

FANTASY SPORTS: A GAME OF SKILL THAT IS IMPLICITLY  
LEGAL UNDER STATE LAW, AND NOW EXPLICITLY  
LEGAL UNDER FEDERAL LAW

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I. INTRODUCTION

It is Sunday morning, December 10<sup>th</sup>, 2006. Mike jumps out of bed and onto the Internet to check his fantasy football team. He does a quick survey of his league's standings, which confirm that he needs a win today over Eric's first-place team if Mike is to make the playoffs. Eric is Mike's best friend, which makes it even harder for Mike to come to terms with the reality that Eric's team will be nearly impossible to beat. However, as Mike clicks on Eric's team page, he finds a glimmer of hope. A note next to the name of one of Eric's star running backs, Chester Taylor, indicates that Taylor's rib injury will likely keep him out of the Minnesota Vikings week 14 game against the Detroit Lions.<sup>1</sup> Mike pounces on this opportunity. He quickly scans the waiver wire, and sees that a relatively unknown backup, Artose Pinner, will likely fill in

<sup>1</sup> See *Unlikely Star Pinner Carries Vikings Past Lions 30-20*, USA TODAY, Dec. 10, 2006, [http://www.usatoday.com/sports/football/games/2006-12-10-vikings-lions\\_x.htm?csp=34](http://www.usatoday.com/sports/football/games/2006-12-10-vikings-lions_x.htm?csp=34).

for Taylor. Pinner has done virtually nothing in his three-year career. Mike knows, however, that any running back who gets a decent amount of opportunities to run the ball against Detroit's dreadful defense can put up strong fantasy numbers. Additionally, a quick background check on Pinner reveals that he actually played for Detroit until three months ago, when the Lions apparently gave up on him after drafting him in 2003.<sup>2</sup> Mike, smelling redemption in the air, decides to trust his instincts and inserts Pinner into his starting lineup. Pinner then proceeds to rush for 125 yards and score three touchdowns,<sup>3</sup> propelling the Vikings, and, more importantly, Mike's fantasy team, to victory. On Sunday night, Mike emails Eric and the rest of his league in order to call their attention to his ingenious managerial skills. The e-mail is met with a myriad of responses from Mike's friends, all reminding Mike that his fantasy team remained terrible, and that Mike himself remained a "loser."

The story above is fictional, but it is based on real events<sup>4</sup> and represents a typical weekend in the life of a fantasy football player. Fantasy sports leagues require each participant to select a group of real-world players from different teams, and then compete against other participants to see who can accumulate the most points based on the performances of those players in actual games.<sup>5</sup> In this way, fantasy leagues allow sports fans to be the owners and general managers of their own individually assembled teams.

The competition and overall appeal of fantasy leagues have attracted many Americans to play fantasy sports over the last decade.<sup>6</sup> A recent study, funded by the Fantasy Sports Trade Association (FSTA), showed that the number of fantasy sports players in America is now fifteen to eighteen million, a figure that has grown 7%-10% per year over the last three years.<sup>7</sup> The Internet has fueled this vast expansion by making information more accessible and by allowing participants to form fantasy leagues with other participants from across the country.<sup>8</sup> Visits to

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> See *id.* These events are real and occurred on December 10, 2006, when the Minnesota Vikings defeated the Detroit Lions, due to the best performance of Artose Pinner's career.

<sup>5</sup> See Fantasy Sports Trade Association Home Page, <http://www.fsta.org>, for a step-by-step description of how to play fantasy football and fantasy baseball.

<sup>6</sup> Press Release, Fantasy Sports Trade Ass'n, FSTA Discusses Issues Covered During its Spring Conference (Mar. 24, 2006) (on file with author). Kim Beason, a University of Mississippi professor, annually conducts this FSTA-funded study.

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

<sup>8</sup> See Anthony N. Cabot & Louis V. Csoka, *Cross-Border Issues in Gaming: The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197 (2003).

the top ten fantasy football Websites rose 10% over the last year,<sup>9</sup> and a recent Google search for "fantasy football" yielded over four million results.<sup>10</sup>

The appeal of fantasy leagues has recently begun to spread beyond the typical male sports fan. Out of the 8.5 million people who play fantasy football, 1 million are women.<sup>11</sup> There has also been a recent emergence of fantasy leagues based on less mainstream sports, such as bowling<sup>12</sup> and darts,<sup>13</sup> as well as leagues that are not based on sports at all. There are now fantasy celebrity leagues, where players receive points every time their celebrities appear in the news headlines,<sup>14</sup> and fantasy Congress leagues, where participants accumulate points based on how their legislators are able to move bills through Congress.<sup>15</sup>

Despite the growing popularity of fantasy sports and the entertainment that they provide, some commentators argue that playing fantasy sports constitutes illegal Internet gambling when the Internet provider charges each participant an entry fee and offers a prize to the league's winner.<sup>16</sup> These commentators argue that the structure of such fantasy sports leagues is similar to those of other illegal online gambling activities, the outcomes of which are predominantly determined by chance.<sup>17</sup> However, a closer look at the activities of typical fantasy players like Mike and his friends reveals why fantasy sports should be legal. Fantasy sports lack the typical evils associated with gambling;<sup>18</sup> in fact, they benefit the public. Mike's maneuvering and light-hearted trash talking on Sunday did not negatively affect the crime rate, the economy, or the moral fiber of society.<sup>19</sup> Rather, his actions provided him and his friends with some good water-cooler-talk

<sup>9</sup> Kristina Knight, *Gamers Flocking to Fantasy Sights*, BIZREPORT, Nov. 27, 2006, [http://www.bizreport.com/2006/11/gamers\\_flocking\\_to\\_fantasy\\_sites.html](http://www.bizreport.com/2006/11/gamers_flocking_to_fantasy_sites.html).

<sup>10</sup> Google Home Page, <http://www.google.com> (enter "fantasy football" in the search box; then click the "Google Search" button).

<sup>11</sup> Sheila G. Miller, *Fantasy Football No Longer Just for Men*, HERALD NEWS, Sept. 2, 2006.

<sup>12</sup> See PBA Fantasy Bowling Home Page, <http://pba.tokenworld.com/fantasyleague/enter.htm>.

<sup>13</sup> See Fantasy Darts League Home Page, <http://www.fantasydarts.bravehost.com/>.

<sup>14</sup> See Fafarazzi Home Page, <http://www.fafarazzi.com> (follow "Take the Tour" hyperlink). The Website explains that participants of fantasy celebrity leagues receive points when their chosen celebrities fight, get nose jobs or get arrested, divorced, married, and pregnant).

<sup>15</sup> See Fantasy Congress Home Page, <http://www.fantasycongress.com>.

<sup>16</sup> See Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201 (2002). See also Complaint at 7, *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 20, 2007) (available at <http://www.gambling-law-us.com/Articles-Notes/Fantasy%20Complaint.pdf>) [hereinafter *Humphrey Complaint*].

