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Jasmin Yang

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# A Whole Different Ballgame: Ticket Scalping Legislation and Behavioral Economics?

By Jasmin Yang\*

**B**aseball is the sport most closely intertwined with American culture.<sup>1</sup> In many ways, the scandals associated with baseball, such as antitrust, segregation, and labor disputes, parallel and reflect the nation's development. In helping to shape the nation's collective identity, baseball's history is a sentimental reminder of a time when people were less concerned with profit and more interested in democratic access. And despite its somewhat tarnished image, many people want to champion and maintain the purity of the game.

In jarring contrast, ticket scalpers personify the intersection of America's love for baseball with its love of profit. They represent pure free-market behavior and unbridled capitalism. For many scalpers, the concepts of face value and democratic access are meaningless. One ticket scalper recounted his best sale:

I'll tell you the best night ever...Willie Mays Night at Shea Stadium, 1973. They had a box office release of 5,000 tickets right before the game. They were two-dollar tickets, and the public never saw them. Scalpers bought them all up for 50 cents over face, and we were selling them for twenties. Great night.<sup>2</sup>

Ticket scalping and baseball, America's "national pastime," have had a thorny relationship. On the one hand, baseball's history and cultural relevance lead many to believe that the sport should be democratically accessible. On the other hand, ticket scalpers and brokers have been able to capitalize immensely on fans' devotion by selling tickets in excess of their face value. Ticket scalpers and fans have a somewhat circular relationship. Opponents of scalping charge that the practice is exploitative and seek regulation or prohibition.

Scalpers and brokers counter that they operate within the free market and exist as a result of fans' desire to attend games. As one ticket broker has put it: "[i]t wouldn't be here if people didn't want it, so there is a need for it."<sup>3</sup>

Ticket scalping is defined as "the reselling of tickets to popular entertainment or sporting events at whatever price the market will bear."<sup>4</sup> Ticket scalping often happens when fans are unable to attend events for which they have tickets, while other fans want to attend the events after face-value tickets are no longer available. This secondary ticket resale market continues to thrive. In spite of ethically neutral market principles that dictate that popular tickets will be sold at higher prices (usually in excess of face value), in general, "the lay public does not share this indifference."<sup>5</sup>

As a response to the public's general disfavor towards ticket scalping, many states have statutes that regulate or limit the activity ranging from controlling or prohibiting the resale of tickets, outlawing scalping near stadiums, and only allowing licensed ticket brokers to resell tickets above face value.<sup>6</sup> Courts uphold legislation that regulates ticket scalping, recognizing that states protect the welfare of the public's access to the free market by having a "legitimate interest in ensuring public access to entertainment and sports events."<sup>7</sup>

The Chicago Cubs became the target of criticism after some fans filed a class-action lawsuit against the club's ticket-brokerage operation.<sup>8</sup> After scalpers resold their tickets for massive profits, the Cubs decided to start their own brokerage.<sup>9</sup> While the Illinois Ticket-Scalping Act prohibits actual baseball teams from selling tickets above face value, the Act allows licensed ticket brokers who meet certain licensing requirements to sell tickets for profit.<sup>10</sup> The Cubs maintained that their ticket brokerage is an associated, but separate, entity from the ball club. Fans nonetheless alleged that the ticket brokerage and

ball club were essentially the same entity, claiming that the Cubs themselves were selling tickets in violation of the statute.<sup>11</sup>

Both fans and other ticket brokers criticized the club's decision to form its own ticket brokerage. The Cubs' situation is unique in that it aligns the fans with the ticket brokers who profit from them in opposition to the club's ticket brokerage.

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In examining the Chicago Cubs' situation, this note seeks to explore why anti-scalping legislation exists, thereby preventing free-market economic principles from determining the price of event tickets. From a behavioral economics perspective, the negative public reaction to ticket scalping is a response to a perceived notion of fairness – that the face value of a ticket is actually the “fair value.”<sup>12</sup> In viewing the face value of tickets as the fair value, the background notion of fairness is a force that drives ticket scalping legislation.

Next, this note discusses why the Chicago Cubs' case inspires more vehement criticism than is usual for ticket scalping. The case strikes fans as more unfair than ordinary ticket scalping because of the close association the brokerage has with the ball club. By setting up a brokerage, the Cubs have shattered the perception that the secondary ticket-resale market is a free market.<sup>13</sup> Fans and other ticket brokers no longer believe that there is an even playing field since the Cubs have far more information and access to the tickets than any other party. Fans believe that the Cubs withhold tickets that could be sold at face value and divert them to the brokerage, thereby shortening the supply of tickets and forcing fans to turn to the secondary ticket market. Brokers criticize the Cubs' brokerage because the Cubs organization controls the distribution of the tickets and engages in an unfair practice by using its distribution, control, and additional information to exert substantial influence over the secondary ticket

market.<sup>14</sup> Though the Cubs organization prevailed in court, the public did not buy its defense that it is just another ticket broker.<sup>15</sup>

This note then examines other ways in which ball clubs have attempted to maximize the revenue they receive off ticket sales. If one views face value prices as below-market prices, since ticket brokers are able to extract prices in excess of face value from fans, then clubs could conceivably decrease the activity of the secondary market by gauging more accurately the price that fans are willing to pay in the primary market (from ball club to consumer). Ball try to do this by instituting variable ticket pricing

mechanisms, charging more for premium games (e.g., weekend games, games in the summer, and games against popular opponents).<sup>16</sup> The Seattle Mariners experimented with another method for three games. They held an online auction, allowing fans to determine the market price of baseball tickets.<sup>17</sup>

Lastly, recognizing that the secondary ticket market will likely continue to thrive in spite of ball clubs' efforts to determine consumers' value for tickets, ball clubs could minimize the profits gained by scalpers, and help ensure affordable public access to events. They could lobby for legislation that prohibits teams from starting their own affiliated ticket brokerages and limit scalpers and brokers to discrete areas. The Phoenix Suns supported an ordinance, for example, that limits scalping activity to a discrete area across from the basketball arena, decreasing scalpers' profits.<sup>18</sup> The scalpers' centralized location fosters a more open market, enabling fans to compare prices and pay less for tickets.

Baseball's best method of balancing increased revenue with the fans' interest in affordable access to games may be a combination of more accurately gauging the value fans place on tickets and regulating the secondary ticket market to prevent fans from paying overly exploitative prices.

## A Whole Different Ballgame

### I. The Chicago Cubs Lawsuit

In 2002, the Chicago Cubs organization found itself embroiled in a courtroom battle over the legality of its ticket brokerage service. After watching ticket brokers and ticket scalpers make huge profits off the sales of Cubs tickets, the organization decided to join in the secondary ticket market itself. Cubs' vice president for business operations, Mark McGuire, stated, "[t]he secondary market is going to continue whether we are in it or not....We are going to be as creative as we can in developing our business."<sup>19</sup> In response, in June 2002, the Cubs set up Wrigley Field Premium Ticket Services, Inc.

("Premium"), a Delaware-incorporated licensed ticket brokerage located at 3717 North Clark Street, just down the street from the ballpark.<sup>20</sup> In selling tickets for more than face value (the most extreme example being \$1,500 for a \$45 face-value ticket), the club stated that Premium is a licensed ticket broker whose tickets are available on the resale market.<sup>21</sup>

McGuire, also the president of Premium, explained that the ticket brokerage acts as a service and as "a market of Cubs fans who will not buy tickets months in advance for games they want to see. Rather, they will wait until two weeks before the game, search for tickets and pay big money for them."<sup>22</sup> By providing this service, says McGuire, Premium offers a superior product to other ticket brokers or scalpers since Premium's affiliation with the Cubs is a guarantee of the tickets' authenticity.<sup>23</sup>

However, Cubs fans disagree with the club as to whether Premium actually benefits from them. On October 9, 2002, Cubs fans filed a class-action lawsuit against the ball club (Chicago National League Ball Club, Inc.) and Premium, charging them with violations of the Illinois' Anti-Scalping Act ("Ticket Scalping Act"), Consumer Fraud and Deceptive

Business Practices Act, and the Uniform Deceptive Trade Practices Act.<sup>24</sup> Cubs fans Gerald Carr Jr. and Peter John Cavoto, Jr., who purchased \$36 Cubs tickets from Premium for prices between \$50 to \$130, spearheaded the litigation.<sup>25</sup> The proponents of the lawsuit demanded that Premium reimburse purchasers \$100 for each ticket that fans purchased, which is the maximum statutory remedy for violations of the Ticket Scalping Act.<sup>26</sup> The suit went to trial in the Circuit Court of Cook County, Illinois before Judge Sophia Hall on August 12, 2003. She issued a ruling on November 24, 2003.<sup>27</sup> Judge Hall concluded that the defendants did not violate the Ticket Scalping Act and that Premium qualified as a licensed ticket broker despite its connection with the Cubs organization.<sup>28</sup>

“Cubs fans disagree with the club as to whether Premium actually benefits from them.”

### II. Illinois Ticket Scalping Act

Section one of the Illinois Ticket Scalping Act prohibits owners and operators of ballparks from directly selling baseball tickets in excess of face value.<sup>29</sup> It also prevents owners and operators from selling tickets outside of the box office or the premises of the ballpark unless the owners and operators offer the tickets at the outside location for the face-value of the tickets "at the same advertised price or printed rate thereof." Judge Hall noted that "the Ticket Scalping Act prohibits owners of amusements, such as Ball Club[s], from selling tickets above the advertised and printed price on the tickets."<sup>30</sup>

Additionally, the next section of the statute states:

(a) Except as otherwise provided in subsection (b) of this Section and in Section 4<sup>31</sup>, it is unlawful for any person, persons, firm or corporation to sell tickets for baseball games, football games, hockey games, theatre entertainments, or any other amusement for a price more than the price printed upon the face of said ticket, and the price of said ticket shall correspond with the same price shown at the box office or the office of original distribution.

