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FANTASY SPORTS—HAS RECENT ANTI-GAMBLING LEGISLATION ‘DROPPED THE BALL’ BY PROVIDING A STATUTORY CARVE-OUT FOR THE FANTASY SPORTS INDUSTRY?

*Anthony Vecchione**

I. INTRODUCTION

Steven Woods, a claims adjuster with Midland Insurance and coach of the Midland Maniacs fantasy basketball team, announced Monday that he is “deeply saddened” by the sexual-assault allegations leveled against his team’s star guard, Kobe Bryant. “I can’t believe this is the same Kobe I’ve worked with all these years,” Woods said at a breakroom press conference. “I’ve won two Midland Fantasy Basketball League championships with him. He’s always handled himself with such class, both on and off the court.” “Obviously, Kobe has my full support during this difficult time,” Woods added. Bryant, 24, is charged with sexually assaulting a 19-year-old woman at a resort in Colorado. If convicted, he faces four years to life in prison or [twenty] years to life on probation. Woods acknowledged that he was shaken by news of the allegations.¹

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1. *Kobe Bryant’s Fantasy-Team Coach ‘Saddened’ by Allegations*, THE ONION, Aug. 6, 2003, <http://www.theonion.com/content/node/29181>. This author recommends that the reader take a moment to read the full *Onion* article, as it lightheartedly illustrates some of the points which will be made in the pages that follow. This author also thanks you, in advance, for refraining from checking your fantasy sports team’s statistics while you read the article online.

WHILE the previous excerpt comes from a satirical newspaper, it is not difficult to imagine why the coach of a “real” fantasy sports team would be “shaken” by news of a possible disruption to his team’s ability to compete. From office pride to large cash jackpots, the stakes are often high.

A. THE IMPORTANCE OF FANTASY SPORTS AND RELEVANT LEGISLATION

The world of fantasy sports has grown from its humble beginnings and paper and pencil roots² into an industry with a multi-billion dollar impact.³ A recent survey revealed that there are 34.5 million individuals in North America alone who have directly participated in fantasy sports.⁴ The friends and families of those participants will testify that you need not be playing the games to feel the impact of the phenomenon.⁵ As such, many are apt to take notice when an industry that affects so many dollars and so many individuals is likely to be impacted by new legislation. Recent legislation has impacted the world of fantasy sports, viewed by some as a world of gambling, in such a way. This Comment argues that recent anti-gambling legislation may have “dropped the ball” by providing a carve-out provision with preferential treatment for the fantasy sports industry.

A discussion of the aforementioned humble beginnings of fantasy sports will provide a historical background, serving as context for the consideration of the scope and influence of the field. An analysis of participant demographics and incentives will yield further insight in an analysis of the impact. Space is reserved for an analysis of the reciprocal impacts between the fantasy sports industry and several others, including the sports themselves, technology, the workplace, and advertising. Next, an overview of pertinent statutes and cases will show how legislation and litigation have shaped the industry while ever threatening to dismantle it. While the preferential treatment for the industry may have been prompted by several arguments which attempt to distinguish fantasy sports from traditional gambling, it might also have been a function of

2. Frank M. Shipman, *Blending the Real and Virtual: Activity and Spectatorship in Fantasy Sports*, <http://www.csdl.tamu.edu/~shipman/papers/dac01.pdf> (last visited Feb. 6, 2008).

3. Nick Williams, *Living the Dream: Fueled in Part by the Internet, Fantasy Sports Have Exploded Into a Billion-Dollar Industry*, GLENS FALLS POST-STAR, July 2, 2006, <http://www.poststar.com/articles/2006/07/02/news/doc44a7b0adee47e799624131.txt>.

4. Jeff Thomas, *Fantasy Sports Conference Demographic Survey Shows Continued Growth*, Aug. 2, 2007, <http://www.fsta.org/news/pressreleases/PRWeb-FantasySportsConference0807.pdf>.

