17, 2020, 9:00 AM), <https://www.chicagotribune.com/sports/white-sox/ct-cb-houston-astros-sign-stealing-danny-farquhar-white-sox-20200117-ckfumn2wfhahbb25tl24gfb4-story.html>.

that the Astros' scheme was "the proximate or legal cause of the resulting injury."³⁰ In other words, was the Astros' sign stealing the "necessary antecedent to the injury, without which no injury would have occurred"?³¹ He will have to prove that the Astros' sign-stealing scheme led to his termination and the fact that he never played baseball professionally in the MLB again. It will be interesting to see whether Bolsinger can prevail on this issue—especially regarding the harm of him never returning to professionally play baseball in the MLB.

ASSUMPTION OF RISK

The MLB has a rich history of sign stealing, and certain types of sign stealing are even allowed under the rules.³² The Astros were not even the only team caught stealing signs in 2017; the Boston Red Sox were fined for an elaborate sign-stealing scheme that year too.³³ One sportswriter describes how believing that those were the only two teams engaged in sign stealing "would be to deny the realities about human behavior in hypercompetitive environments with massive economic stakes in play, especially where policy loopholes and gray areas exist . . ."³⁴ Two former Astros have hinted that sign-stealing practices were far more prevalent in the MLB than even what the Astros were doing.³⁵

The known prevalence of sign stealing is why teams implement secret signs in an effort to reduce the risk of their signs being stolen by opposing teams. Some teams even change signs every batter for this reason.³⁶ This is why it was necessary for the

³⁰ See *Ladd v. Cty. of San Mateo*, 911 P.2d 496, 498 (Cal. 1996) (discussing elements of negligence).

³¹ *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr. 2d 748, 752 (1992).

³² Emma Baccellieri, *Sign Stealing Has Long Been a Part of MLB. It's Not Going Anywhere*, *SPORTS ILLUSTRATED* (Nov. 13, 2019), <https://www.si.com/mlb/2019/11/13/sign-stealing-baseball-history> (explaining that sign stealing is only illegal when mechanical devices are utilized).

³³ Svrluga & Sheinin, *supra* note 27 (explaining that the Red Sox would relay sequences of signs from the video room to a trainer's Apple Watch located in the dugout).

³⁴ *Everything You Need to Know*, *supra* note 1.

³⁵ *Id.*

³⁶ Baccellieri, *supra* note 32.

Astros to implement “Codebreaker,” a custom-developed algorithm used to decipher the signs of opposing teams.³⁷

Of course, the mere awareness of tortious conduct and effort to minimize the harmful effects does not negate a victim’s ability to seek compensation. But one could argue that, given the known prevalence of sign stealing in baseball, it has become part of the game. The outcomes of baseball games are affected by numerous factors. These include fallible umpires, player injuries, weather, equipment malfunctions, manager decisions, fan interference, and various methods of cheating.

It is unclear where the line should be drawn as to what prohibited behavior is actionable in civil court and what is not. Famously, NBA teams would sometimes implement the strategy to intentionally foul Shaquille O’Neil because he was a poor free throw shooter.³⁸ These fouls were deliberate violations of the rules, and they likely caused damage to O’Neil’s future earning potential. Should O’Neil therefore have been able to seek damages from the teams, coaches, and players whose rule violations caused this harm?

The doctrine of assumption of risk often applies to suits between sports coparticipants.³⁹ Sports players generally are not liable to another participant for harm “from conduct in the course of the sport that is merely careless or negligent.”⁴⁰ Liability may only be imposed if a participant “intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.”⁴¹ While the Astros’ activity was certainly deliberate, the foreseeability of how it would affect people such as Bolsinger is less clear. Furthermore, if sign stealing was not outside the range

³⁷ Everything You Need to Know, *supra* note 1.

³⁸ See generally Andrew Keh, *The Birth of Hack-a-Shaq*, N.Y. TIMES (Apr. 30, 2016), <https://www.nytimes.com/2016/05/01/sports/basketball/the-birth-of-hack-a-shaq.html> (describing the practice of intentionally fouling players who frequently missed free throw attempts).