(b) This Act does not apply to the sale of tickets of admission to a sporting event, theater, musical performance, or place of public entertainment or amusement of any kind for a price in excess of the printed

upheld the constitutionality of the Ticket Scalping Act against challenges that it is an improper delegation of legislative power and that it is an impermissible piece of special legislation.<sup>36</sup> The court held that a rational basis supported the Ticket Scalping Act because the public welfare would be furthered by protecting the public from “exorbitant prices” charged by the stereotypical ticket scalper.<sup>37</sup>

Illinois is not alone in regulating ticket sales; twenty-two other states impose price controls on ticket sales while three states simply have location controls that exclude scalping within the vicinity of the entertainment venue. Five states have enabling statutes that allow municipalities to draft their own statutes to regulate ticket scalping.<sup>38</sup>

Courts have upheld the constitutionality of anti-scalping legislation as remedying legitimate government concerns and as permissible exercises of states’ police powers because they are rationally related to such legitimate government concerns.<sup>39</sup> In response to ticket-scalping legislation, the courts explain, “the

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box office ticket price by a ticket broker who meets all of the following requirements.<sup>32</sup>

This part of the statute lays forth a general prohibition against selling tickets for more than face value, but creates an exception for licensed ticket brokers who comply with certain statutory formalities.<sup>33</sup>

The third part of the statute creates a cause of action for those who pay more than face value for tickets and establishes a statutory damage award of \$100 for each ticket purchased in excess of face value.<sup>34</sup>

The legislative history of the Ticket Scalping Act indicates that its purpose is to “prevent ‘ticket scalpers’ from purchasing large blocks of tickets for the best seats at sporting and entertainment events and then reselling those tickets to the public at exorbitant prices.”<sup>35</sup> Consequently, the state has

trend towards more ticket scalping regulation is gaining momentum as states attempt to protect the public’s access to the free market.”<sup>40</sup> Various courts, including the Illinois court, recognize a legitimate government interest in protecting the public’s access to entertainment events by regulating ticket scalping.<sup>41</sup>

## III. Application of the Statute to the Cubs’ Lawsuit

### A. Parties’ Arguments

At first glance, the statute indicates that the owners and operators of ball clubs cannot charge above face value for tickets and that the only entities permitted to sell above face value are licensed ticket brokers. The plaintiffs’ attorney argued that

## A Whole Different Ballgame

Premium is illegal because “there’s no practical distinction between the broker and the Cubs. The team ‘engaged in an elaborate corporate shell game to disguise its activities because it was understood it was unlawful for it to sell or permit the sale of Cubs tickets at prices in excess of the Lawful Price.’”<sup>42</sup> (Emphasis included in original.) Since the statute prohibits teams from selling tickets above face value, the statute would bar Wrigley’s sale above face value if Premium and the Cubs are the same entity.

Paul M. Bauch, the plaintiffs’ attorney, further contended that Wrigley Field is but a “shell corporation” designed by the Cubs to get around state law.<sup>43</sup> The plaintiffs argued that Premium was in noncompliance with the Ticket Scalping Act since the Cubs did not legitimately sell the tickets to Premium. Furthermore, the plaintiffs argued that the overlap in corporate structure between Premium and the Cubs should lead the court to disregard their technical separation and treat them as the same entity.<sup>44</sup> By placing tickets with Premium as opposed to legitimately purchasing them, the Cubs were essentially selling tickets above face value in violation of the Ticket Scalping Act.<sup>45</sup> As to the claims under the Consumer Fraud and Deceptive Business Practices Act and Uniform Deceptive trade Practices Act, the plaintiffs alleged that the Cubs engaged in a “bait and switch advertising scheme...[by] advertising Cubs tickets at face value, and then allegedly switch[ing] the consumers to Premium’s higher priced tickets by artificially limiting the supply of Cubs tickets in the marketplace.”<sup>46</sup>

The Cubs organization maintained that Premium did not violate the Ticket Scalping Act. It claimed that it was a licensed ticket broker that satisfied the requirements enumerated in the Illinois Ticket Scalping Act.<sup>47</sup> Additionally, the Cubs organization maintained that the tickets sold at Premium were tickets that were otherwise unavailable to regular Cubs fans because they come

from a pool of VIP tickets reserved for sponsors and employees.<sup>48</sup> At trial, Frank Maloney, the Cubs’ director of ticket operations testified that McGuire

“ By placing tickets with Premium as opposed to legitimately purchasing them, the Cubs were essentially selling tickets above face value in violation of the Ticket Scalping Act. ”

instructed him “to reduce the size of the [VIP] pool and sell the difference to Wrigley Premium.”<sup>49</sup> Klenk stated, “Premium buys its tickets from the Cubs and pays for them through intercompany transfer at Tribune Co.”<sup>50</sup>

Premium also argued that it is a licensed ticket broker within the ambit of the Ticket Scalping Statute and that its actions are separate from those of the Cubs organization since it is a distinct organization.<sup>51</sup> Additionally, it provides a service to Cubs fans who do not purchase tickets far in advance. It also provides a superior product by offering lower prices and guaranteeing the authenticity of the tickets.<sup>52</sup> Also, in offering tickets that are otherwise unavailable for sale to the general public, Premium argued that its ticket operation did not disadvantage normal fans, since those fans would not normally have access to those tickets.<sup>53</sup> In fact, Premium argued that the concerns of rival ticket brokers who were losing revenue in the form of less tickets sold and offering tickets at lower prices to stay competitive with Wrigley Field actually motivated the suit.<sup>54</sup>

### B. Decision

Judge Hall held that the Cubs and Premium did not violate the Ticket Scalping Act, the Illinois Consumer Fraud and Deceptive Business Practices Act, or the Uniform Deceptive Trade Practices Act because the facts were “largely undisputed

## SPORTS

regarding customers' access to Cubs tickets, and the creation and operation of Premium."<sup>55</sup> In outlining the Cubs' ticket sales practices, Judge Hall concluded that the sales of tickets between the Cubs and Premium comply with the Ticket Scalping Act.<sup>56</sup> The Cubs testified that season ticket holders and group purchasers were typically able to purchase tickets before the general public.<sup>57</sup> As benefits to these purchasers, season ticket holders could return tickets for rained out games and group purchasers could return ten percent of purchased tickets ten days prior to the day of the game.<sup>58</sup> After season ticket and group sales, other consumers could purchase tickets at the box office starting on the public on-sale date.<sup>59</sup> However, aside from the tickets that are sold, the Cubs "hold back about four to five thousand tickets per game in reserve...allocated to organizations such as game sponsors, opposing teams, the media, elected officials, and employees."<sup>60</sup> Forty-eight hours before the game, any unused reserve tickets are released for sale to the general public and are available at the Cubs' box office.<sup>61</sup> "The tickets Premium purchased from Ball Club for resale were tickets Ball Club historically held in reserve...Premium was able to obtain these tickets before the on-sale day."<sup>62</sup> Judge Hall held that Premium met the statutory requirements of the Ticket Scalping Act because it operated from a fixed location, displayed its broker registration, maintained a list of its employees' names and addresses, paid amusement taxes, and complied with the statute's advertising and consumer protection requirements.<sup>63</sup>

Although Premium and the Cubs are both subsidiaries of the Tribune Company, Judge Hall also found no defects with Premium's corporate structure.<sup>64</sup> She noted that Premium and the Cubs shared corporate officers, Premium's officers were initially on the Cubs payroll, the Cubs paid for some of Premium's invoices, and that the Cubs provided Premium with advice, assistance, and free advertising time.<sup>65</sup> Premium testified that its finances are operated through the Finance Service Center of the Tribune Company in a manner analogous to that of other Tribune subsidiaries, where the Service Center acts as the subsidiaries' bank, maintaining accounts for each and crediting and debiting their accounts accordingly.<sup>66</sup> Premium also has inter-company accounts with other Tribune subsidiaries, such as the ball club, through which it transfers funds.<sup>67</sup> The Court found that the use of inter-

company accounts was a standard business practice used to increase efficiency and reduce fraud.<sup>68</sup>

Premium stated that when it purchased reserve tickets from the Cubs, the transactions were recorded on both companies' inter-company accounts. In 2003, Premium purchased \$402,700 worth of tickets from the Cubs, which was recorded as a debit to Premium and a credit for the Cubs.<sup>69</sup> Premium was allowed to sell back ten percent of its tickets ten days prior to game day under a policy that is identical to the one for group sales purchasers.<sup>70</sup> In 2002, Premium purchased \$1,047,766 worth of tickets from the Cubs and was allowed to sell 90 percent of the tickets back to the Cubs (in contrast to the group sales policy), but mostly did so more than 48 hours prior to the game (the same time when unused reserve seats are released in the box office).<sup>71</sup>

Contrary to the plaintiffs' contentions, the court held that the defendants did not violate the Ticket Scalping Act because the ticket transactions between Premium and the Cubs were sales. The court stated that, to prove a sale, "there must be evidence of the transfer of ownership for a price...when money is paid or a debt is recorded at the time of sale, ownership transfers, the buyer assumes the benefits and risks of ownership, and the buyer sets the price and conditions for resales."<sup>72</sup> As evidence of the sale, the court noted that inter-company accounts were standard practices in recording business transactions, that transfer of ownership was evidenced by ticket statements from the Cubs to Premium, the Cubs paid amusement taxes when tickets were sold to Premium, and that Premium undertook the risks and benefits of ticket ownership (that Premium incurred losses for unsold tickets and had a similar return policy to group sales in 2003).<sup>73</sup> Judge Hall held that the 2002 return of 90 percent of the tickets "does not prove that a sale did not occur" and that the "Ball Club had discretion to allow returns under circumstances it determined were special."<sup>74</sup>