5. See Abigail Lorge, *In Fantasy Leagues, the Field Is Level*, N.Y. TIMES, July 28, 2007, at D6. “Last summer, a friend confessed that her boyfriend’s postcoital routine often included an abrupt shift from the bed to the computer so he could check on his fantasy baseball team. ‘I can understand if he doesn’t always want to cuddle with me,’ she said over drinks, her face conveying a combination of bewilderment and revulsion. ‘But why does he want to cuddle with Albert Pujols?’” *Id.*

illicit lobbying. Those arguments which attempt to differentiate fantasy sports from illegal gambling are presented and refuted, an alternative proposition identifying the possibility that fantasy sports may function as a gateway to more serious gambling is discussed, and the information which infers the possibility of unlawful conduct in the passage of the legislation is provided. Finally, a careful statutory analysis will show that a majority of fantasy sports activity may not, in fact, even be saved by the provided statutory carve-out. Suggestions for future action are also provided. This Comment concludes that in light of the fact that much of the rationale for excluding fantasy sports from the label of illegal gambling is specious, that the impact of legalizing this type of gambling is uncertain and could potentially lead to more serious problem gambling, that statutory language may in fact fail to adequately excuse the industry, and that those exceptions may have been ill-procured fantasy sports should not be excused from the gambling label and should not be afforded special treatment under the anti-gambling statutes.

II. HISTORY AND BACKGROUND OF FANTASY SPORTS

A. RULES AND ROOTS

Before discussing the beginnings of fantasy sports, it may better serve the audience to describe the basic rules. When learning to play any game, knowing the rules is a good place to start. The Fantasy Sports Trade Association (FSTA) was founded in 1998 by representatives of companies with interests in fantasy sports to help promote the industry.⁶ An eight-step explanation of “How to Play Fantasy Football” is provided on their web site.⁷ First, a league of “owners” is assembled.⁸ A basic league is typically made up of ten “team owners.”⁹ Leagues, are often comprised of groups of friends, but are now formed by co-workers, and even unaffiliated groups of individuals on the Internet.¹⁰ Second, a commissioner is elected, likely from among the “team owners,” and imbued with the power to enforce the league’s bylaws and to issue final decisions.¹¹ Third, the rules regarding the number of points to be awarded for an active player’s statistical achievements and regarding the number of players on an owner’s active roster are determined.¹² This step is integral because each week the accumulated points of one team’s active roster are

6. FSTA, History, <http://www.fsta.org/about> (last visited Nov. 3, 2008).

7. FSTA, How to Play Fantasy Football, <http://www.fsta.org/faq/howtoplay/football.php> (last visited Nov. 3, 2008).

8. *Id.*

9. Greg Sandoval, *Fantasy Football Leagues Score Big with Fans*, CNET NEWS, Nov. 27, 2006, http://www.news.com/Fantasy-football-leagues-score-big-with-fans/2100-1026_3-6138083.html?tag=nefd.top. Larger or smaller leagues will suffice, but the number of teams should be even to enable head-to-head weekly match-ups. FSTA, How to Play Fantasy Football, *supra* note 7.

10. M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J. L. & TECH. 59, 62 (2006).

11. FSTA, How to Play Fantasy Football, *supra* note 7.

12. *Id.*

matched up against those of another's, and the end result is either a victory or a defeat for that team.¹³ For instance, in a given week an owner might activate nine players from the roster: usually one quarterback, one tight end, one kicker, four running backs, and four wide receivers.¹⁴ Each owner also drafts one team's total defense.¹⁵ To determine which players to activate before game time, owners usually delve into statistical analyses, devour sports headlines, and fervently track games both online and on television.¹⁶ Fourth, the league's players are chosen by the team owners in a draft, very similar to the one held each year in the NFL.¹⁷ An eagerly anticipated all-day event, draft day is sometimes referred to by team owners as "Guy's Christmas."¹⁸ Each "team owner" will draft between sixteen and twenty players.¹⁹ Upon completion of the draft, a schedule is set, providing for each team to play all others at least once, and insuring a smooth transition to postseason play.²⁰ The sixth step is to sit back and compile the scores.²¹ Each week, the owner will earn points "based on the performance of the individual players and the team defense."²² Seventh, owners are free to conduct transactions (so long as they are consistent with the league's bylaws) during the course of the season.²³ Eighth, and most importantly, owners are encouraged to have fun.²⁴ After all, "[t]hat's what it's all about."²⁵

The rules of fantasy baseball are fundamentally similar, with a few noted exceptions (slightly more complex scoring, a bidding option for draft-day player selections, contingencies for player transactions, etc.).²⁶ With some ground rules laid for two of the most popular fantasy sports, we can proceed to a survey of their origins.