<sup>17</sup> See Davidson, *supra* note 16.

<sup>18</sup> These typical evils include a rise in the crime rate, economic loss, and morality erosion. See *infra* Part IV.A.

<sup>19</sup> See *infra* Part IV.A.

and probably increased the revenues of the National Football League (the "NFL"), the sports Websites, and the companies that advertise on those Websites.<sup>20</sup> Additionally, the research and clever strategizing that led to Mike's victory also reflect how skill, not chance, is the primary determinant in the outcome of fantasy games.<sup>21</sup> Thus, the argument that fantasy sports should be considered illegal Internet gambling because they are predominantly controlled by chance<sup>22</sup> is unfounded.

This Recent Development also discusses the legal and policy justifications for distinguishing between typical fantasy sports leagues<sup>23</sup> and more traditional forms of gambling. Part II focuses on the legality of fantasy sports leagues under federal law in the wake of the recently enacted Unlawful Internet Gambling Enforcement Act of 2006 (the "Gambling Enforcement Act").<sup>24</sup> Part III argues that fantasy sports are legal under the majority of state laws because skill, not chance, is the predominant factor in determining the winners of fantasy sports leagues. Finally, Part IV explains why fantasy sports are legal under federal law and should be legal under all state laws by summarizing and critiquing the policy arguments made for and against fantasy sports.

## II. THE LEGALITY OF FANTASY SPORTS UNDER THE GAMBLING ENFORCEMENT ACT

### A. *The Material Effect of the Gambling Enforcement Act*

The Gambling Enforcement Act makes it a crime for anyone in the business of wagering to accept any monetary transfers from U.S. financial institutions for the purpose of Internet gambling that is already unlawful under existing state or federal laws.<sup>25</sup> Section 5364 also gives federal regulators 270 days from the date the Act was passed to create rules that the U.S. financial institutions may rely upon to identify and block transactions that the Act restricts.<sup>26</sup> Thus, the Act targets online gambling providers rather than individual bettors.

<sup>20</sup> See *infra* Part IV.B.

<sup>21</sup> See *infra* Part III.C.

<sup>22</sup> This argument stems from the state anti-gambling laws that direct courts to examine whether a contest's outcome is determined by chance or by skill, in order to determine whether that contest constitutes an illegal form of gambling. See *infra* Part III.A.

<sup>23</sup> For the purposes of this Recent Development, a typical fantasy sports league is one in which the participants pay an entry fee, select and manage real-world players, and receive prizes when they win their leagues.

<sup>24</sup> Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006).

<sup>25</sup> *Id.* This language indicates that the Gambling Enforcement Act does not pre-empt state law, but rather relies on state law to determine whether a game or contest is illegal.

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

Despite Congress' intentions,<sup>27</sup> commentators have debated whether this Act has any legal impact. Professor I. Nelson Rose, a distinguished expert on gambling law, believes that the Act does not affect current state laws, which do not expressly apply to gambling operators across state lines.<sup>28</sup> He also argues that the Act does not expand the reach of existing Federal anti-gambling statutes, such as the Wire Act of 1961,<sup>29</sup> which has never been applied to non-sports related gambling.<sup>30</sup> However, other commentators argue that the Gambling Enforcement Act now makes the operators of every online gambling site that accepts money from U.S. bettors criminally liable because, by accepting the money, these operators violate every state's basic anti-gambling law.<sup>31</sup> Under this view, operators of these sites are committing crimes even in the states that have not enacted specific Internet gambling laws.<sup>32</sup>

Regardless of the Gambling Enforcement Act's actual effect, the message behind the Act is clear: the government is targeting Internet gambling in the United States. As *Party Gaming*, a major online gambling company, stated in a recent press release, this law "does make clear that the US government intends to stop the flow of funds from Americans to online gaming operators."<sup>33</sup> The government's 2006 assault on Internet gambling actually began even before the Act was passed. In July 2006, police arrested David Carruthers, the British CEO of BetOnSports.com, during a

<sup>27</sup> Congress passed the Unlawful Internet Gambling Enforcement Act in order to minimize the flow of revenue to gambling Websites and "limit the devastating effect" that Internet gambling has had on America's youth and compulsive gamblers. H.R. Rep. No. 109-552 (2006). The Internet lowers transaction costs for gamblers, allows them to gamble at any time, from any place, and provides anonymity that can shield compulsive gamblers from the public scrutiny that might deter further gambling. Additionally, betting with a credit card on the Internet can blur a player's understanding of how much money he is actually gambling away. The Internet also makes it easier for youths to gamble because it is significantly harder to enforce gambling age limits when the underage children are not physically present at a casino. *Id.* Senator Jim Leach, who helped draft the Gambling Act, even went so far as to dub the Internet "crack-cocaine for gamblers." Chico Harlan, *New Law May Break the Bank for Internet Gambling Industry*, PITTSBURGH POST-GAZETTE, Oct. 23, 2006, at A1, available at <http://www.post-gazette.com/pg/06296/732225-84.stm>.

<sup>28</sup> I. Nelson Rose, *Internet Poker Folds a Winning Hand*, POKER PLAYER, Nov. 13, 2006, <http://www.pokerplayernewspaper.com/viewarticle.php?sort=author&id=1571>.

<sup>29</sup> 18 U.S.C. § 1084 (1961). The Wire Act of 1961 prohibits those in the business of betting or wagering from using interstate telephone lines to conduct such betting or wagering. *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Chuck Humphrey, *Internet Gambling Funding Ban*, Oct. 13, 2006, <http://www.gambling-law-us.com/Federal-Laws/internet-gambling-ban.htm>. See *infra* Part III for a discussion on state anti-gambling laws.

<sup>32</sup> *Id.* Only about one half of the states have laws that expressly cover gambling on the Internet. *Id.*

<sup>33</sup> Press Release, PartyGaming Plc, PartyGaming Reacts to the Passage of the Unlawful Internet Gambling Enforcement Act of 2006 (Oct. 2, 2006) (on file with author).

layover in Dallas on charges of mail fraud and racketeering.<sup>34</sup> In September, Peter Dicks, the British chairman of SportingBet.com, was arrested at John F. Kennedy International Airport for violating Louisiana anti-gambling laws.<sup>35</sup> These arrests, coupled with the passage of the Gambling Enforcement Act, have scared away many online casino operators from entering the United States.<sup>36</sup> Even the owner of an online bingo site has been too scared to fly through the United States.<sup>37</sup>

### B. The Gambling Enforcement Act's Fantasy Sports Exemption

Although the Gambling Enforcement Act attacks Internet gambling, Section 5362(E) (ix) of the Act explicitly exempts

[p]articipation in any fantasy or simulation sports game . . . in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization<sup>38</sup> . . . and that meets the following conditions: (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants. (II) All winning outcomes reflect the relative knowledge and skill of the participants<sup>39</sup> and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events. (III) No winning outcome is based – (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.<sup>40</sup>

<sup>34</sup> Carol J. Williams, *High Stakes for Antigua in Fight for Web Gaming*, L.A. TIMES, Nov. 12, 2006, at C1.