As to the plaintiffs' arguments that the Cubs placed tickets with Premium and shared in the excess revenue, the court stated, "plaintiffs presented no evidence that Ball Club has an arrangement with Premium whereby Ball Club directly or indirectly shares in the excess over face value which Premium receives upon reselling tickets."<sup>75</sup> As to concerns about the Cubs and

## A Whole Different Ballgame

Premium's common ownership, the court further noted,

If indirect sharing is to be assumed because of the common ownership of Premium and Ball Club by Tribune Co., then the legislature could prohibit common ownership outright, or prohibit Ball Club from selling tickets to a broker also owned by a common parent. Both of these prohibitions are absent from the Ticket Scalping Act.<sup>76</sup>

Additionally the court found no reason to disregard the corporate separateness of Premium and the Cubs, stating that "the evidence fails to show that Ball Club controls or dominates its sister subsidiary Premium."<sup>77</sup>

The court quickly disposed of the Consumer Fraud and Deceptive Business Practices Act by finding that Premium did not engage in any deception concerning its independence from the Cubs and that it had not engaged in any bait and switch advertising tactics that would violate the statute.<sup>78</sup> Also, the court found that Premium did not artificially limit the market for tickets since it purchased relatively small numbers of tickets and since its tickets came out of the reserve pool that is otherwise unavailable to fans.<sup>79</sup> For similar reasons, the court found for the defendants on the Uniform Deceptive Trade Practices Act claim, holding that the plaintiffs failed to prove bait and switch tactics, failed to prove a diminished opportunity to buy tickets, and failed to prove that they were confused as to whether Premium and the Cubs were separate corporate entities.<sup>80</sup>

### C. Criticism

Judge Hall articulated concerns over the common ownership of Premium and the Cubs when she stated, "Should the public have a concern about the common ownership of an amusement and a licensed ticket broker, the relationship of the

subsidiaries or advantages they devise from that relationship, then, the legislature can do the public's bidding by enacting desired limitations."<sup>81</sup> Despite the court's ruling that Premium has abided with the letter of the Ticket Scalping Act, the close association between it and the Cubs is problematic.

In casting Premium as largely identical to other ticket brokers, the court has overlooked the consequences and advantages of common ownership. The court declared, "Ticket brokers

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purchase tickets in the same way as *any* customer; from the Box Office, from Tickets.com, from a season ticket holder or from other ticket brokers. *Premium is one of those ticket brokers.*" (Emphasis added)<sup>82</sup> However, Premium's tickets are purchased from the Cubs reserve ticket supply, a luxury that is not available to other non-Tribune affiliated ticket brokers.<sup>83</sup> Were it not for the Cubs selling reserve tickets to Premium, according to the Cubs' ticket sales practices, the unused reserve tickets would otherwise be released for sale at the box office 48 hours prior to the game (and thus become available to patrons of the Box Office, fans, and competing tickets brokers alike). The Cubs' sale of reserve tickets to Premium decreases the fans' likelihood of obtaining these tickets at face value.

The 2002 return of 90 percent of the unused tickets is another example of preferential treatment that Premium receives in relation to other ticket purchasers. While the Cubs have since amended Premium's return policy to limit returns to ten percent of unused tickets, the 90 percent return that was permitted in 2002 was far more generous than the group sale policy of allowing ten percent returns.

While abiding by the requirements of the Ticket Scalping Act, Premium's privileged position relative to other ticket brokers (i.e., having exclusive access to selling reserve seats more than 48 hours

before the game and benefiting from a generous ticket return policy) decreases the number of tickets that fans can purchase at face value and allows increased revenue to inure to the benefit of Premium and Tribune Co. Judge Hall's finding that Premium's ticket operations do not cause the Cubs to directly or indirectly benefit from the sale of ticket above face value seems dubious. In maintaining that Premium abided by the letter of the statute, and in refusing to disregard the corporate separateness of Premium and the Cubs, the court has permitted Premium and the Cubs to skirt legislative intent. Ticket scalping legislation was enacted and upheld as a legitimate government interest in protecting the public from "exorbitant prices" charged by the stereotypical ticket scalper.<sup>84</sup>

The Ticket Scalping Act negotiates a delicate balance between allowing event promoters to extract maximum revenue from tickets and enabling affordable access to events. In upholding the legality of Premium's actions, the court is essentially permitting the Cubs and Premium to exploit their

the public on sale date) or it should give other ticket brokers equal access to reserve seats to ensure that other (non-Premium) secondary ticket brokers are part of a free market.

## D. Public Reaction to the Ticket Brokerage Case

Although the court upheld the legality of Premium as a separate entity, fan reaction has been negative, as fans feel that "tickets they could buy at face value are taken out of the market."<sup>85</sup> Though the Cubs and Premium describe Premium as a service and a benefit to Cubs fans, the fans, as well as sportswriters and theatre owners, are skeptical of this benefit. Sports columnist Tom Cushman wrote, "On Nov. 24, Judge Sophia Hall ruled that the Cubs had done nothing illegal. She apparently didn't address the morality issue."<sup>86</sup> Ron Stern, a theatre manager in Chicago stated, "The Cubs have their hustle and the brokers have their hustle...And

there's no solution to protect the guy who just wanted to get into a Cubs playoff game."<sup>87</sup>

The negative press and fan reaction may far outweigh the economic benefits the Cubs organization has gained from Premium.<sup>88</sup> McGuire testified that "the plan was to get through the initial PR hit of owning Premium, then get involved

“The Cubs have their hustle and the brokers have their hustle...And there's no solution to protect the guy who just wanted to get into a Cubs playoff game.”

access and information concerning tickets to the public's detriment in a way that other ticket brokers cannot. Judge Hall's statements that Premium is similarly situated to other ticket brokers are incorrect. Premium has exclusive access to reserve tickets, unlike other ticket brokers, and the secondary market is not a level playing field. If courts are going to uphold the validity of team-affiliated ticket brokerages, the legislature should either prohibit teams from granting their brokerages exclusive access to tickets (and force them to obtain tickets just like any other ticket broker by purchasing them from season ticket holders or on

with other Chicago teams to scalp their tickets too."<sup>89</sup> Newspaper columnists have made the Cubs a frequent target of criticism, highlighting the plight of loyal working class fans who have waited long hours in line or on the phone without being able to obtain Cubs tickets at face value.<sup>90</sup> In painting a picture of loyal, blue-collar fans being exploited by the Cubs' organization, the media has transformed the ticket brokering controversy into a public relations disaster, damaging the club's reputation of good will and fairness.

While the fans may be the most sympathetic parties in the Cubs controversy, Premium also

## A Whole Different Ballgame

adversely affects other parties, such as Major League Baseball (“MLB”) and other ticket brokers. Since the Cubs are required to give 30 percent of their ticket revenues to MLB, the Cubs may be giving 30 percent of the face value to MLB while its parent company keeps the rest of the ticket sales revenue when they sell the tickets above face value.<sup>91</sup> In keeping the extra revenue, and effectively redirecting revenue that would have gone to MLB, the Cubs have subverted the league’s revenue sharing system, which purportedly enables smaller-market teams to remain competitive with larger market teams.<sup>92</sup> The plaintiffs’ attorney, Paul M. Bauch, predicted that Premium’s court victory could translate into similar practices by other ball clubs. He said, “I think what you’re going to see, basically, is other sports franchises, in effect, doing their own scalping, which is basically promoting tickets at one price, and then, in effect, shorting the market, and then selling the tickets at higher prices.”<sup>93</sup>

Aside from drawing criticism from fans and from MLB, ticket brokers criticize the Premium plan as unfair competition by undercutting the ticket market and utilizing the club’s access to information to exploit consumers. As one ticket broker responded, “the Cubs’ entry into the secondary market creates an uneven playing field for other brokers because they control the product—the tickets that everybody wants.”<sup>94</sup> The Cubs’ contention that Premium is just another ticket broker has not been well received. One economist has stated, “The Cubs’ brokering firm has much more access to information about the supply of tickets than other brokers do. To suggest that the Cubs’ brokerage is just one more licensed broker in the industry and therefore brings more competition is just a misstatement of reality.”<sup>95</sup> In leveraging its increased information into higher

ticket prices, Premium has subverted the legislative intent of protecting the public from exorbitant fees.

The widespread public reaction to the Chicago Cubs’ case indicates that fans at least distinguish Premium from other unaffiliated ticket brokers. While reaction towards ticket brokering can be characterized as generally negative, it is often condoned as the operation of free enterprise.<sup>96</sup> Proponents of scalping assert “[t]here is no need to regulate [a scalper’s] prices, even if they seem excessive, because the readjustment process would be left to the market correction mechanism. If consumers deem [a scalper’s] prices to be

“Public reaction towards the Cubs’ brokerage has been especially negative, in part because of the perception that the Cubs have been “playing both sides of the fence” in terms of distributing tickets at face value and also manipulating those values in the secondary resale market through its brokerage.”

unreasonable, they have the freedom to purchase goods from another less expensive merchant and the market place would remain the soundest determination of price limits.”<sup>97</sup> However, public reaction towards the Cubs’ brokerage has been especially negative, in part because of the perception that the Cubs have been “playing both sides of the fence” in terms of distributing tickets at face value and also manipulating those values in the secondary resale market through its brokerage.