³⁹ *Jimenez v. Roseville City Sch. Dist.*, 247 Cal. App. 4th 594, 601 (2016).

⁴⁰ *Ford v. Gouin*, 834 P.2d 724, 726 (Cal. 1992).

⁴¹ *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992); see also CAL CIV. JI 408 (providing the jury instruction for primary assumption of risk for liability of a coparticipant in sport or other recreational activity).

of ordinary baseball activity—despite being against the rules—assumption of risk may preclude liability for the harm done.

DAMAGES

The prayer for relief in the complaint does not provide a specific dollar amount request for damages.⁴² The only specific amount in the complaint is the request for approximately \$31 million in post-season bonuses the Astros earned from winning the 2017 World Series.⁴³ The complaint seeks to direct these restitutionary damages to charitable causes “focused on bettering the lives of children with an emphasis on charities in Los Angeles as well as a fund for elderly retired professional baseball players in need of financial assistance.”⁴⁴

In the event Bolsinger wins, calculating damages will be a somewhat nebulous task. The jury would essentially need to undertake the highly probabilistic nature of calculating how much Bolsinger was harmed by the Astros’ cheating.⁴⁵ In lieu of the Astros’ cheating, Bolsinger may have gone on to be a star pitcher in the MLB. Or, he may have continued to toggle between the majors and the minors. The jury would also need to consider how much longer Bolsinger would likely have played. The average baseball career is only 5.6 years,⁴⁶ and Bolsinger is now thirty-two years old, five years older than the average MLB player.⁴⁷

The jury may also find the Astros’ conduct so reprehensible that they will award punitive damages. Punitive damages are awarded when compensatory damages alone are not adequate to punish and deter the defendant.⁴⁸ Punitive damages are subjective by nature, requiring the defendant’s conduct to be “outrageous,

⁴² Complaint, *supra* note 2, at 14.

⁴³ *Id.* at 2–3.

⁴⁴ *Id.*

⁴⁵ See *Meister v. Mensinger*, 230 Cal. App. 4th 381, 396 (2014); see also CAL. CIV. JI 3900.

⁴⁶ Average Major League Baseball Career 5.6 Years, Says New Study, SCI. DAILY (July 11, 2007), <https://www.sciencedaily.com/releases/2007/07/070709131254.htm>.

⁴⁷ Conor Wakeman, Age to Reason: The MLB Player’s Average Age, BLEACHER REP. (Mar. 22, 2010), <https://bleacherreport.com/articles/367083-age-to-reason-the-mlb-players-average-age>.

⁴⁸ Jennifer K. Robbenolt, Determining Punitive Damages: Empirical Insights and Implications for Reform, 50 BUFF. L. REV. 103, 110 (2002).

because of the defendant's evil motive or his reckless indifference to the rights of others."⁴⁹

CONCLUSION

This case brings up interesting issues of cheating in professional sports, whether liability can arise from such cheating, and the extent to which the doctrine of assumption of risk might be applied to nontraditional sports tort cases. Bolsinger's suit has the potential to create precedent for future litigation involving banned practices by other athletes and sports teams. As the previously mentioned class action lawsuit from fantasy sports players demonstrates, the ramifications from this case could even extend beyond just players as the plaintiffs. Other parties can be harmed by the outcomes of sporting events, including fantasy sports players, businesses located near a sporting venue, television networks with contracts to broadcast sports, businesses that hired an athlete as a spokesman, season ticket holders, and businesses that advertise at sports venues. The case could even lead to litigation over the use of performance-enhancing drugs. If the Astros are found liable for cheating through technology and a trash can, why could a cyclist who lost the Tour de France or a boxer who lost a big fight not seek compensation from an opponent who was later found to have been using banned performance-enhancing drugs during the competition? As one headline put it, the Bolsinger case is "only the beginning."⁵⁰

⁴⁹ RESTATEMENT (SECOND) OF TORTS § 908(2) (AM. LAW INST. 1977).

⁵⁰ Aubrey Hansen, *This Astros Sign-Stealing Lawsuit Is Only the Beginning*, CCN.COM (Feb. 12, 2020, 1:46 PM), <https://www.ccn.com/this-astros-sign-stealing-lawsuit-is-only-the-beginning/>.