<sup>35</sup> *Id.*

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

<sup>37</sup> *Id.* (explaining that Stuart Gordon, the British-Antiguan founder of Helix International, refused to take a trip to the United States despite his lawyers' opinion that his Website did not violate any U.S. gambling laws because his site did not accept sports bets).

<sup>38</sup> Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(E)(ix) (2006). This requirement and the condition under section (E)(ix)(III) [is author referring to section (E)(ix)(III)? Author's original text was "requirement (III)"] were designed to eliminate any possible connection between fantasy leagues and the fixing of real-world games. See *infra* Part IV.A.

<sup>39</sup> This language is somewhat ambiguous because it does not specify the level to which "relative knowledge and skill" must factor into a fantasy league's outcome in order for that league to be exempted. However, one can assume that Congress included this section of the Act to exempt typical fantasy sports leagues, regardless of the amount of skill that they require.

<sup>40</sup> 31 U.S.C. § 5362(E)(ix).

This section marks the first time that Congress has included an explicit fantasy sports exemption in any Federal anti-gambling Statute.<sup>41</sup> While Congress has intensified its assault on Internet gambling in the United States, it has also gone out of its way to explicitly ensure operators of fantasy sports Websites that they have nothing to fear.<sup>42</sup>

### III. THE LEGALITY OF FANTASY SPORTS UNDER STATE LAW

Generally, at common law, a contest is held to be an illegal lottery if it consists of three essential elements: "(1) the distribution of prizes, (2) according to chance, (3) for a consideration."<sup>43</sup> These requirements are reflected in almost every state's anti-gambling statute. New York's anti-gambling statute, for example, reads,

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.<sup>44</sup>

Although Congress has now specifically addressed the legality of fantasy sports, only one state's statute—Montana's—overtly exempts fantasy sports from its gambling laws.<sup>45</sup> Therefore, one must look to state court interpretations of various state anti-gambling statutes in order to ascertain the legality of fantasy sports in a specific state. Since *consideration* and *prize* elements are present in a typical fantasy league, where participants pay an entry fee with the understanding that they will win a prize if they win their league, under most state laws, the legality of such leagues turns on whether the leagues' outcomes depend on the requisite level of chance.

<sup>41</sup> These statutes include the Interstate Wire Act, 18 U.S.C. § 1084 (2007); the Travel Act, 18 U.S.C. § 1952 (2007); the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953 (2007); the Federal Antigambling Statute, 18 U.S.C. § 1955 (2007); and the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2007).

<sup>42</sup> Accordingly, Websites can still accept money from any American bank or credit card company to play in fantasy games that meet the Act's further stipulations. This has caused online casinos, such as PartyGaming, to keep its database of U.S. customers in case they decide to offer fantasy sports betting on their Websites. Andrew Edgecliffe-Johnson, *Betcorp Decides To Cash In Its Chips*, FIN. TIMES, Oct. 23, 2006, at 18.

<sup>43</sup> *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 494 (N.J. Sup. Ct. 1955).

<sup>44</sup> N.Y. PENAL LAW § 225.00 (2007).

<sup>45</sup> MONT. CODE ANN. § 23-5-802 (2005).

A. *The Dominant Factor Test*

In order to determine whether a contest is one of skill or chance, most states rely on the "dominant factor test," or "predominance test."<sup>46</sup> This test requires a court to decide whether chance or skill "is the dominating factor in determining the result of the game."<sup>47</sup> Some states have taken an even stronger anti-gambling stance, choosing to prohibit even those games whose outcomes are primarily determined by skill.<sup>48</sup> Typical fantasy sports games, as well as almost all other games that involve the consideration and prize elements, are, therefore, illegal in such states.<sup>49</sup> The states that follow the predominance test, however, greatly outnumber the states that adhere to the strict anti-gambling approach.

The rationale behind the chance/skill distinction stems from the American pastime of competing in games of skill for the chance to win a prize.<sup>50</sup> Some commentators also suggest that the chance/skill distinction exists because gambling on skill-based games is not nearly as popular or as accessible as gambling on

<sup>46</sup> In *re* Allen, 377 P.2d 280, 281 (Cal. 1962). See also *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995) ("[t]he principle that a game of skill is not within the compass of a gambling statute is one of long standing in [New York].")

<sup>47</sup> *Id.*

<sup>48</sup> Arizona, Arkansas, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, and Tennessee have issued court decisions or enacted statutes asserting that their anti-gambling laws do not distinguish between games of chance and games of skill. For example, Florida's anti-gambling statute makes it "[u]nlawful to bet on [a] result of trial or contest of skill." FLA. STAT. ANN. § 849.14 (West 2007). The Florida Attorney General has even stated that this section "prohibits the operation of and participation in a [typical] fantasy sports league." 1991 Op. Att'y Gen. 3 (Fla. 1991). New Jersey has also rejected the predominance test in favor of a slightly stricter standard, which bans games in which "the element of chance is a factor that is material to . . . [a game's] final result." *Boardwalk Regency Corp. v. Att'y Gen. of N.J.*, 457 A.2d 847, 850 (N.J. Super. Ct. Law Div. 1982). However, most state courts have chosen to follow the "majority, dominant factor rule" unless there is "clear language in the [State] Constitution supporting a contrary rule." *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1384 (D. Del. 1977).

<sup>49</sup> Although Arizona's gambling statute does not distinguish between chance and skill, ARIZ. REV. STAT. ANN. § 13-3304 (2001), the Arizona Supreme Court held that the payment of entry fees does not constitute illegal wagering under Arizona law when the entry fees are paid unconditionally and the prizes do not depend on the number of participants. *State v. Am. Holiday Ass'n.*, 727 P.2d 807, 812 (Ariz. 1986). Nevada and New Jersey courts have also narrowly construed the term "wager" in this way. See *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961); see also *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 20, 2007). Therefore, fantasy sports Websites that award pre-determined prizes to league winners do not engage in illegal gambling under the laws of the above states. Those states, however, have outlawed promoting gambling or "knowingly obtain[ing] any benefit from gambling." ARIZ. REV. STAT. ANN. § 13-3304 (2007); see also N.J. STAT. ANN. § 2C:37-2 (West 2007). Many fantasy sports participants use these Websites to create their own custom fantasy leagues in which the prizes are determined by the number of participants, which makes the entry fees "wagers" under the above states' laws. Therefore, even if these Websites do not engage in gambling in the aforementioned states, the Websites could still be criminally liable for benefiting from the gambling that they enable.