Traditional economic analysis often conflicts with price control regulations such as anti-scalping statutes.<sup>98</sup> However, if the fair market value of a ticket is whatever the public is willing to pay, what explains the existence of anti-scalping regulations

and the negative reaction towards the Wrigley Field Premium brokerage? In looking at the negative reaction towards the Premium brokerage, what are alternative methods by which promoters can sell their tickets for prices closer to that which the market will bear?

#### IV. Fairness as a Factor in Shaping the Contents and Effects of Law

As standard economic principles dictate, “[A]ll human behavior can be viewed as involving participants who (1) maximize their utility (2) from a stable set of preferences and (3) accumulate an optimal amount of information and other inputs in a variety of markets.”<sup>99</sup> A “principle of conventional law and economics is that ‘resources tend to

and as ethically neutral,” but “[t]he lay public does not share this indifference.”<sup>102</sup> The authors explain that the existence of market bans on transactions in contravention to market principles is due to people’s perceptions of fairness and legislators’ response to their constituents.<sup>103</sup>

In their analysis, the authors define “fairness” in relation to a “‘reference transaction’—a transaction that defines the benchmark for the parties’ interactions. ... [I]f the parties are a consumer and a firm in the market, the ‘reference transaction’ is a transaction on the usual terms for the item in question.”<sup>104</sup> Selling tickets in excess of the face value is a transaction that deviates from such a “reference transaction.” Furthermore, “[b]ehavioral analysis predicts that if trades are occurring frequently in a given jurisdiction at terms far from those of the reference transaction, there will be strong pressure for a law banning such trades.”<sup>105</sup>

The authors state that, since the face value of the ticket is the “reference transaction,” when brokers sell those tickets far above market value, the public perceives it as unfair and prohibited even though it makes economic sense.<sup>106</sup>

The authors cite a study in which tickets were to be allocated either by an

“The results of the study suggest that people remain tied to the idea of the face value of the ticket being its fair value, and that they value investments of time in acquiring tickets over the willingness to pay more money in obtaining tickets.”

gravitate toward their most valuable uses’ as markets drive out any unexploited profit opportunities.”<sup>100</sup> Price restraints and restraints on market transactions such as ticket brokering seem antithetical to allowing goods to reach their maximum value.

Jolls, Sunstein, and Thaler explain the existence of price limiting legislation, such as anti-scalping statutes, by positing a behavioral economics approach that incorporates perceptions of fairness into the content and effects of law.<sup>101</sup> “[C]onventional economic analyses assume as a matter of course that the excess demand for a good creates an opportunity for suppliers to raise prices” and that “[t]he profit-seeking adjustments that clear the market are as natural as water finding its level—

an auction, in which the individual who was willing to pay the most would obtain tickets, or by awarding tickets to people who had waited in line the longest.<sup>107</sup> The subjects of the study indicated they thought tickets should be allocated to those who waited in line the longest, as opposed to those who was willing to pay more for them.<sup>108</sup> The results of the study suggest that people remain tied to the idea of the face value of the ticket being its fair value, and that they value investments of time in acquiring tickets over the willingness to pay more money in obtaining tickets. The pervasiveness of the notion that face value of a ticket is its fair value seems to account as a factor in explaining the existence of anti-scalping laws.

## A Whole Different Ballgame

Consequently, the existence and effects of anti-scalping legislation shape promoters' responses towards ticket pricing. Most promoters generally recognize that "there is a strong public relations argument" against raising ticket prices.<sup>109</sup> Major sports associations, such as the National Basketball Association ("NBA") and MLB, have recognized that the reputation costs of dramatically raising ticket prices for events are more damaging than the value of the increased revenue from sales at higher prices. In turn, the NBA and MLB "specify limits on the prices that home teams can charge for the NBA finals or the World Series so that the proper image of the leagues can be maintained and future sales do not suffer."<sup>110</sup> In maintaining prices below the amount that can be obtained on the market, promoters foster goodwill amongst their consumers, generating greater profits in the long run.<sup>111</sup> Put another way, "[c]harging what the market will bear in the short run generates extremely adverse 'moral effects' or 'reputation effects' in the long run. Because of consumer perceptions about fairness and moral treatment, below-market pricing [and presumably ticket-scalping regulation] continues."<sup>112</sup>

### A. Distinguishing Wrigley Field Premium

Although the existence of anti-scalping legislation can be explained by perceptions of fairness, and its popularity is increasingly being embraced by courts, such legislation does not completely capture the animosity engendered by the Premium ticket brokering attempt.

Premium can be distinguished from other ticket brokers by its association with the Cubs organization. Premium's close ties with the Cubs' organization, along with the "inter-company transfer" of VIP tickets that are only made available to the public via Premium, could indicate that the Cubs are using their increased information and control of distribution of tickets to exploit the secondary ticket market to the disadvantage and chagrin of other ticket brokers and consumers.<sup>113</sup> The "free market" concept espoused by ticket brokers and resellers only works to the extent that access to tickets is equally divided between regular consumers and ticket brokers. Although the context of the following comments concern commercial bribery between promoters and ticket brokers, they are equally applicable to Premium's situation: "There cannot be a free market when the price of a product is

controlled at the original point of distribution by a conspiracy based on [bribery]. This results in access to the product (tickets) for only a limited number of people who are known to each other and who determine the price that has to be paid for a ticket in excess of the printed price."<sup>114</sup> Similarly, in Premium's situation, the price of the tickets on the secondary market is controlled at the same place where the original face value for the tickets is determined and the resale prices are often higher than the face value of the ticket. Although the Cubs contend that only a small number of VIP tickets are diverted to Premium, it still has the effect of denying the public access to tickets they may have otherwise been able to obtain at face value, since, unused reserve tickets could otherwise have been placed at the box office 48-hours prior to the game.

As a result of the connections between Premium and the Cubs, the public perceives unfairness in the form of unequal access to face value tickets. As Happel and Jennings explain, "if the public perceives that promoters are controlling or rigging not only initial sales but also the resale market, or if box-office employees are in league with scalpers to acquire choice seats, reaction is likely to be strong."<sup>115</sup> They elaborate further on the perception of a free market:

The public's concept of a free market traditionally does not cover those who obtain access or information by means not available to everyone. An analogy is the harsh sanctions against insider trading in securities. Anyone can spend the time and money to research a security and the offering company, but not everyone would have access to a lawyer at a firm that handles the company's security offerings. Insider access is the line of demarcation for public policy in free-market regulation. Anyone can spend the time to stand in line for tickets or pay the funds to hire others to do so or run ads seeking tickets, but not everyone can gain access to a promoter or a box-office employee. Regulators thus must respond in some way to the public policy concern of the level playing field perceived to be lost if insider control of the secondary market is permitted.<sup>116</sup>

In analogizing the Cubs-Premium connection to that of an insider-trading relationship,

Happel and Jennings characterize the public's negative reaction as a response to an asymmetry of information. Since Premium benefits from the Cubs' increased information concerning ticket sales, the secondary resale market for tickets is no longer comparable to a free market; one party possesses significantly more information than other parties, such as non-Premium ticket brokers and the consumers themselves. In suspecting the transparency of this altered market, according to Happel and Jennings, the negative public reaction is due in part to the Cubs' failure to respond to the

## B. Other Methods of Ticket Pricing

In the wake of ticket scalping legislation, the presence of ticket brokers, and public perceptions of insider trading, promoters strive to achieve a delicate balance when determining ticket prices and making decisions concerning secondary resale markets. The secondary resale market for tickets will continue to exist as long as tickets are sold in advance.<sup>119</sup> When tickets are sold in advance, people who desire to buy tickets may not be able to wait in

line for tickets or may prefer to pay a ticket reseller in exchange for staying in line; people who purchase tickets may not be able to attend the event and will instead transfer their tickets to other people, or people may not enter the market for tickets until time is close to the event.<sup>120</sup> The Cubs themselves stated that Premium

“In turn, public distrust and dissatisfaction might make the Wrigley Field Premium ticket brokerage far less profitable in terms of damaged reputation and lost sales than the Cubs originally anticipated.”

“public policy concern of the level playing field perceived to be lost.”<sup>117</sup>

In asserting that Premium's ticket source came from a vaguely defined “VIP pool,” perhaps the Cubs have not provided enough disclosure or assurance to the public that Premium's sales did not come at the expense of face value sales. In turn, public distrust and dissatisfaction might make the Wrigley Field Premium ticket brokerage far less profitable in terms of damaged reputation and lost sales than the Cubs originally anticipated.<sup>118</sup> To dispel the perception that Premium is benefiting unfairly from its association with the Cubs, legislators should give other ticket brokers equal access to the Cubs reserve pool or prohibit Premium from enjoying the benefits of its association with the Cubs (e.g., force Premium to buy its tickets from the same sources available to other non-Cub affiliated brokers consisting of season ticket holders and tickets available as of the public on-sale date).

evolved after they watched the ticket brokers make money off their face-value tickets.<sup>121</sup> Other sports franchise owners have expressed similar dissatisfaction in seeing ticket scalpers profit off the market demand for tickets, reflecting the idea that tickets at face value are priced below market value when scalpers are able to sell them for more than face value.<sup>122</sup> In response to scalpers' profit, many sports clubs have instituted pricing strategies that attempt to more accurately reflect the market demand for tickets while taking into account the concern for public accessibility.