The first fantasy football league, The Greater Oakland Professional Pigskin Prognosticator's League, was formed in a New York City hotel room in 1963 by Oakland Raiders co-owner Bill Winkenbach, Oakland Tribune sportswriter Scotty Sterling, and Oakland Tribune editor George Ross.²⁷ In the past, Winkenbach had proposed other fantasy games, but

13. *Id.*

14. Sandoval, *supra* note 9.

15. *Id.*

16. *Id.*

17. FSTA, How to Play Fantasy Football, *supra* note 7.

18. Rick Dawson, *Higher Fantasy Sports Costs Could Become a Reality*, J. GAZETTE-TIMES COURIER ONLINE, July 23, 2006, <http://www.jg-tc.com/articles/2006/07/23/sports/sunday/sports001.txt>; Lorge, *supra* note 5, at D6.

19. Sandoval, *supra* note 9.

20. FSTA, How to Play Fantasy Football, *supra* note 7.

21. *Id.*

22. Sandoval, *supra* note 9.

23. FSTA, How to Play Fantasy Football, *supra* note 7.

24. *Id.*

25. *Id.*

26. See generally FSTA, How to Play Fantasy Baseball, <http://www.fsta.org/faq/howtoplay/baseball.php> (last visited Jan. 24, 2008). Fantasy baseball is so complex that it warrants thirteen steps (compared to fantasy football's eight) and that does not even include the prescription of mandatory enjoyment. *Id.*

27. Stephen Dorman, *The Fantasy Football Phenomenon*, THE ACORN, Aug. 3, 2006, <http://www.theacorn.com/news/2006/0803/Sports/076.html>; Jerry Magee, *It's No Fantasy—*

when he shared the idea for a football game the men “stayed up all night to iron out the details.”²⁸ By the 1970s, the epicenter of the hobby had positioned itself in the Kings X Sports Bar in Oakland, California.²⁹

Fantasy baseball’s roots, on the other hand, are slightly more shallow. Daniel Okrent is widely recognized as the father of the game.³⁰ He recalls the idea coming to him on a flight taken from Hartford, Connecticut to Austin, Texas in the fall of 1979.³¹ The idea was likely inspired by collegiate memories of the late 1960s, when Okrent’s professors at Michigan University held a pool where participants “would try to guess who would lead the league in various statistical categories.”³² Okrent had a “betting game among friends based on real baseball players’ performances over the course of a season” in mind when he created fantasy baseball.³³ In Austin, Okrent pitched the idea to representatives of Texas Monthly magazine, but they were not interested.³⁴ Several weeks later, a second pitch was made to a group of five friends at a New York City restaurant, and three of the five expressed interest.³⁵ After making some phone calls and doing some networking, they managed to expand to a group of ten franchises.³⁶ Seven of the ten charter members met the following winter and founded the first fantasy baseball league.³⁷

B. POPULARITY BREAKDOWN

Fantasy sports have expanded from their baseball roots to a number of other sports including basketball, hockey, and NASCAR.³⁸ A survey of fantasy sports players published in a 2003 article showed that 65% had football teams, 27% had baseball teams, 24% had basketball teams, 11% had hockey teams, 9% had NASCAR teams, and 3% had golf teams.³⁹ A series of Google keyword searches also serve to betray the relative popularities of the following fantasy sports: “Fantasy Football,” 24.5 million hits; “Fantasy Baseball,” 11.3 million hits; “Fantasy Basketball,” 4.91 mil-

NFL Puts Its Stamp on Gambling, SIGN ON SAN DIEGO, Aug. 17, 2003, http://www.signon-sandiego.com/sports/nfl/magee/20030817-9999_1s17nflcol.html. Some accounts also credit the Oakland Raiders’ public relations officer Bill Tunnell in the creation of the league. Dorman, *The Fantasy Football Phenomenon*, *supra*.