<sup>50</sup> Cabot & Csoka, *supra* note 8, at 206.

chance-based games.<sup>51</sup> Additionally, those who gamble and compete in skill-based games are generally more passionate about their competitions because they have put more time and energy into learning and studying the games. Thus, the chance/skill distinction allows legislatures to ban the most popular forms of gambling without prohibiting gambling on the skill-based games that have a smaller and more passionate following.<sup>52</sup>

Although the methodology behind the chance/skill distinction and the predominance test is fairly straightforward, there is still no definite way to determine whether chance or skill predominates in a given game. Although a few courts and legislatures have weighed in on how to conduct this test,<sup>53</sup> courts have disagreed about whether the outcomes of borderline games, such as poker and backgammon, are determined predominantly by chance or by skill.<sup>54</sup> The modern approach to conducting the dominant factor test appears to be to subjectively determine whether a game's outcome is controlled more by chance or by some other factor that is under the game participants' control.<sup>55</sup>

Although no court has ever directly applied the dominant factor test to fantasy sports, several courts have held that chance was the dominant factor in determining the outcome of contests in which participants predicted the outcome of a pool of football games.<sup>56</sup> In *Seattle Times v. Tielsch*, the Washington Supreme Court found that chance factors such as the physical and mental conditions of players, potential problems between team members, and the game-time weather conditions all greatly affected the outcomes of the football games, and in turn dominated the outcome of the pool.<sup>57</sup> The courts in *National Football League v.*

<sup>51</sup> *Id.*

<sup>52</sup> See *id.*

<sup>53</sup> In *Morrow v. State*, 511 P.2d 127 (Alaska 1973), for example, the Alaska Supreme Court listed several skill factors to examine, and the Wisconsin anti-gambling statute states:

"[S]kill" means, within an opportunity provided for all players fairly to obtain prizes or rewards of merchandise, a player's precision, dexterity or ability to use his or her knowledge which enables him or her to obtain more frequent rewards or prizes than does another less precise, dexterous or knowledgeable player.

WIS. STAT. ANN. § 945.01(3)(b)(3) (West 2006). Charles Humphrey has also recently hired members of a major University's math department to help conduct a study that will hopefully give courts a better understanding of how to conduct the dominant factor test. *Jessica Centers, All In*, DENV. WESTWORD, Dec. 14, 2006.

<sup>54</sup> Cabot & Csoka, *supra* note 8, at 202-203.

<sup>55</sup> In *re* Allen, 377 P.2d 280, 281 (Cal. 1962). See also *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995).

<sup>56</sup> *Seattle Times Co. v. Tielsch*, 495 P.2d 1366 (Wash. 1972); *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372 (D. Del. 1977); *Commonwealth v. Laniewski*, 98 A.2d 215 (Pa. Super. Ct. 1953); see also *State v. Steever*, 246 A.2d 743 (N.J. Super. Ct. App. Div. 1968).

<sup>57</sup> *Seattle Times Co.*, 495 P.2d at 1367-1368.

*Governor of Delaware and Commonwealth v. Laniewski* also applied similar reasoning, adding that “[n]o one knows what may happen once . . . [a football] game has begun.”<sup>58</sup> Accordingly, these courts held that, under their respective state laws, the pools were chance-dominated, illegal lotteries, regardless of how harmless the participants and promoters thought the contests were.<sup>59</sup>

Although one might argue that the same chance factors that determined the outcomes of these contests equally affect the outcomes of fantasy sports leagues, there are several reasons why fantasy sports depend less on chance and more on skill than do the pool contests that try to predict the outcomes of sports games. First, the pools at issue in *National Football League* and *Laniewski* required its participants to select the teams that they thought would do better than a pre-determined *point spread*.<sup>60</sup> So, for example, if a stronger team were favored to beat a weaker team by a point spread of seven points, the contestants would have to decide not only whether the stronger team would win, but also whether it would win by more than seven points. This “designated point spread or ‘line’ [was] designed to equalize the odds on the two teams involved . . . . [which] inject[ed] a further factor of chance.”<sup>61</sup> Since there is no equalizer like a point spread involved in fantasy sports, the outcomes of fantasy sports leagues are less susceptible to chance than the outcomes of sports pool contests.

Fantasy sports can be distinguished even from pools that do not involve point spreads because pools allow multiple competitors to pick the same team,<sup>62</sup> whereas typical fantasy sports leagues forbid more than one participant from selecting the same real-world player. This gives the most attentive and rigorous – or skilled – fantasy sports competitors an upper hand over their competition, but does not reward the most vigilant pool contestants. For example, if a star quarterback on a real-world team is seriously injured a few days before a game, every participant in the pool contest could pick that player’s team to lose its upcoming game because such contests allow an unlimited number of participants to select the same team to win or lose. As a result, even contestants who actively monitor their football players would not be able to gain a competitive advantage over less-active contestants. Under the same scenario, the first alert fantasy league participant to pick up the injured quarterback’s

<sup>58</sup> *Nat’l Football League*, 435 F. Supp. at 1386 (quoting *Laniewski*, 98 A.2d at 217).

<sup>59</sup> *Seattle Times Co.*, 495 P.2d at 1370.

<sup>60</sup> *Nat’l Football League*, 435 F. Supp. at 1385; *Laniewski*, 98 A.2d 215.

<sup>61</sup> *Nat’l Football League*, 435 F. Supp. at 1385.

<sup>62</sup> See *Seattle Times Co.*, 495 P.2d 1366; *Nat’l Football League*, 435 F. Supp. 1372; *Laniewski*, 98 A.2d 215; *State v. Steever*, 246 A.2d 743 (N.J. Super. Ct. App. Div. 1968).

replacement could gain a competitive advantage over the rest of the league because each real-world player is only allowed to be on one fantasy competitor’s team.<sup>63</sup> Therefore, a fantasy participant’s attention to detail and skillful managerial decision-making abilities are factors that are much more vital in determining the outcomes of fantasy leagues than they are in shaping the outcomes of sports pool contests.

Fantasy sports leagues are also less dependent upon chance than pools, because pool contests impose an earlier deadline for submitting predictions. Whereas pools require participants to mail in their entries in advance of the real-world games,<sup>64</sup> most fantasy sports leagues allow participants to shuffle the players on their teams up until game time.<sup>65</sup> This ability to make last-minute substitutions further decreases the level of chance involved in fantasy sports; the “educated predictions” that fantasy sports competitors make, unlike the locked-in predictions made by pool contestants, are “subject to last minute changes” that are based on additional information unearthed by the participant.<sup>66</sup>

In addition to the chance/skill distinction, fantasy sports are distinguishable from pool contests because, unlike fantasy sports, pool contests threaten the perceived integrity of real-world sports leagues.<sup>67</sup> A contestant who stands to win a large sum of money by picking the winners of several games would obviously have a strong incentive to try to fix the games in his favor. However, as further explained in Part IV.A of this Recent Development, the structure of typical fantasy sports leagues makes it virtually impossible for a fantasy participant to profit from influencing real-world games.<sup>68</sup> In fact, the NFL, which sued the contest promoters in *National Football League* in order to protect the perceived integrity of the league,<sup>69</sup> now publicly supports fantasy football leagues.<sup>70</sup>

Charles Humphrey, a Colorado attorney with a history of

<sup>63</sup> Due to the widespread effect that a starting quarterback’s injury has on a real-world game, a fantasy league participant can also gain a competitive advantage over the rest of the league by trading for, adding, or dropping any player on that quarterback’s team or any player on the opposing team’s defense, whose performance may be positively or negatively affected by the quarterback’s injury.