One approach is for clubs to try to gauge the primary ticket market more accurately in order to decrease the amount of secondary resale by ticket brokers.<sup>123</sup> If promoters can more accurately gauge the value of its tickets to its fans, then the need for ticket brokers may be decreased if those fans are offered the tickets they desire at the prices they want.<sup>124</sup> In the past the Cubs held back some of their bleacher seats for day of game sales at the box office, enabling fans to buy tickets at face value at a relatively short time before the game.<sup>125</sup> Frank Maloney, Cubs' director of ticket sales, stated that

## A Whole Different Ballgame

this method of ensuring public access to tickets was a poor business model because it forced the club to assume the risk of unsold seats.<sup>126</sup> With uncertainties such as the weather and the ever-changing popularity of the club on any given day, Cubs' officials decided it was not economically sound to continue to allocate tickets in this manner.

Clubs including the Cubs have capitalized on changing circumstances by instituting variable ticket pricing. Analogous to the ticket pricing strategies for Broadway shows and airline tickets, variable ticket pricing, also called "scaling the house," is a method in which "teams charge more for popular games in mid and late season, on weekends, and against marquee opponents. It charges less for less attractive midweek or early season contests."<sup>127</sup> In the past, baseball tickets maintained set prices during the season without respect to

the date of the game or the opponent.<sup>128</sup> In 1999, the Colorado Rockies were the first team in MLB to institute a system of variable ticket pricing by implementing a two-tiered pricing system for each individual seat based on factors, including the date of the game and the opponent.<sup>129</sup> The Rockies' system has since "evolved into a multi-tiered program that compounds the extra charges for the best games."<sup>130</sup> Other teams use a less complicated approach to variable ticket pricing, such as reduced ticket prices earlier in the season or for midweek games.<sup>131</sup> Nearly half of MLB's teams currently institute some form of variable ticket pricing.<sup>132</sup>

Variable ticket pricing attempts to "tie the cost of a ticket directly to consumer demand."<sup>133</sup> In targeting pricing to reflect consumer demand, Mets' senior vice president David Howard noted, "[I]t's all peak versus off-peak pricing. It's a wasted asset if you don't use it."<sup>134</sup> The push for increasing ticket revenues has been tied in part to decreases in ballpark attendance and the league's revenue sharing plan.<sup>135</sup> Additionally, some clubs have been able to use variable ticket pricing as a means of subsidizing

other games, enabling clubs to offer more games at a lower cost.<sup>136</sup> Teams have made different decisions regarding whether variable ticket pricing should be applied to season ticket holders, for fear of alienating these important consumers.<sup>137</sup>

Fan reaction towards variable ticket pricing has been mixed. Some fans view it as exploitative price gouging, while others are content to pay a premium to see games against marquee opponents on the days of their choosing.<sup>138</sup> In spite of the mixed reactions, variable ticket pricing is not a perfect

“In the auction situation, there is no reference transaction or face value on which to base perceived notions of fairness; instead, the consumers themselves determine the value of the ticket.”

answer in assessing ticket demands. The promoter still suffers from a lack of information, which prevents him from charging the same price that the market will bear.<sup>139</sup>

In an attempt to better approximate ticket prices, the Seattle Mariners conducted an experimental ticket-pricing scheme in which the team used an Internet real-time auction using fan demand to dictate the ticket prices for three games.<sup>140</sup> The Mariners created an online marketplace where the price of tickets was tied to consumer demand; fans could visit the website and see the current going rate for tickets.<sup>141</sup> They could either purchase at that price or indicate a lower reservation price, at which the tickets would automatically be purchased should the price fall to that level.<sup>142</sup> Without disclosing specific numbers, the club indicated that its ticket revenue had been higher than the revenue it would have obtained had it sold the tickets for face value.<sup>143</sup> Economist Werner Reinartz has indicated that the Mariners' attempt at dynamic ticket pricing did not violate perceptions of fairness in that ticket prices did not

change between customers, but that they changed over time, much like they would in a stock market.<sup>144</sup> In being open with consumers about the nature of ticket pricing and transparently allowing them to determine the prices of ticket, the perceived fairness concerns cited by Jolls, Sunstein, and Thaler are no longer an impediment to perceived fairness. In the auction situation, there is no reference transaction or face value on which to base perceived notions of fairness; instead, the consumers themselves determine the value of the ticket.

While the Seattle Mariners' experiment functioned as a more precise example of tying ticket prices to consumer demand than variable ticket pricing, it has not caught on as a widely used mechanism for pricing tickets. Although it does tie ticket prices to consumer demand, it presents the same problems as brokerages—i.e., enabling those who are willing to pay more access to tickets.<sup>145</sup> The dynamic pricing does not resolve the problem of ensuring affordable public access to events. Additionally, dynamic ticket pricing does not fully address the concerns of the secondary resale market. While having consumers determine the prices they want to pay for tickets may result in fewer fans reselling their tickets, the secondary resale market will still persist for the same reasons that it currently does; people are unwilling to spend time to bid for tickets, people buy tickets but are later unable to use them, and fans may not realize that they want tickets until it is too late to bid.<sup>146</sup>

One company has combined the pricing mechanism of an auction with the authenticity guarantee that Premium offers. Stubhub is a ticket auction service that allows buyers and sellers to mingle in the marketplace and, through free negotiation, arrive at a price that reflects the true value of a ticket.<sup>147</sup> As commission, Stubhub collects 15 percent of the ticket price from the seller and ten percent from the buyer.<sup>148</sup> Stubhub's authenticity guarantee offers consumers either the tickets they ordered or comparable tickets purchased by the company.<sup>149</sup> Unlike other auctions, such as eBay, Stubhub's authenticity guarantee may encourage those who are fearful of being defrauded to use ticket auctions.

The company was created because "The market, in business-speak, lacked liquidity. It was highly fragmented. Buyers and sellers had a hard time finding each other. Information was scarce, fraud was rampant and pricing was distorted. Two buyers sitting side by side at a basketball playoff might

have paid wildly different prices for what was, essentially, the same product."<sup>150</sup> Stubhub seeks to remedy a lack of information with a centralized forum, allowing for a common meeting ground and a more accurate reflection of a ticket's real worth.

Assuming that teams have not engaged in undercutting the supply of face-value ticket themselves, one approach to regulate the secondary ticket market is to restrict scalping to a specific area, making it illegal to scalp tickets in any other area than the designated area. Such an approach was used in Phoenix, Arizona, to regulate scalping during the 1995 NBA All-Star Game.<sup>151</sup> When the sellers were in a designated area, and it was legal to sell tickets above face value without a license, potential buyers could more easily compare prices between scalpers, which is something they otherwise had difficulty doing.<sup>152</sup> The Phoenix free-market atmosphere created a competitive pricing atmosphere, reducing the amount of scalpers who were able to procure since the open market allowed customers to comparison-shop among different ticket vendors.<sup>153</sup> While Happel and Jennings have pushed this idea further, to suggest the implementation of a system in which tickets are traded on a futures market, the impetus of their observation is that market-based approaches to ticket-scalping may function better to balance the protection of consumers with the toleration of the secondary resale market since such an approach would result in smaller economic profits for scalpers as a result of competitive pressures and greater open-market access.<sup>154</sup> However, this model of regulating ticket scalping would only be effective if all ticket brokers had equal access and information concerning ticket distribution (i.e., that there isn't a brokerage like Premium that has continuing exclusive access to good seats).

In balancing the interest in affordable public access to sporting events with the promoters' and ticket brokers' interest in extracting revenue from the resale of tickets, it seems that promoters may stand the best chance of maximizing revenue by more accurately predicting the prices that consumers are willing to pay in the primary market rather than risk alienating their customers' notions of perceived fairness by attempting to profit off of the secondary resale market. As for ticket brokers and resellers in the secondary market, assuming that such brokers are equally situated in terms of access to tickets, restriction of such sellers to a centralized location may likely result in lower ticket prices obtained by the resellers, which translates into more favorable

## A Whole Different Ballgame

results for fans who make use of the secondary market.

### V. Conclusion

The allegedly slight profits the Cubs gained from the operation of Wrigley Field Premium are likely outweighed by the damage of the public relations backlash that has accompanied the Premium trial. Baseball's history has certainly demonstrated that it can overcome the effects of negative publicity. Still, in light of the recent trends of decreased ballpark attendance, the popularity of other sports, and other forms of entertainment, which have forced MLB to institute attention-grabbing tactics such as inter-league play, the Cubs may have picked an inopportune time to alienate their fans.

Limitations on ticket brokering and scalping can be explained as a response to perceptions of fairness—that the face value printed on a ticket is its fair value. Despite the acknowledgment that ticket brokers can operate within a free market bounded by the limitations of the Ticket Scalping Act, fan reaction to the trial has been negative because fans' perceptions of fairness have been further offended. Not only are tickets being sold above face value, they are being sold by a brokerage affiliated with the Cubs, which the public perceives as having the capability to sell those same tickets at face value. The public fears that the Cubs are diverting tickets away from the supply to be sold at face value, altering the market, and forcing fans to purchase at higher prices from ticket brokers (Wrigley Field Premium included). With the Cubs brokering their own tickets, the market is no longer transparent, and access to face-value tickets is further impaired. While the Cubs attempted to combat the criticism, by stating that Premium only

sold VIP tickets that were not otherwise available to fans and that Premium sold only a very limited number of tickets, the brokerage operation may be unable to shake the taint of unfairness—regardless of the decision of the Cook County Circuit Court.