28. Magee, *supra* note 27.

29. Dorman, *supra* note 27.

30. Chris Colston, *Revisiting Roto’s Roots*, USA TODAY BASEBALL WEEKLY, <http://www.usatoday.com/sports/baseball/bbw/v96/bbw9605.htm> (last visited Jan. 24, 2008).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* The first league was lovingly dubbed the Rotisserie League, after La Rotisserie Francaise, the restaurant where the men had initially agreed to form the league. *Id.* Consequently, fantasy baseball is sometimes referred to as Rotisserie baseball. *Id.*

38. Joshua Chaffin, *All to Play For*, FIN. TIMES ONLINE, Nov. 9, 2007, http://www.us.ft.com/ftgatewaysuperpage.ft?news_id.=fto111920071357474282&page=1. There was even a short-lived effort to cultivate fantasy bass fishing. *Id.*

39. ARTHUR R. RANEY & JENNINGS BRYANT, *HANDBOOK OF SPORTS AND MEDIA* (2006).

lion hits; "Fantasy Hockey," 4.1 million hits; "Fantasy Golf," 3.3 million hits; "Fantasy Tennis," 198,000 hits; "Fantasy NASCAR," 155,000 hits; "Fantasy Bowling," 24,700 hits; and "Fantasy Field Hockey," 1,350 hits.⁴⁰ The craze has also reached European markets, with the United Kingdom boasting its own tradition of fantasy "football" leagues.⁴¹ It would appear that football is by-and-large the most popular of the fantasy sports. Most believe that the schedules are to thank: it is easier to keep up with football because the games occur once or twice a week, as opposed to baseball where the games are played daily.⁴² Greg Ambrosius, editor of *Fantasy Sports Magazine*, calls fantasy football a "100-yard dash compared to the marathon of fantasy baseball," adding that "[t]he MTV generation can focus on playing only one day a week."⁴³ One fan admits, "I've played fantasy football for years because it's pretty easy to follow and to keep up with. I quit my fantasy baseball league because I don't have the time to keep up with it every day."⁴⁴

The insanity is not limited to merely athletic events, as some media executives envision a future beyond the green fields of play.⁴⁵ Quincy Smith, president of CBS Interactive, has even considered arranging a weekly Hollywood-themed contest in which participants can draft celebrities and then tally points based on those celebrities' box office performances, and more colorful contingencies such as whether they become pregnant, enter rehab, or are arrested for driving under the influence.⁴⁶ In the end it would seem, rather fittingly, that our imaginations may be the only thing limiting our fantasy ideas.

C. THE COVETED DEMOGRAPHIC

Fantasy sports participants come from a particularly focused demographic. Players are on average thirty-seven years of age.⁴⁷ Most are college educated with 92% having attended college and 71% having completed a bachelor's degree.⁴⁸ Average income is in the mid-\$70,000

40. Google keyword searches made by author for "Fantasy Ping Pong" and "Fantasy Dodgeball" return 156 and 149 hits respectively, although this author suspects that many of the corresponding sites were created in jest.

41. Chaffin, *supra* note 38. Google keyword searches made by author for "Fantasy Soccer" and "Fantasy Cricket" yield 1.53 million and 1.14 million hits respectively, effectively eclipsing the popularity of American fantasy bowling and field hockey.

42. Adam Caplan, *It's Not Just a Fantasy Anymore*, <http://www.fsta.org/news/press-releases/casino.php?PHPSESSID=3gj5jthf4efjoaodp0rd5b5i2> (last visited Jan. 25, 2008).

43. Magee, *supra* note 27.

44. Caplan, *supra* note 42.

45. Chaffin, *supra* note 38.

46. *Id.*

47. Liz Ecker et al., *Betting on an Industry: Uncertain Future for Booming Fantasy Sports*, May 30, 2007, <http://depot.northwestern.edu/~ese913/fantasysports/fantasysports.html> (last visited Jan. 25, 2008); Dorman, *supra* note 27.