<sup>64</sup> See *Nat’l Football League*, 435 F. Supp. at 1384.

<sup>65</sup> Although a participant would not be able to pick up real-world players that are already on another participant’s team, a good fantasy player would draft and place on the bench the back-ups of his star real-world players, so that he could exchange one for the other at a moment’s notice.

<sup>66</sup> See *Nat’l Football League*, 435 F. Supp. at 1384.

<sup>67</sup> See *infra* Part IV.A.

<sup>68</sup> See *infra* Part IV.A.

<sup>69</sup> See *Nat’l Football League*, 435 F. Supp. 1372.

<sup>70</sup> See *infra* Part IV.B.

searching for creative ways to make money through poker,<sup>71</sup> had hoped that the New Jersey District Court would be the first to extend the holdings of the *Seattle Times* line of cases to fantasy sports.<sup>72</sup> In June of 2006, Humphrey alleged that CBS SportsLine, Vulcan Sports Media, and ESPN operated illegal pay-to-play fantasy sports Websites.<sup>73</sup> Humphrey's suit relied on the 300 year-old laws of eight states, which permit a *qui tam* plaintiff to recover money that third parties had lost to illegal gambling operators.<sup>74</sup> He sought to convince the court that the fantasy sports contests offered on the defendants' Websites were forms of illegal gambling because their outcomes were predominantly determined by chance.<sup>75</sup> The New Jersey court dismissed the suit without ever addressing the chance/skill distinction on the grounds that the entry fees at issue were not wagers under New Jersey law; additionally, Humphrey failed to show that the defendants were "winners" and the fantasy contestants "losers" under the narrowly construed New Jersey *qui tam* statutes.<sup>76</sup> Nevertheless, Humphrey's complaint presented the basic arguments that could persuade a future court to find that the dominant factor in fantasy sports contests is chance rather than skill.<sup>77</sup>

#### B. Does Chance Predominate?

Humphrey's complaint alleged that any attempt to predict the future statistical production of athletes "involve[s] chance guesses."<sup>78</sup> Therefore, Humphrey argued, the outcomes of fantasy leagues, which depend on how accurately fantasy participants are able to predict athletes' performances, are predominantly shaped by chance.<sup>79</sup> The complaint then listed multiple chance factors that could affect an athlete's statistics.<sup>80</sup>

First, the complaint asserted that injuries play a prominent

<sup>71</sup> He has earned \$50,000 playing poker, sponsored a group of twelve professional poker players in exchange for half of their winnings, and unsuccessfully tried to create the "Tournament of Champions of Poker," in which only winners of major poker tournaments could play. Centers, *supra* note 53.

<sup>72</sup> See Humphrey v. Viacom, Inc., No. 06-2768, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 20, 2007).

<sup>73</sup> Humphrey Complaint, *supra* note 16, at 2-3.

<sup>74</sup> Memorandum of Law in Support of Defendant ESPN, Inc.'s Motion to Dismiss the Complaint Pursuant to Fed R. Civ. P. 12(B)(6) at 8-9, Humphrey v. Viacom, Inc., No. 2:06 Civ. 2768 (D.N.J. Sept. 28, 2006). Several of the eight states require the *qui tam* plaintiff to give half of the recovered revenue to the state. See Humphrey Complaint, *supra* note 16, at 25-29.

<sup>75</sup> Humphrey Complaint, *supra* note 16, at 3.

<sup>76</sup> Humphrey v. Viacom, Inc., No. 06-2768, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 20, 2007).

<sup>77</sup> Humphrey Complaint, *supra* note 16, at 16-20.

<sup>78</sup> *Id.* at 17.

<sup>79</sup> *Id.* at 16.

<sup>80</sup> *Id.* at 16-20.

role in shaping a player's production.<sup>81</sup> Over one half of all NFL players suffer injuries each year, and game-related injuries in the National Basketball Association (the "NBA") have risen by 12.4% over the last ten years.<sup>82</sup> Athletes' injuries can greatly affect fantasy leagues, especially when the real-world team waits until game time to disclose that an injured player will not play in that day's game.<sup>83</sup> When this occurs, it is often too late for a fantasy player to substitute a new player for the injured one in his lineup.<sup>84</sup>

Humphrey also argued in his complaint that off-the-field incidents can similarly influence a player's statistics, since players can be injured during their daily routines.<sup>85</sup> For example, NFL quarterback Ben Roethlisberger was injured in a motorcycle crash, Major League Baseball (the "MLB") pitcher John Smoltz was injured by an iron, and MLB third-baseman Wade Boggs was injured while putting on cowboy boots.<sup>86</sup> Players also miss time on the field due to personal tragedies in their lives, such as the deaths of friends or family members.<sup>87</sup> Lastly, players can be suspended from games if they get arrested, abuse drugs, or otherwise violate their leagues' bylaws.<sup>88</sup>

Finally, the complaint alleged that the ordinary management of real world games, which is aimed at winning games rather than bolstering an individual player's statistics, can also influence a player's production.<sup>89</sup> Coaches will often bench their starting players when one team's lead becomes insurmountable in order to avoid running up the score, to rest their star athletes, or to give younger players a chance to play.<sup>90</sup> Furthermore, MLB managers will sometimes replace their star players towards the end of a game if the circumstances call for a specific skill, such as a faster runner or a better fielder.<sup>91</sup> MLB managers may also choose to "intentionally walk"<sup>92</sup> an opposing team's hitter when the situation warrants it.<sup>93</sup> Humphrey argues that the above-enumerated factors, which lie beyond a fantasy player's control, influence a fantasy league's outcome to a much greater extent than does a

<sup>81</sup> *Id.* at 17.

<sup>82</sup> *Id.* at 18-19.

<sup>83</sup> *Id.* at 18.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 18.

<sup>86</sup> *Id.* at 19.

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 20.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 17, 20.

<sup>91</sup> *Id.* at 20.

<sup>92</sup> A pitcher "intentionally walks" a hitter by purposely throwing four balls out of the strike zone, forcing the hitter to go to first base without giving him the opportunity to hit the ball.

<sup>93</sup> *Id.*



fantasy league participant's skill.<sup>94</sup>

### C. Does Skill Predominate?<sup>95</sup>

Although some degree of luck is involved in fantasy sports, the amount of skill involved in selecting and managing a winning fantasy team is the dominant factor in shaping a fantasy league's outcome. Humphrey's complaint illustrated how chance can strongly influence the real-world games and player-performances on which fantasy leagues depend.<sup>96</sup> However, a fantasy participant's skill in recognizing and adjusting to those chance occurrences is the dominant factor in determining the success of that fantasy player.

