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Sometimes Cheaters Do Prosper

BY [STEVEN MILSTEIN](#)/ON FEBRUARY 5, 2020



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Cheating in professional sports is nothing new. Over time, in almost every well-known professional sport, scandals have been uncovered. Whenever a cheating scandal comes to light, as a fan, you hope that the proper punishment will be administered and that the “cheater does not prosper.” In 2015 the New England Patriots, a professional football team in the National Football League, found themselves under the spotlight. The Patriots had been caught cheating multiple times in the past decade, so when “Deflategate” was introduced to the public, few were surprised.^[1] “Deflategate’ was a National Football League (NFL) controversy involving the allegation that New England Patriots quarterback Tom Brady ordered the deliberate deflation of footballs used in the Patriots’ victory against the Indianapolis Colts in the 2014 American Football Conference (AFC) Championship Game.”^[2] As a rule, a football used in an NFL game has to be inflated to weigh 12 ½ to 13 ½ pounds.”^[3] If a ball does not weigh that amount, the ball is ineligible for use. After a player on the Indianapolis Colts intercepted a pass that Brady had thrown and brought the ball to the sideline, the Colts realized something was off about the ball. After looking into the balls that

Brady was using, it turned out that 11 of the 12 footballs were underinflated.[\[4\]](#) In other words, the balls that Brady was using were deflated; hence the name “Deflategate.” The controversy resulted in Brady being suspended for four games, the team was fined 1 million dollars, and the team forfeited two draft selections in 2016.[\[5\]](#) The next year, after Brady finished serving his suspension, he led the Patriots to a Super Bowl victory.

The NBA has also had its fair share of scandals.[\[6\]](#) In 2007 the basketball world was shocked to find out that a member of the NBA’s officiating crew, Tim Donaghy, had been betting on games that he was actually refereeing.[\[7\]](#) After admitting to what he had done, Donaghy was sentenced to 15 months in prison.[\[8\]](#)

Most recently, the sports world was astonished when evidence came to light that the Houston Astros had cheated in 2017, the very same year that they won the World Series.[\[9\]](#) Major League Baseball conducted an investigation into the Astros after Mike Fiers, an MLB pitcher and member of the 2017 Houston Astros, told a reporter that the Astros had been illegally stealing signs from the opposing team in order to know what pitch the batter would see.[\[10\]](#)

Sign stealing has been a part of Major League Baseball for a long time.[\[11\]](#) It is the “practice in which one team tries to decode the signs of its opponent. Those signs could be relayed from the catcher to the pitcher, or from the dugout to the catcher, or from one infielder to another, or from a base coach to a batter or runner.”[\[12\]](#) In decoding the signs from catcher to pitcher, the opposing team tries to figure out the next pitch that the batter will see. Put simply, a “90-mph fastball can reach home plate in 400 milliseconds — or four-tenths of a second. But a batter has just a quarter-second to identify the pitch, decide whether to swing, and start the process.”[\[13\]](#) So, if a batter doesn’t have to figure out what pitch he’s getting next, it will be much easier for him to hit the ball. However, although sign stealing is part of the game, if a team uses technology to steal a sign, that violates the rules of the MLB.[\[14\]](#)

Using technology to steal signs wasn’t always against the rules. Prior to 2017 there wasn’t much clarity on whether using technology to steal signs was allowed or not. However, in 2017, the Commissioner of the MLB, Rob Manfred, sent a memo to all 30 clubs clearly prohibiting the use of technology to steal signs.[\[15\]](#)

Now that it was clear to everyone in and around the MLB that using technology was not allowed to steal an opposing team’s signs, when the news about the Astros broke, everyone was waiting to see how harshly the MLB would punish them.

There has been a large split in opinion if the punishment that the Astros received was severe enough. After concluding their investigation, the MLB found that the Astros did in fact use technology to steal signs from opposing teams.[\[16\]](#) As a punishment; A.J. Hinch, the Astros manager, and Jeff Luhnow, the team’s General Manager, were both suspended from baseball for a year. In addition, the Astros have to forfeit their 1st and 2nd round draft picks for the years

2020 and 2021, and the MLB imposed a \$5,000,000 fine on the Astros organization, the largest fine ever issued in the history of the MLB.^[17] That however was not the only fallout from the whole Astros scandal. In addition to the punishments that Rob Manfred handed down to the Astros, Alex Cora and Carlos Beltran, both of whom played a role in the Astros sign stealing scandal, were fired from their new jobs; Alex Cora as the manager of the Boston Red Sox and Carlos Beltran as the manager of the New York Mets.