48. Ecker, et al., *supra* note 47; Dorman, *supra* note 27.

range.⁴⁹ Males dominate the field, comprising 92% of the participants.⁵⁰ Female interest in the industry, however, continues to grow.⁵¹ Worth noting, this male, college-educated, white-collar worker in his thirties is a member of a “coveted demographic.”⁵²

D. MOTIVATION

Fantasy sports participants indulge in the contests for a variety of reasons. Many players claim that the appeal goes beyond the cash prizes and the fascination with numbers.⁵³ Players have been driven to borderline obsessive-compulsive behavior by the competition and the glory of outsmarting friends and co-workers.⁵⁴ Thomas Bowers, co-director of the Kelley MBA Sports and Entertainment Academy at Indiana University, says that men rely on their participation in fantasy sports as a way to maintain longstanding (and long-distance) friendships with old acquaintances.⁵⁵ In fact, while some consider sites like MySpace and Facebook to be pioneers in the field, fantasy leagues are arguably among the first social-networking sites.⁵⁶ Research conducted by Jeff Thomas, president of the FSTA and founder of SportsBuff.com (a subscriber-based fantasy sports platform and online community), illustrates three main reasons people play fantasy sports: competition, love of the sport, and prizes.⁵⁷ A sociological analysis conducted by Don Levy, an assistant professor of sociology at West Virginia Wesleyan College, found that among the varied reasons for participation in fantasy sports was the intrinsic enjoyment derived from the activity, the opportunity to maintain and create relationships, and even the ability to satisfy a thirst for gambling.⁵⁸ Another reason that participants may feel more committed is that they make an emotional investment in a team whose lineup they can control and develop.⁵⁹ The emotional investment has certainly been a more risky one in sports generally since the advent of free agency and the deterioration

49. Ecker, et. al., *supra* note 47; Christopher M. Leporini, *Fantasy Sports Bring Real Opportunities*, <http://web.archive.org/web/200712201959/http://www.marketingpower.com/content300363.php> (last visited Nov. 5, 2008); *see also* Tom Van Riper, *The Costs of Online Football: Pure Fantasy*, FORBES.COM, Sept. 26, 2007, http://www.forbes.com/leadership/2007/09/26/fantasy-football-office-lead-cx_tvr_0926productivity.html (citing sources that place the average salary between \$60,000 and \$100,000).

50. Dorman, *supra* note 27.

51. See Leigh Alexander, *Survey: Female, Male Gamers Equally Competitive*, Nov. 13, 2007, http://www.gamasutra.com/php-bin/news_index.php?story=16235; Lorge, *supra* note 5, at D6.

52. Jim Hu, *Sites See Big Season for Fantasy Sports*, CNET NEWS, Aug. 8, 2003, <http://www.news.com/2100-1026-5061351.html>; Catherine Holahan, *Great Fall Fun—The Best That Money Can Buy*, BUS. WK. ONLINE, Sept. 21, 2006, http://biz.yahoo.com/special/luxury092106_article4.html.

53. Hu, *supra* note 52.

54. *Id.*

55. Lorge, *supra* note 5.

56. Sandoval, *supra* note 9.

57. Ecker et al., *supra* note 45.

58. Aaron Levy, *A Risky Bet: The Future of Pay-to-Play Online Fantasy Sports*, 39 CONN. L. REV. 325, 329 (2006).

59. Leporini, *supra* note 49.

of the connections between teams and their players.⁶⁰ It is also worth noting that individuals who do not have a home team because they reside outside a major market can create a team in which they can invest emotionally.⁶¹ By this logic, even those who are ashamed of their home team might also have an interest in creating a team in which they may purchase psychological stock. Even this short summary shows a compelling number of reasons for participants to become, and remain, involved.

E. IMPACT

The fantasy sports industry has had an impact on, and has been impacted by, several things. Presented here are highlights of the relationships between the fantasy sports industry and the real-world sports they represent, the advancing technology which supports its infrastructure, the workplace as the industry's field of play, and the all-powerful empire of commercial advertising.

1. *A Benefit for the Sport*

Most obviously, as recognized by Dallas Cowboys owner Jerry Jones, fantasy football has had a positive impact on the NFL, helping "the league continue to expand its fan base."⁶² "Everything 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."⁶³ Fantasy sports have also been acknowledged for engendering goodwill and increased fan interest in baseball.⁶⁴ A 2005 FSTA report showed that 55% of fantasy sport players reported watching more sports on television since they started playing and that many of the fans who attend games also play fantasy sports.⁶⁵ By bringing more fans and more deeply engaging current fans, fantasy sports is obviously benefiting the leagues.