A fantasy competitor's display of skill starts with his preparations for the draft. The fantasy league draft is the most important time for a fantasy competitor to display his knowledge of each real-world athlete's potential to perform. The players that a fantasy participant selects on draft day will likely be the foundation of that participant's team for the ensuing year. Most successful fantasy participants will come to the draft armed with detailed information about player statistics, injury news, team-depth charts, and rookie reports. Participants must then be careful to select quality starters and back-ups to fill each fantasy position. Thus, if a participant allows a computer to select his team's players by using pre-determined rankings,<sup>97</sup> his team will often end up having too many players to fill one position, and not enough players to fill another.

After the draft, a successful fantasy player will closely monitor the real-world players for injuries, trades, signings, or any other news that could possibly affect a particular real-world player's performance. If an incident negatively affects the value of a real-world player on a fantasy participant's team, the participant may respond by benching, dropping, or trading that real-world player. Conversely, if an occurrence increases the value of a real-world player, who is either not on a fantasy team or is on another person's fantasy team, a competitor might want to pick up or trade for that real-world player. Additionally, if a player shows a history of mid-season occurrences that negatively affect his value, such as

<sup>94</sup> *Id.*

<sup>95</sup> The information contained in this section is based on the author's personal experience and opinion, unless otherwise indicated.

<sup>96</sup> Humphrey Complaint, *supra* note 16, at 16-20.

<sup>97</sup> This type of feature is now available on fantasy Websites operated by companies such as Yahoo!. See, e.g., Yahoo! Fantasy Football Help, <http://help.yahoo.com/1/us/yahoo/football/rules/frules-06.html> (last visited Nov. 13, 2007).

frequent injuries or suspensions, this should also factor into a fantasy competitor's decision to draft that player.

In order to effectively manage his team, a fantasy participant must closely monitor and react to the events that Humphrey argues make fantasy sports a game of chance, such as injuries, off-the-field incidents, and suspensions. For example, in the hypothetical laid out at the beginning of this Recent Development, if Eric had learned that Chester Taylor was not going to play against the Detroit Lions that week, and had picked Artose Pinner before Mike did, Eric's fantasy team would have won. And if Mike had not done the proper research on the Detroit Lions defense and Pinner's history, he may have chosen to start a less productive player, which might have cost Mike's fantasy team the victory. It was Mike's superior skill in researching, recognizing, and adjusting to the chance occurrences that Humphrey listed that proved to be the dominant factor in determining Mike's success.

### IV. THE POLICY REASONS THAT INDICATE WHY FANTASY SPORTS SHOULD BE LEGAL

Congress most likely exempted fantasy sports from liability under the Gambling Enforcement Act because it recognized that, unlike more traditional forms of gambling, fantasy sports leagues create purely positive externalities for American society. Nevertheless, the only state to affirmatively distinguish between fantasy sports and other types of gambling is Montana, which has resolved the ambiguity about whether its anti-gambling laws cover fantasy sports by making it "lawful to conduct or participate in a fantasy sports league."<sup>98</sup> Every state should follow the leads of Montana and Congress by explicitly exempting fantasy sports operators and competitors from criminal liability.

#### A. Fantasy Sports Do Not Create Negative Externalities

The typical vices that are associated with gambling do not apply to fantasy sports; the monetary awards involved in fantasy games are nominal and secondary to the games' interactive and entertainment aspects.<sup>99</sup> Gambling is often associated with an increased crime rate because it spurs a rise in organized crime and tax skimming;<sup>100</sup> compulsive gamblers generally commit more

<sup>98</sup> MONT. CODE ANN. § 23-5-802 (2005).

<sup>99</sup> Neville Firdaus Dastoor, *The Reality of Fantasy: Addressing the Viability of a Substantive Due Process Attack on Florida's Purported Stance Against Participation in Fantasy Sports Leagues that Involve the Exchange of Money*, 6 VAND. J. ENT. L. & PRAC. 355, 368 (2004).

<sup>100</sup> Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64



crimes than average citizens because they are often forced to find quick ways to pay off their gambling debts.<sup>101</sup> Gambling has also traditionally been said to cause economic loss;<sup>102</sup> compulsive gamblers who go bankrupt have always been a problem for banks and credit agencies.<sup>103</sup> Furthermore, the Government expends anywhere from \$13,200 to \$52,000 per year to treat a gambling addict.<sup>104</sup> In contrast, fantasy sports leagues generally involve a minimal amount of money, and as a result of the nominal amounts involved, these games could only have a substantial negative affect on the crime rate and the economy if every participant were to compete in a great number of fantasy games.<sup>105</sup> Such an occurrence would be logistically impossible due to the amount of time that it takes to effectively compete in a single fantasy league.<sup>106</sup>

Neither does fantasy sports participation cause any morality depletion, another typical gambling externality.<sup>107</sup> Gambling is generally believed to instill negative social values by teaching people that they can win money without hard work.<sup>108</sup> It is also estimated that the actions of one compulsive gambler directly affect ten to seventeen non-gamblers.<sup>109</sup> Unlike typical gamblers, however, typical fantasy sports participants do not usually play fantasy sports to win money.<sup>110</sup> They play to manage their own dream teams, root for their players, enthusiastically watch and follow the sports in which their athletes play, and compete against family and friends. Whatever minimal amount of money a fantasy league winner takes home is unlikely to be significant enough to

MISS. L.J. 291, 346 (1995).

<sup>101</sup> See *id.*

<sup>102</sup> Aaron Craig, *Gambling on the Internet*, 1998 COMP. L. REV. & TECH. J. 61, 64 (1998).

<sup>103</sup> Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW. J. 21, 25 (2001). See also Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5361(a)(3) (2006) (stating that the Act was enacted partially because Internet gambling is a "growing cause of debt collection problems" for banks and credit card companies).

<sup>104</sup> Craig, *supra* note 102, at 64-65.

<sup>105</sup> Thompson, *supra* note 103, at 40.

<sup>106</sup> *Id.* The average fantasy player spends approximately three hours per week managing each team. Christopher M. Leporini, *Fantasy Sports Bring Real Opportunities*, AM. MKTG. ASS'N, <http://www.marketingpower.com/content300363.php> (last visited Nov. 13, 2007).

<sup>107</sup> Cabot & Csoka, *supra* note 8, at 231.

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

<sup>109</sup> Dastoor, *supra* note 99, at 369. This statistic is particularly worrisome given the recent rise in the popularity of gambling among youths. In October 2006, the Annenberg Public Policy Center at the University of Pennsylvania released data estimating that the number of young men (i.e., men between ages eighteen and twenty-two) who gamble online at least once a month has doubled over the last year. Alan Schmadtke, *Are All Bets Offline? New Law Makes It Riskier To Wager on the Web*, ORLANDO SENTINEL, Nov. 12, 2006, at C9.