The Commissioner was in his full right to penalize the Astros in this way. The Commissioner has the authority from the constitution of the MLB "to determine, after investigation, what preventive, remedial or punitive action is appropriate in the premises, and to take such action either against Major League Clubs or individuals, as the case may be."^[18] Clearly, Manfred thought that these punishments would do just that.

After all of this, one question that some may be bothered by is; aside from the MLB's punishments, are there any legal implications? Can fans sue the Houston Astros for contractual fraud or misrepresentation? The fans who attended the games thought they were paying to watch a fair, unadulterated game, when in fact what they were really watching was cheating. Additionally, can Aaron Judge, a member of the New York Yankees, sue Jose Altuve, a member of the Astros, because he didn't win the MVP in 2017? In a close race for the title of MVP in 2017, Jose Altuve, who undoubtedly benefitted from the illegal sign stealing, won the MVP title. If not for the sign stealing perhaps Judge would've won. Now that Judge didn't win the MVP, he can surely make the argument that his future earnings were and will be affected. After all, any endorsement deals or future playing contracts would most likely be more lucrative for an MVP.

Regarding the first question, it is unlikely for a fan to prevail on a lawsuit claiming contractual misrepresentation. "The core legal argument would be that fans attended Astros games with marketing and contractual assurances that they would witness a competitive contest between two MLB clubs when, in reality, one club had fixed certain outcomes."^[19] However, in claiming this a plaintiff would have to prove that the Houston Astros guaranteed a spectator that they would be observing more than just a competitive game between two teams. The plaintiff would have to prove that the guarantee was for a game without any cheating. Proving this would seem difficult.^[20] A similar suit was brought by a New York Jets fan against the New England Patriots after the Patriots were found to have been spying on the Jets. The plaintiff claimed that the Patriots were in breach of their contractual duties for spectators to watch games without cheating. The Patriots however prevailed in the 3rd Circuit where the court held that the only contractual duty that the Patriots owed the fan was that there would be a game played between two opposing teams.^[21] Likewise, in this case, it is unlikely that the fans would prevail in such a lawsuit.

Regarding a lawsuit that Aaron Judge would bring against Jose Altuve, that might be a tough case as well. When a player thinks about suing another player, the "lawsuit of choice" would

usually be a tort claim. However, even in a tort lawsuit, for a player to prevail, the plaintiff would have to prove that the tortious activity was above a level that exceeded the injured players "assumption of risk." In order for that to be the case an Illinois court said "It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player."^[22] After all, player's assume a certain amount of risk when they play professional sports. However, if a player could prove that the activity of the tortfeasor was above a certain degree, the plaintiff would have a case.^[23]

I would argue similarly over here. Although most of us would want to believe that professional sports players are held to a higher standard and they don't cheat, if you look throughout the history of professional sports, cheating is a part of the game. The Chicago White Sox even cheated against themselves in the World Series.^[24] I therefore do not think that Aaron Judge would have a valid lawsuit in this case. Jose Altuve would argue; just as in torts where the injured player assumes a risk of injury and is therefore sometimes barred from a tort claim, a player should also assume that some level of cheating will occur; thereby barring this kind of lawsuit. In order for a valid "cheating lawsuit" to prevail, perhaps a player would have to show how the cheating went beyond a certain expectable level. Stealing signs likely doesn't meet that level.

Even after all the embarrassment and punishment that came along with this cheating scandal, one thing that remains is that the Houston Astros are the 2017 world champions of baseball. Many would argue that this is a fair price to pay for a championship. So, perhaps we've been lying to ourselves and our children for all these years, maybe cheaters do prosper.

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[21] *Mayer v. Belichick*, 605 F.3d 223 (3rd Cir. 2010).

[22] *Nabozny v. Barnhill*, 31 Ill. App. 3d 212 (Ill. App. Ct. 1975).

[23] *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516 (10th Cir. 1979).

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