Jolls, Sunstein and Thaler have noted that a pure economic model based on self-interest is inadequate to explain spiteful or kind behavior that is not economically efficient.<sup>155</sup> Perceived notions of fairness sometimes override the desire for profit. As they explain, "In many market and bargaining settings, people care about being treated fairly and want to treat others fairly if those others are

“Promoters may stand the best chance of maximizing revenue by more accurately predicting the prices that consumers are willing to pay in the primary market rather than risk alienating their customers' notions of perceived fairness by attempting to profit off of the secondary resale market.”

themselves behaving fairly. As a result of these concerns, the agents in a behavioral economic model are both nice and (when they are not treated fairly) more spiteful than the agents postulated by a neoclassical theory.”<sup>156</sup> Also, as Chicago Sun-Times columnist Greg Couch put it, “[T]he spirit of baseball isn't supposed to be about technicalities. It's about the fans... It's about the several fans who e-mailed me to say they would like to sell their Cubs-Yankees tickets at face value to Oscar Ruiz, a blue-collar Cubs fan who spent the night in his car to get tickets, only to be told they were sold out.”<sup>157</sup> Jolls, Sunstein and Thaler's theory explains the behavior of fans who are willing to forego profit (since Premium was selling those tickets in excess of face value) in order to assure that someone who was behaving fairly (by waiting for tickets) was being treated fairly (by obtaining tickets at face value).

The reaction of sports fans who sympathized with the ticketless, blue-collar fan demonstrates the popular interest that baseball tickets remain affordable and accessible for all fans, even if they are not able to pay market price (e.g., ticket broker prices) for tickets. Perhaps the interest in maintaining accessibility for baseball events is particularly strong because of baseball's enduring association with America and its goals of democracy and egalitarianism. In order to accommodate the interest in ensuring affordable public access to baseball games, the Cubs could reconsider implementing measures designed to keep prices affordable. Various teams use methods such as game-day sales, limiting the number of tickets that can be purchased by a single buyer, and allocating playoff tickets by lottery to ensure affordable access for fans. Additionally, lobbying for laws that level the playing field for all ticket brokers and put caps on the surpluses that brokers can charge may also work towards achieving that end.

In searching for a way to increase profits, the Cubs ticket brokerage has alienated fans, causing them to be distrustful of the organization. While baseball teams are interested in generating more profit, operating their own ticket brokerages and giving them exclusive access to good seats does not seem to be a good solution. One method for clubs to increase revenues would be to institute variable ticket pricing or auction systems in order to more accurately gauge the market demand for tickets. While raising prices is generally unpopular, this method seems to engender less criticism than the Wrigley Field scheme and allows clubs to use such excess revenue to subsidize price reductions for other games. Additionally, recognizing that the secondary market will always continue to exist, fans could lobby for legislation keeping baseball teams from granting exclusive access to tickets to their own brokerages. Baseball teams could lobby for laws that restrict the locations of scalpers, such as the Phoenix Suns' measure, allowing a free-market within borders to allow fans greater access to knowledge of market conditions, enabling them to pay lower prices and minimize the profits enjoyed by scalpers.

### Endnotes

\* J.D. Candidate, 2005, Vanderbilt University School of Law. The author would like to thank her professors and the JELP editorial staff for their contributions and assistance.

<sup>1</sup> Baseball has been the national pastime for over one hundred years and enjoys a unique place

in our American heritage. Major league professional baseball is avidly followed by millions of fans, looked upon with fervor and pride and provides a special source of inspiration and competitive team spirit especially for the young.

Baseball's status in the life of the nation is so pervasive that it would not strain credulity to say the Court can take judicial notice that baseball is everybody's business. To put it mildly and with restraint, it would be unfortunate indeed if a fine sport and profession, which brings surcease from daily travail and an escape from the ordinary to most inhabitants of this land, were to suffer in the least because of undue concentration by any one or any group on commercial and profit considerations. The game is on higher ground; it behooves every one to keep it there.

Flood v. Kuhn, 407 U.S. 258, 266-67 (1972) (quoting Judge Cooper's District Court opinion in the case, 309 F. Supp. 793, 797).

<sup>2</sup> Tim Layden, *The Hustle*, SPORTS ILLUSTRATED, Apr. 7, 1997, at 102.

<sup>3</sup> Melissa Isaacson, *Brokers Cut Off Average Fans? That's the Ticket*, CHI. TRIB., Mar. 3, 2002, at C1.

<sup>4</sup> Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37 U. MIAMI L. REV. 71, 71 (1982).

<sup>5</sup> Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1512 (1998). ("Conventional economic analyses assume as a matter of course that the excess demand for a good creates an opportunity for suppliers to raise prices and that the profit-seeking adjustments that clear the market are ... as natural as water finding its level – and as ethically neutral, but the lay public does not share this indifference." (internal quotes omitted)).

<sup>6</sup> Paul J. Criscuolo, *Reassessing the Ticket Scalping Dispute: The Application, Effects, and Criticisms of Current Anti-scalping Legislation*, 5 SETON HALL J. SPORT L. 189, 193-95 (1995).

<sup>7</sup> Sheree Rabe, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 64, 66 (1991).

# A Whole Different Ballgame

<sup>8</sup> Fran Spielman, *Ticket-Scalping Suit Filed Against Cubs for Scalping*, CHI. SUN-TIMES, Oct. 10, 2002, at 115.

<sup>9</sup> Annie Sweeney, *Cubs Open Own Ticket Brokerage*, CHI. SUN-TIMES, June 20, 2002, at 113.

<sup>10</sup> 720 Ill. Comp. Stat. 375/1.5 (2004).

<sup>11</sup> Mickey Ciokajlo, *Wrigley Ticket Agency Defends its Service; Class Action Suit Against the Cubs Charges Scalping*, CHI. TRIB., Aug. 13, 2003, at C3.

<sup>12</sup> Jolls, *supra* note 5, at 1508, 1511.

<sup>13</sup> Stephen K. Happel & Marianne M. Jennings, *The Folly of Anti-scalping Laws*, 15 CATO J. 65, 78-79 (1995) available at <http://www.cato.org/pubs/journal/cj15n1-4.html>.

<sup>14</sup> Sweeney, *supra* note 9. "You are the people who control the product, and now you're playing both sides of the fence." (quoting ticket broker Kurt Soderholm).

<sup>15</sup> Greg Couch, *Cubs, Scalpers, Government, All in It Together*, CHI. SUN-TIMES, Dec. 31, 2003.

<sup>16</sup> See Darren Rovell, *Forecasting the Sports Business Future*, ESPN.com, at <http://espn.go.com/sportsbusiness/sl/2002/1230/1484284.html> (Dec. 30, 2002).

<sup>17</sup> *Netsports Team/League Notes*, NetSports (July 19, 2000), [http://www.sbrnet.com/PreviewSamples/netSPORTS\\_Sample\\_Issue.htm](http://www.sbrnet.com/PreviewSamples/netSPORTS_Sample_Issue.htm).

<sup>18</sup> Stephen K. Happel & Marianne M. Jennings, *Herd Them Together and Scalp Them*, WALL ST. J., Feb. 23, 1995, at A14.

<sup>19</sup> Sweeney, *supra* note 9.

<sup>20</sup> *Id.*; Fran Spielman, *Ticket Scalping Suit Filed Against Cubs for Scalping*, CHI. SUN-TIMES, Oct. 10, 2002, at 115.

<sup>21</sup> Greg Couch, *A Textbook Case of Might vs. Right*, CHI. SUN-TIMES, May 1, 2003, at 127.

<sup>22</sup> Spielman, *supra* note 20; Sweeney, *supra* note 9.

<sup>23</sup> Sweeney, *supra* note 9 ("McGuire said the fans benefit from knowing the tickets they buy through the Cubs' subsidiary are the real thing.").

<sup>24</sup> Spielman, *supra* note 20; *Cavoto v. Chi. Nat'l League Ball Club, Inc.*, No. 02 CH 18372 (Ill. Cir. Ct. Nov. 24, 2003) (on file with the Vanderbilt Journal of Entertainment Law and Practice).

<sup>25</sup> *Cavoto*, No. 02 CH 18372, slip op. at 21-22 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>26</sup> Ciokajlo, *supra* note 11 at C3; 720 Ill. Comp. Stat. 375/3 (2004).

<sup>27</sup> Ciokajlo, *supra* note 11 at C3; *Cavoto*, No. 02 CH 18372 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>28</sup> *Cavoto*, No. 02 CH 18372, slip op. at 39 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>29</sup> "It is unlawful for any person, firm or corporation, owner, lessee, manager, trustee, or any of their employees or agents, owning, conducting, managing or operating any theater, circus, baseball park, place of public entertainment or amusement where tickets of admission are sold for any such places of amusement or public entertainment to sell or permit the sale, barter or exchange of such admission tickets at any other place than in the box office or on the premises of such theater, circus, baseball park, place of public entertainment or amusement, but nothing herein prevents such theater, circus, baseball park, place of public entertainment or amusement from placing any of its admission tickets for sale at any other place at the same price such admission tickets are sold by such theater, circus, baseball park or other place of public entertainment or amusement at its box office or on the premises of such places, at the same advertised price or printed rate thereof." 720 Ill. Comp. Stat. 375/1.

<sup>30</sup> *Cavoto*, No. 02 CH 18372, slip op. at 3 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>31</sup> Section 4 of the Ticket Scalping Act concerns itself with service charges and states: Nothing contained in this Act was ever intended to prohibit nor shall ever be deemed to prohibit a ticket seller, with consent of the sponsor of such baseball game, football game, hockey game, theatre entertainment or other amusement, from collecting a reasonable service charge, in addition to the printed box office ticket price, from a ticket purchaser in return for service actually rendered. 720 Ill. Comp. Stat. 375/4.