<sup>110</sup> Dastoor, *supra* note 99, at 368.

influence the values that the individual places on hard work or morality.

Gambling on the outcomes of sporting events can create gambling-related scandals that can harm a sports league's integrity, as well as the fans' perception of that integrity.<sup>111</sup> As David Stern, the commissioner of the National Basketball Association stated, "[s]ports betting places athletes and games under a cloud of suspicion, as normal incidents of the game give rise to unfounded speculation of game-fixing and point-shaving."<sup>112</sup> Major League Baseball in particular has been forced to work hard to stave off the connection between gambling and the people involved with the organization. The most notable incident of baseball gambling occurred during the 1919 "Black Sox Scandal," when eight members of the Chicago White Sox were banned from the sport following allegations that the White Sox intentionally lost the World Series.<sup>113</sup> More recently, in 1989, Pete Rose, baseball's all-time hits leader, was banned after he was accused of betting on baseball games in which he played or coached.<sup>114</sup>

Scandals such as these have driven sports leagues, and even the federal government, to enact rules aimed at protecting sports leagues' integrity from being marred by a connection to gambling.<sup>115</sup> Almost every major sports league now contains a clause in its bylaws forbidding any of the league's employees from gambling on a game's outcome.<sup>116</sup> A good example of these rules is Major League Baseball Rule 21, which imposes a one-year ban on MLB personnel who bet on baseball, and a lifetime ban on MLB personnel who bet on baseball games while also having "a duty to perform."<sup>117</sup> The federal government has also recognized the devastating impact that gambling can have on the integrity of sports, and the need to ensure that children do not begin to associate sports with gambling-related scandals.<sup>118</sup> Accordingly, Congress made sports wagering a federal offense when it passed

<sup>111</sup> Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 7 (1992).

<sup>112</sup> Tom Farrey, *Is Sports Gambling with Its Integrity?*, ESPN, <http://espn.go.com/nba/s/2003/0209/1506501.html> (last visited Nov. 13, 2007) (quoting NBA commissioner David Stern's 1991 testimony before the Senate Judiciary Committee).

<sup>113</sup> Anthony N. Cabot & Robert D. Faiss, *Gambling Law Symposium: Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 3 (2002).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 4.

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

<sup>117</sup> See Robert M. Tufts, Guest Letter, *Rose, With or Without Thorns*, MARKS'S SPORTSLAW NEWS, Oct. 29, 1999, <http://www.sportslawnews.com/Letters/Letters7.html>.

<sup>118</sup> See Bradley, *supra* note 111, at 5.

the Professional and Amateur Sports Protection Act.<sup>119</sup>

Although gambling's potential negative impact on sports is a legitimate concern, fantasy sports participation does not have any negative influence on sports leagues or the integrity of their games.<sup>120</sup> The structure of fantasy leagues, in which fantasy teams are comprised of different players from each real-world team, does not give any incentive to influence, fix, or tarnish individual games.<sup>121</sup> For example, if a fantasy league participant had the New York Yankees' Alex Rodriguez and Derek Jeter on his fantasy team, he would have no incentive to try to fix a Yankees game so that the Yankees would score a lot of runs, because that would also help other fantasy teams in that participant's league that had drafted other Yankees players to their teams. Although a fantasy league participant might have an incentive to fix games in the Yankees' favor if his team were composed of only Yankees players, a fantasy league with this type of structure would not qualify for the fantasy sports exemption under federal law.<sup>122</sup> Section 5362 of the Gambling Enforcement Act only exempts fantasy leagues whose individual teams are not comprised of just the players of corresponding individual real-world teams and whose outcome is not based upon a game's score, point spread, or performance of actual entire teams.<sup>123</sup> This language strongly suggests that Congress sought to insure that no conceivable fantasy sports league could ever give rise to suspicions of game fixing. Major professional sports leagues like the NFL have acknowledged this by endorsing fantasy sports<sup>124</sup> and backing the passage of the Act.<sup>125</sup>

The most compelling argument against fantasy sports is that they hurt the sanctity of sports by promoting the individualistic attitudes of today's athletes over the traditional team concept.<sup>126</sup> As one commentator noted, "[t]here's still something unsettling about people going to games and rooting not for their team, but for 'their guys.'"<sup>127</sup> However, Congress cannot be asked to ban a

<sup>119</sup> 28 U.S.C. § 3702 (2008). This Act made it illegal for a government entity, or person acting "pursuant to the law or compact of a governmental entity," to operate, sponsor, or promote gambling on games in which amateur or professional athletes participate. *Id.*

<sup>120</sup> Thompson, *supra* note 103, at 30.

<sup>121</sup> *Id.*

<sup>122</sup> Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361-5367 (2006).

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

<sup>124</sup> See *infra* Part IV.B.

<sup>125</sup> *Online Gambling Measure Passes Committee, Awaits House Action*, WASH. INTERNET DAILY, Mar. 16, 2006.

<sup>126</sup> See Davidson, *supra* note 16, at 225.

<sup>127</sup> Jayson Stark, *Top 25 Baseball Innovations*, ESPN, <http://sports.espn.go.com/mlb/news/story?id=2328893> (last visited Nov. 13, 2007).

game as popular as fantasy leagues merely to help endorse the *teamwork ideal* of sports,<sup>128</sup> especially when most major sports leagues actually promote fantasy games based on their respective sports.<sup>129</sup> Additionally, most athletes who focus on personal, rather than team, achievements are driven by media attention, the six or seven figure incentive clauses<sup>130</sup> in their contracts, and endorsement deals. It is a stretch to argue that these players' individualistic attitudes would be further influenced by the thought that scoring a touchdown or hitting a home run would help out a particular fantasy-team-owner.

#### B. Fantasy Sports Create Positive Externalities

Participation in fantasy sports leagues continues to increase the revenues of professional sports leagues by strengthening and expanding fan bases, introducing fans to teams and players from other cities, and increasing attendance.<sup>131</sup> Fantasy sports participants are also more likely to generally follow the sport of their league, which makes them more knowledgeable about that sport, its professional league, teams, and players.<sup>132</sup> A recent study showed that 55% of fantasy sports players report watching more sports on television since they began playing fantasy sports.<sup>133</sup> Additionally, last year, while only 12% of Americans attended a Major League Baseball game, 60% of fantasy participants went to an MLB game at least once.<sup>134</sup> The study also reflected similar jumps in attendance figures for the NFL, NBA, and NHL.<sup>135</sup>

In response to these statistics, major sports leagues like the NFL have begun to openly promote fantasy sports, while maintaining their bans on gambling.<sup>136</sup> The leagues have chosen to distinguish between the two activities because, as NFL spokesman Brian McCarthy noted, "fantasy football is a game of skill, and gambling is not."<sup>137</sup> Accordingly, the NFL's Website

<sup>128</sup> Dastoor, *supra* note 99, at 370.