Fantasy sports may also ultimately drive changes in the sports themselves. Frank Shipman of the Center for Study of Digital Libraries and Department of Computer Science at Texas A&M University points out that:

Anything that changes the desires of the spectators has the potential to change the sports themselves. Consider how television has resulted in changes to the rules of the major sports in the United States—television timeouts in professional and collegiate football, shot clocks in professional and collegiate basketball and illegal defense rules for professional basketball are just a few examples. How will decades of growing fantasy sports play change real sports? One example of how it could change current sports practice is to require

60. *Id.*

61. *Id.*

62. Dorman, *supra* note 27.

63. *Id.*

64. *Id.*

65. LeeAnn Prescott, *Fantasy Sports Online*, iMEDIA CONNECTION, May 19, 2006, <http://www.imediaconnection.com/content/9599.asp>.

coaches to publish starting line-ups in time for fantasy players to adjust their starters. Already, the National Football League requires injury reports publishing the likelihood of whether an injured player is going to be ready on a scale ranging from probable, questionable, doubtful, to definitely out.⁶⁶

Time will only tell how this industry and the demands of its spectators impact the sports themselves.

2. *Advanced Technology*

The fantasy sports industry has an impact on Internet use. A graph tracking Internet traffic at major fantasy sports sites markedly shows peaks during the beginning of the NFL and MLB seasons, and a noteworthy dip following the end of the NFL regular season.⁶⁷ Internet traffic at sites like ESPN.com and Yahoo Sports is “going through the roof. . . as fantasy sports. . . thrive.”⁶⁸ The Internet, however, is more often noted for having an impact on fantasy sports. Before the Internet, “fantasy leagues were conducted using pens, calculators and lots of patience.”⁶⁹ Jason Kint, general manager of Sporting News recalls that “[n]ormally, the commissioners would spend half their day once a week crunching numbers.”⁷⁰ The Internet benefited the game by making statistics more readily accessible and allowing players to analyze statistics that had once required more difficult manual calculations.⁷¹ “The Internet has geometrically expanded the availability and variations of statistics that have captivated fans ever since bubble gum met baseball cards.”⁷²

The industry impact is not limited to computers; other advances in technology have had, and will likely continue to have, an impact on the industry. Real-time statistics are now sent directly to cell phones as well as computers.⁷³ Fantasy sports leagues from MSN/Fox Sports, CBS SportsLine, and ESPN provide clients with increased access through podcasts and instant message updates.⁷⁴ Mobile devices allow players to remain connected while commuting, running errands, or taking a break for lunch.⁷⁵ With virtually everyone carrying either a cell-phone or an iPod these days, it is possible for real time stats to reach us all.

Radio and television have also been affected by fantasy sports. Satel-

66. Shipman, *supra* note 2.

67. *Sports Traffic No Fantasy for Yahoo*, VALLEYWAY, Dec. 21, 2007, <http://valleyway.com/tech/stats/sports-traffic-no-fantasy-for-yahoo-336833.php>.

68. Sandoval, *supra* note 9.

69. Hu, *supra* note 52.

70. *Id.*

71. *Id.*

72. Matthew Purdy, *Any Fan's a Manager with Baseball Facts Online*, N.Y. TIMES, June 7, 2001, available at <http://www.nytimes.com/2001/06/07/technology/07BASE.html?ex=1201410000&en=c59445eaeaf8a1467&ei=5070>.

73. Stacey Vanek-Smith, *Cashing in on Fantasy Football*, Aug. 11, 2006, <http://marketplace.publicradio.org/shows/2006/08/11/AM200608118.html>.