<sup>32</sup> The requirements enumerated in subsection b are that ticket brokers be: (1) registered with the Office of the Secretary of State and certify that the broker (A) engages in the resale of tickets on a regular and ongoing basis from one or more permanent or fixed locations located within this State; (B) maintains as the principal business activity at those locations the resale of tickets; (C) displays at those locations the ticket broker's registration; (D) maintains at those locations a listing of the names and addresses of all persons employed by the ticket broker; (E) is in compliance with all applicable federal, State, and local laws relating to its ticket selling activities, and that neither the ticket broker nor any of its employees within the preceding 12 months have been convicted of a violation of this Act; (F) that the ticket broker meets the following requirements: (i) maintains a statewide toll free number for consumer complaints and inquiries; (ii) has adopted a code that advocates consumer protection that includes, at a minimum: (a-1) consumer protection guidelines; (b-1) a standard refund policy; and (c-1) standards of professional conduct; (iii) has adopted a procedure for the binding resolution of consumer complaints by an independent, disinterested third party; and (iv) has established and maintains a consumer protection rebate fund in an amount in excess of \$100,000,

# SPORTS

at least 50% of which must be cash available for immediate disbursement for satisfaction of valid consumer complaints. Alternatively, the ticket broker may fulfill the requirements of subparagraph (F) of this subsection (b) if the ticket broker certifies that he or she belong to a professional association organized under the laws of this state, or organized under the laws of any other state and authorized to conduct business in Illinois, that has been in existence for at least 3 years prior to the date of that broker's registration with the Office of the Secretary State, and is specifically dedicated, for and on behalf of its members to provide and maintain the consumer protection requirement of subparagraph (F) of subsection (b) to maintain the integrity of the ticket brokerage industry.; (2) (Blank); (3) The ticket broker and his employees must not engage in the practice of selling, or attempting to sell, tickets for any event while sitting or standing next to the facility at which the event is to be held or is being held.; (4) The ticket broker must comply with all requirements of the Retailers' Occupation Tax Act and all other applicable federal, State and local laws in connection with his ticket selling activities; (5) Beginning January 1, 1996, no ticket broker shall advertise for resale any ticket within this State unless the advertisement contains the name of the ticket broker and the Illinois registration number issued by the Office of the Secretary of State under this Section; (6) Each ticket broker registered under this Act shall pay an annual registration fee \$100. 720 Ill. Comp. Stat. 375/1.5.

<sup>33</sup> *Cavoto*, No. 02 CH 18372, slip op. at 5-6 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>34</sup> "Whoever, upon the purchase of such admission tickets as herein provided, feels himself aggrieved or injured by paying for such tickets any sum in excess of the advertised price or printed rate, or any sum in excess of the price originally charged in the box office . . . has, irrespective of the penalties herein provided, a right of action in his name and against such person, firm, corporation, owner, lessee, manager, trustee, or any of their agents or employees owning, conducting, managing or operating any such . . . baseball park, to recover for each ticket for which an overcharge was made contrary to the provisions of this Act, a sum of \$100, which may be recovered in a civil action before the circuit court in this State." 720 Ill. Comp. Stat. 375/3.

<sup>35</sup> *Illinois v. Waisvisz*, 582 N.E.2d 1383, 1387 (Ill. App. Ct. 1991) (citing 86th Ill. Gen. Assem., House Proceedings, June 25, 1990, at 47-48).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Stephen K. Happel & Marianne M. Jennings, *Creating a Futures Markets for Major Ticket Events: Problems and Prospects*, 21 CATO J. 443, 445 (2002).

<sup>39</sup> Phyllis L. Zankel, *Wanted: Tickets – A Reassessment of Current Ticket Scalping Legislation and the Controversy Surrounding Its Enforcement*, 2 SETON HALL J. SPORT L. 129, 129 (1992).

<sup>40</sup> Sheree Rabe, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 62 (1991) ("The courts have recognized that the state has a legitimate interest in ensuring public access to entertainment and sports events." *Id.* at 66).

<sup>41</sup> *Id.* at 66.; *Waisvisz*, 582 N.E.2d 1383, 1387 (Ill. App. Ct. 1991) (citing 86th Ill. Gen. Assem., House Proceedings, June 25, 1990, at 47-48).

<sup>42</sup> Robert C. Herguth, *Can Trib Give Broker Coveted Cubs Tickets to Sell?*, CHI. SUN-TIMES, Apr. 20, 2003, at 17.

<sup>43</sup> Mickey Ciokajlo, *Cubs Ticket-Brokerage Trial Ends; Judge Says She Will Make Ruling in Next 3 Months*, CHI. TRIB., Aug. 21, 2003, at C3.

<sup>44</sup> *Cavoto*, No. 02 CH 18372, slip op. at 2, 31 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 33.

<sup>47</sup> Ciokajlo, *supra* note 43.

<sup>48</sup> Sweeney, *supra* note 9.

<sup>49</sup> Ciokajlo, *supra* note 11.

<sup>50</sup> Ciokajlo, *supra* note 43.

<sup>51</sup> *Cavoto*, No. 02 CH 18372, slip op. at 2 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>52</sup> Ciokajlo, *supra* note 11.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* "'Ticket brokers don't like Premium's competition,' Klenk told Judge Sophia Hall during opening arguments of the bench trial that is expected to last the rest of the week. 'We believe that is why we're here.'"

<sup>55</sup> *Cavoto*, No. 02 CH 18372, slip op. at 6 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>56</sup> *Id.* at 27.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* The public on sale date is generally the third Friday of February, occurring after season ticket sales which are effectuated in December and group sales which are held at the end of January.

<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.*

## A Whole Different Ballgame

<sup>62</sup> *Id.* at 17.

<sup>63</sup> *Id.* at 10. The consumer protection requirements consisted of a toll free number for consumer complaints and inquiries, a consumer protection code, a refund policy, and a consumer rebate fund of \$100,000.

<sup>64</sup> *Id.* at 9, 29.

<sup>65</sup> *Id.* at 11-13.

<sup>66</sup> *Id.* at 14.

<sup>67</sup> *Id.* at 15. When subsidiaries engage in transactions with each other through their intercompany accounts, corresponding credits and debits are recorded on each company's account.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 18-19.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 19-20.

<sup>72</sup> *Id.* at 24 (quoting *Plast v. Metro Trust Co.*, 401 Ill. 302, 312 (1948) and *Chickering v. Bastress*, 130 Ill. 206, 215-16 (1889)).

<sup>73</sup> *Id.* at 25.

<sup>74</sup> *Id.* at 26.

<sup>75</sup> *Id.* at 28.

<sup>76</sup> *Id.* at 29.

<sup>77</sup> *Id.* at 32.

<sup>78</sup> *Id.* at 32-34.

<sup>79</sup> *Id.* at 34-35.

<sup>80</sup> *Id.* at 38.

<sup>81</sup> *Id.* at 40.

<sup>82</sup> *Id.* at 9.

<sup>83</sup> *Id.* at 17 ("The tickets Premium purchased from Ball Club for resale were tickets Ball Club historically held in reserve.").

<sup>84</sup> *Waisvisz*, 582 N.E. 2d 1383, 1387 (Ill App. Ct. 1991).

<sup>85</sup> David Eggert, *Cubs Exec Defends Club's Ticket Brokerage Operation*, Aug. 13, 2003 (on file with the Vanderbilt Journal of Entertainment Law and Practice); Dodd, *supra* note 49 ("It's a public relations headache for a small piece of business.

Premium Tickets has sold about 2,500 tickets this year, Klenk says. Last year, it started in the midseason and sold about 3,900 tickets – less than 2/10 of the 2.9 million tickets sold.").

<sup>86</sup> Tom Cushman, *Cubs Win! Cubs Win! And Fans Lose in Ticket Scalping Case*, SAN DIEGO UNION-TRIB., Dec. 14, 2003, at C4.

<sup>87</sup> Greg Couch, *Cubs, Scalpers, Government All in it Together*, CHI. SUN-TIMES, Dec. 31, 2003, at 135.

<sup>88</sup> Ciokajlo, *supra* note 11. The Cubs organization stated that Wrigley obtained \$1 million in tickets from the Cubs, but ended up returning \$900,00 of those tickets in the 2002 season. For the 2003 season, Wrigley Field has sold an average of fewer than 150 tickets per game.

<sup>89</sup> Greg Couch, *Cubs Just Giving Fans the Business*, CHI. SUN-TIMES, Aug. 17, 2003, at 103.

<sup>90</sup> Isaacson, *supra* note 3. (recounting Air Force Maj. Michael Freestone's unsuccessful attempt to obtain Cubs tickets by calling the Cubs' ticket line and spending several hours online); Greg Couch, *Average Joe Can't Grasp Premium Pricing Logic*, CHI. SUN-TIMES, May 16, 2003, at 173 (Randy Galles, a cab driver, paid \$422.96 to Wrigley Premium for two \$36 face-value tickets, in order to keep a promise to his daughter).

<sup>91</sup> Couch, *supra* note 21.

<sup>92</sup> *Id.*

<sup>93</sup> Maureen O'Donnell, *Cubs Prevail in Ticket Broker Case*, CHI. SUN TIMES., Nov. 25, 2003 at 8.

<sup>94</sup> Sweeney, *supra* note 9 (summarizing the comments of Kurt Soderholm of Front Row Ticket Service; "You are the people who control the product, and now you're playing both sides of the fence.").

<sup>95</sup> Couch, *supra* note 91, (quoting Allen Sanderson).

<sup>96</sup> Isaacson, *supra* note 3 (quoting Eric Soderholm, proprietor of Front Row Tickets, "[H]e sees ticket brokering as free enterprise, pure and simple. 'It wouldn't be here if people didn't want it, so there is a need for it.' Corporate America needs quality seats to entertain clients. Average fans who can't afford season tickets want quality seats four or five times a year. Who's getting hurt here? I am buying from season ticket-holders who don't want to go.").