<sup>129</sup> See *infra* Part IV.B.

<sup>130</sup> "Incentive clauses" in player contracts give athletes the opportunity to earn more money if they achieve certain team or personal goals. For example, a major league baseball player's contract might have incentive clauses that guarantee him more money if he hits a certain amount of home runs or if his team wins the World Series.

<sup>131</sup> Williams, *supra* note 34.

<sup>132</sup> See Thompson, *supra* note 103, at 42.

<sup>133</sup> Press Release, Fantasy Sports Trade Association, *supra* note 6.

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

<sup>135</sup> Last year, out of every American citizen, only 9% attended an NFL game, 8% attended an NBA game, and 4% attended an NHL game. Alternatively, out of every fantasy sports player, 47% attended an NFL game, 28% attended an NBA game, and 27% attended an NHL game. *Id.*

<sup>136</sup> Jason La Canfora, *Beating Yourself Takes New Meaning*, WASHINGTON POST, Aug. 13, 2006, at E1.

<sup>137</sup> *Id.*

displays a highlighted link on the top of its homepage for fantasy sports.<sup>138</sup> By clicking on this link, a fan can access several fantasy football contests, and can find everything he needs to effectively compete in a fantasy football league.<sup>139</sup> Even the owners of real-world sports franchises have now realized the importance of promoting fantasy leagues. Major League Baseball's San Francisco Giants recently agreed to offer a \$30,000 per-year job within the organization to the winner of a Yahoo! fantasy baseball contest.<sup>140</sup> According to Jerry Jones, owner of the NFL's Dallas Cowboys, "[e]verything we see in the NFL, every study we do, any of the stats we see, is that fantasy football is a real plus for the promotion and the interest of the NFL."<sup>141</sup>

Fantasy sports also increases the revenues of other private businesses that offer fantasy games or information on their Websites. Participation in fantasy sports has become so widespread that it currently has a three to four billion dollar impact on the entire sports industry.<sup>142</sup> Almost every major sports-related company has responded to this growth by offering a fantasy sports section on its Website, where fantasy players can access updated information about depth charts, injuries, or any other player news that might affect fantasy leagues.<sup>143</sup>

Advertisers have also recognized the growth of fantasy sports, and the potential to capitalize on the loyalty of fantasy players.<sup>144</sup> A recent FSTA-sponsored study tracking fantasy players' consumer behavior found that the average fantasy participant has played fantasy sports for nine years and has spent an average of \$493.60 on fantasy leagues over each year that he played.<sup>145</sup> This study also found that participants spend an average of three hours per week on each fantasy team, and an average of 11 minutes and 55 seconds on a fantasy sports Website per visit.<sup>146</sup> The loyalty and commitment exhibited by fantasy players has made fantasy leagues "an advertiser's dream," according to Steve Snyder, the general

<sup>138</sup> See NFL Home Page, <http://www.nfl.com>.

<sup>139</sup> See NFL Fantasy Home Page, <http://www.nfl.com/fantasy>.

<sup>140</sup> Dawn Kawamoto, *Fantasy Winner To Score Real-Life Giants Job*, CNETNEWS.COM, Mar. 15, 2006, [http://www.news.com/Fantasy+winner+to+score+real-life+Giants+job/2100-1026\\_3-5618290.html](http://www.news.com/Fantasy+winner+to+score+real-life+Giants+job/2100-1026_3-5618290.html).

<sup>141</sup> Stephen Dorman, *The Fantasy Football Phenomenon*, ACORN, Aug. 3, 2006, available at <http://www.theacorn.com/news/2006/0803/Sports/076.html>.

<sup>142</sup> Press Release, Fantasy Sports Trade Association, *supra* note 6.

<sup>143</sup> See e.g., Yahoo! Fantasy Sports Home Page, <http://fantasysports.yahoo.com/>; ESPN Fantasy Sports Home Page, <http://games.espn.go.com/frontpage>; CBSSports Fantasy Sports Home Page, <http://www.sportsline.com/fantasy>; NFL Fantasy Home Page, <http://www.nfl.com/fantasy>.

<sup>144</sup> Knight, *supra* note 9.

<sup>145</sup> Leporini, *supra* note 106.

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

manager and senior vice president of CBS SportsLine.<sup>147</sup> Snyder explains, "[m]arketers know that people are spending time and energy and passion on [fantasy] sites."<sup>148</sup> Jeff Thomas, committee chairman of the Fantasy Sports Trade Association, claims, "[f]antasy leagues are everything that brand managers and sports marketers would ever want."<sup>149</sup> Advertising goliaths such as McDonald's, GMC, Anheuser-Busch, Coca-Cola, and Toyota have all recognized the potential to exploit the fantasy league market, as they now advertise their products on the fantasy sports sections of Websites like [cbs.sportsline.com](http://cbs.sportsline.com).<sup>150</sup>

Finally, fantasy sports leagues have a strong social value in that they foster intimate, friendly competition between friends and family. Three out of four fantasy players compete in leagues with people that they already know.<sup>151</sup> Thus, participation in a fantasy league can become an enjoyable pastime for a family or a group of friends. Bill Simmons, ESPN's "Sports Guy," echoed this sentiment when he wrote, "[m]aybe it's just a fantasy league, but I can't imagine few things I'll miss more . . . than the annual draft at Lee's house—cracking the same jokes, seeing old friends, laughing for five straight hours, putting another year in the books."<sup>152</sup>

## V. CONCLUSION

The dominant factor test, which prevails in the majority of states and resolves the ambiguous language of the Gambling Enforcement Act's fantasy sports exemption, all but dictates that fantasy sports are legal under federal law and most state laws, since the primary determinant of a fantasy league's outcome is the skill of its participants. The minority of states whose gambling laws do ban fantasy sports have failed to recognize that fantasy sports leagues provide purely positive influences. These states should follow Congress' direction by differentiating between fantasy sports and other forms of gambling that are actually detrimental to society.

<sup>147</sup> Knight, *supra* note 9.

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

<sup>149</sup> Greg Sandoval, *Fantasy Football Leagues Score Big with Fans*, CNETNEWS.COM, Nov. 27, 2006, [http://www.news.com/Fantasy+football+leagues+score+big+with+fans/2100-1026\\_3-6138083.html?tag=nefd.top](http://www.news.com/Fantasy+football+leagues+score+big+with+fans/2100-1026_3-6138083.html?tag=nefd.top).

<sup>150</sup> Knight, *supra* note 9.

<sup>151</sup> Press Release, Fantasy Sports Trade Association, *supra* note 6.

<sup>152</sup> Bill Simmons, *Draft Day Swan Song*, ESPN, <http://proxy.espn.go.com/espn/page2/story?page=simmons/021114> (last visited Nov. 13, 2007).

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