<sup>97</sup> Zankel, *supra* note 39, at 144 (citing Thomas A. Diamond, *Ticket Scalping: A New Look at an Old Problem*, 37 U. Miami L. Rev. 71, 78-79 (1972)).

<sup>98</sup> Jolls, *supra* note 5, at 1511 ("[E]conomists and economically oriented lawyers often view [ticket scalping laws] as inefficient and anomalous.").

<sup>99</sup> *Id.* at 1476 (quoting GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 14 (1976)).

<sup>100</sup> *Id.* at 1483 (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 11 (5th ed. 1998)).

<sup>101</sup> *Id.* at 1509 (“We argue that the explanation for ‘anomalous’ laws is typically a quite simple one: Most people think the result is fair.”).

<sup>102</sup> *Id.* at 1512 (quoting Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 735 (1986)).

<sup>103</sup> *Id.* at 1511. The authors dismiss the argument that ticket-scalping legislation is due to rent-seeking and lobbying by powerful ticket brokerages who need to maintain moderate prices in order to create demand. They state that the attractiveness of public events would not decrease even if there was a slight decrease in demand since the events are well known and televised.

<sup>104</sup> *Id.* at 1496 (citing Kahneman et al, *supra* note 103, at 729-30).

<sup>105</sup> *Id.* at 1511-12.

<sup>106</sup> *Id.* at 1512-15.

<sup>107</sup> *Id.* at 1512 (citing Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Fairness and the Assumptions of Economics*, 59 J. BUS. 5285, 5287-88 (1986)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1514. The authors quote the heads of Broadway theatres: “Even though we could sell tickets at \$100, ...we’d be cutting our own throats because it would be a P.R. disaster for Broadway.” John Tierney, *Tickets? Supply Meets Demand on Sidewalk*, N.Y. TIMES, Dec. 26, 1992, at D24.

<sup>110</sup> Zankel *supra* note 39, at 144.

<sup>111</sup> *Id.*

<sup>112</sup> Happel & Jennings, *supra* note 13.

<sup>113</sup> Ciokajlo, *supra* note 11, at C3.

<sup>114</sup> Andrew Kandel & Elizabeth Block, *The “De-icing” of Ticket Prices: A Proposal Addressing the*

*Problem of Commercial Bribery in the New York Ticket Industry*, 5 J.L. & POL’Y 489, 493 (1997). The authors discuss different remedies to the problem of ticket scalping when promoters take bribes from ticket brokers, disposing of large numbers of tickets, thereby depriving the public from access to those seats except through ticket brokers.

<sup>115</sup> Happel & Jennings, *supra* note 13.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> James Janega, *Cubs’ Ticket Business Upheld*, CHI. TRIB., Nov. 25, 2003, at C1; Mike Dodd, *Sold Out? Cubs Hawk Premium Tickets*, USA TODAY, June 6, 2003, available at [http://www.usatoday.com/sports/baseball/nl/cubs/2003-06-19-cubs-premium-ticket-prices\\_x.htm](http://www.usatoday.com/sports/baseball/nl/cubs/2003-06-19-cubs-premium-ticket-prices_x.htm). The club was not even able to capitalize on the Cubs’ 2003 playoff success, being unable to broker playoff tickets through Wrigley Field since the subsidiary had suspended operations due to litigation.

<sup>119</sup> Happel & Jennings, *supra* note 13.

<sup>120</sup> *Id.*

<sup>121</sup> Sweeney, *supra* note 9.

<sup>122</sup> Happel & Jennings, *supra* note 13 (“Jerry Colangelo, president of the Phoenix Suns indicated that he disliked scalpers because ‘they made money off of him without his permission, and that was not right.’ ... [H]e pointed to the fact that he paid taxes while scalpers did not.”).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Cavoto, No. 02 CH 18372 (Ill. Cir. Ct. Nov. 24, 2003).

<sup>126</sup> Isaacson, *supra* note 3 (“Maloney explains that it’s bad business. It might rain that day. The Cubs may be in the cellar. And people would line up in the wee hours of the morning, creating a security problem.”).

<sup>127</sup> Eric Fisher, *Cheapest Seat in Town to Vary on a Daily Basis*, WASH. TIMES, Nov. 26, 2002, at C01; Happel & Jennings, *supra* note 13. The authors define variable ticket pricing as “a method of price discrimination that charges a series of prices for different seat locations to increase profits and to fend off scalpers or brokers.” *Id.*

<sup>128</sup> John Morell, *Business; How Much for Tickets? You Need a Scorecard*, N.Y. TIMES, June 8, 2003, at 3:4.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* (“For instance, a midweek game against the Giants might include a \$3 ‘premium game’ surcharge. For a Saturday game against the Yankees, Rockies fans pay \$9 a ticket.”).

<sup>131</sup> David A. Markiewicz, *Sports Marketing: Baseball Plays with Capital Idea*, ATLANTA JOURNAL-CONSTITUTION, July 7, 2002, at 4D.

<sup>132</sup> Sean McClelland, *Reds Buying into Variable Ticket Pricing Trends*, DAYTON DAILY NEWS, Feb. 12, 2003, at D1 (Listing other teams instituting variable ticket pricing including the Cincinnati Reds, the Cleveland Indians, the New York Mets, the New York Yankees, the Chicago Cubs, the St. Louis

## A Whole Different Ballgame

Cardinals, the San Francisco Giants, the Anaheim Angels, and the Baltimore Orioles); Fisher, *supra* note 128; John Brennan, *Variable Pricing: Mets, Yanks adjust Tickets to Reflect Foe, Date*, THE RECORD (Bergen County, N.J.), Mar. 30, 2003, at S03; Markiewicz, *supra* note 132; Morell, *supra* note 129.

<sup>133</sup> Brennan, *supra* note 133.

<sup>134</sup> *Id.*

<sup>135</sup> Morell, *supra* note 129 (“The Cubs are trying to squeeze every bit of revenue they can from every fan. So are the other 29 Major League Baseball franchises, in part because average attendance at big-league ballparks has fallen the last decade. . . . For teams in the biggest cities, the pain of declining attendance has been compounded by the adoption of a form of revenue sharing, which has put pressure on big-city teams to make up for what they must give to small-market competitors.”).

<sup>136</sup> McClelland, *supra* note 133 (Cleveland Indians spokesman Bob DiBiasio stated that hiking prices for the so-called showcase games helped the Indians lower the price of about \$15,000 seats per game for their remaining 71 other home dates.).

<sup>137</sup> Morell, *supra* note 129 (Teams such as the Cubs and the Mets have applied variable ticket pricing to season ticket packages whereas the Giants have not.).

<sup>138</sup> Morell, *supra* note 129. “While one fan stated ‘I’m seeing the teams I want to see play on a day that works for me. So I’m not bothered by a price increase at all,’ another stated ‘It’s gouging. They cut the prices on the seats you don’t want, put a poor product on the field, then they jack up the prices on games everybody wants to see.’ ”).

<sup>139</sup> Happel & Jennings, *supra* note 13. (“One problem for the producer is to gather sufficient information about demand to charge the right prices.”).

<sup>140</sup> Netsports, *supra* note 17 (The Seattle Mariners were involved in an online ticket sales program in conjunction with Ticketmaster Online-Citysearch, Inc. and @TheMoment, Inc., in setting up an auction system where fans bid for tickets when the Mariners played against the Toronto Blue Jays, Boston Red Sox, and Cleveland Indians.).

<sup>141</sup> Werner J. Reinartz, *Customizing Prices in Online Markets*, 6 EUR. BUS. F. 35, 35 (Summer 2001), available at <http://www.reinartz.com/research/ebf.pdf>.

<sup>142</sup> *Id.* at 35-36.

<sup>143</sup> *Id.* at 36.

<sup>144</sup> *Id.* at 40 (“The fact that prices change over time is publicly stated and customers do know what is happening. Customer animosity is avoided by the fact that all shoppers pay the same price if they purchase at a given time.”).

<sup>145</sup> Happel & Jennings, *supra* note 13.

<sup>146</sup> *Id.*

<sup>147</sup> William Grimes, *The Invisible Hand that Guides the Game of Ticket Hunting*, N.Y. TIMES, June 18, 2004, at E1.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Happel & Jennings, *supra* note 18.

<sup>152</sup> Layden, *supra* note 2. (“So you ride your bike up to the front gate of the stadium early and find out what the game is worth. If it’s a \$5 ticket, you ride around the stadium as fast as you can, buying up every ticket you can put your hands on [at that price]. Then you go out on the highway, and you sell like crazy and make 20 bucks a ticket . . . . The people out by the highway, they don’t know it’s a \$5 ticket yet.”).

<sup>153</sup> Happel & Jennings, *supra* note 38; Happel and Jennings, *supra* note 18 (Ticket vendors were complaining, “We can’t make nothing.” In observing the Phoenix ticket-scalping ordinance, the authors observed market reallocation, supply and demand, and a market-based solution to scalping. “If you can’t beat the scalpers, put them all in one place and let them compete.”); Layden, *supra* note 2 (The author has noted, “The best of brokers operate like futures traders, trying to nail the value of [tickets] three months before the event. For instance, Golden Tickets sold most of its Super Bowl tickets at prices ranging from \$1,150 to \$1,350 . . . and tried to fill those orders by buying seats for \$900 or less.”).

<sup>154</sup> Happel & Jennings, *supra* note 13.

<sup>155</sup> Jolls, *supra* note 5, at 1479.

<sup>156</sup> *Id.*

<sup>157</sup> Greg Couch, *supra* note 21, at 127.

# music