74. Leporini, *supra* note 49.

75. *Id.*

lite radio is available for fans who want greater game coverage.⁷⁶ DirecTV is working with ESPN to make NFL games fully interactive with fantasy stats and injury updates.⁷⁷ The Dish Network is trying to capitalize on the trend by launching an interactive application where subscribers pick winners from football games each week, entering their picks directly into their set-top boxes.⁷⁸ Another company offers a product called NanoGaming, “a real-time predict-the-play solution, [that turns a] live event into hundreds of real-time prediction opportunities, . . . transforms the passive viewing experience into an interactive game—where every batter gives viewers a chance to win points, challenge friends, support their team, and climb the leader board.”⁷⁹ Yet all these advances in technology and the accompanying increase in access to data for fantasy gamers is not heralded by all as a blessing.

3. *Workplace Productivity*

Employers are considered one group that does not welcome the increased interest in, and access to, fantasy sports.⁸⁰ Losses in workplace productivity have been associated with employees constantly logging on to the Internet to track players’ statistics and performances.⁸¹ A study conducted by Challenger, Gray & Christmas, an outplacement consultant group, estimated that employers lose as much as \$1.1 billion weekly from fantasy sports.⁸² So great is the threat of lost productivity to some companies, like Lehman Brothers, have restricted access to fantasy sports websites.⁸³ These figures are discounted by some critics, however, who claim that since the demographics indicate that most of these employees are salaried professionals, the time that they have “wasted” is ultimately added to the ends of their days, and productivity may not really suffer.⁸⁴ Such critics also suggest that there may even be benefits, such as opportunities for networking.⁸⁵ Until further research is conducted, it is likely that the impact on workplace productivity will be seen, by upper management anyway, as negative.

4. *Advertising*

Boasting millions of players each year, fantasy sports have also drawn

76. *Has Major League Baseball Hit a Foul in Its Recent Skirmish with Online Fantasy Leagues?*, June 14, 2006, <http://knowledge.wharton.upenn.edu/article.cfm?articleid=1495>.

77. Vanek-Smith, *supra* note 73.

78. Hu, *supra* note 53.

79. Press Release, LiveHive Systems, Inc., LiveHive Systems to Unveil New Predict-the-Play Fantasy Baseball Solution at the FSTA Spring Business Conference (Jan. 10, 2007), <http://www.livehivesystems.com/news/2007-jan-10-FSTA.html> [hereinafter LiveHive Systems Press Release].

80. See Ecker et al., *supra* note 47.

81. *Id.*

82. *Id.*

83. *Id.*

84. Van Riper, *supra* note 49.

85. *Id.*

the attention of advertisers.⁸⁶ Dr. Kim Beason, a University of Mississippi professor who conducts annual studies of demographics of fantasy sports participants, points out that “[f]antasy sports represent an easy, cost-effective way for advertisers to reach an engaged, demographically focused group of consumers.”⁸⁷ Beason also reports that “fantasy sports owns a 1-2 billion dollar annual impact and a 3-4 billion dollar impact on the sports industry in general.”⁸⁸ Another article reports that marketers spent \$150 million on branding and advertising deals with online fantasy sports communities in 2006 and forecasts that those dollars will continue to flow.⁸⁹ Fantasy sports are touted as a “natural tie-in for advertisers,” as it is an opportunity to get highly passionate fans to engage with a message that is tied with their sport.⁹⁰ Advertisers are lining up for a chance to reach the game’s engaged audience.⁹¹ Kevin Gralen, FSTA board member and president of Head 2 Head Fantasy Sports, reports that each year has seen growth, with many big advertisers, like McDonalds and Ford, getting involved.⁹² So valued are these advertising revenues, in fact, that they may have been an underlying and driving factor which led to *C.B.C. Distribution and Marketing v. MLB Advanced Media*, discussed below. Next, a discussion of the litigation and legislation related to fantasy sports will provide a transition from the presentation of history and the impact of the industry to the statute in question and a subsequent analysis of the decision of Congress to include a carve-out provision for the benefit of the industry.

III. PRESENT LAW

A. AN ATTEMPT TO STRIKE OUT THE LITTLE GUY—*C.B.C. DISTRIBUTION AND MARKETING, INC. v. MAJOR LEAGUE BASEBALL ADVANCED MEDIA, L.P.*

In 2005, MLB sold eighteen licenses to fantasy baseball providers, giving them the rights to use the league’s statistics.⁹³ That same year, MLB Advanced Media, the operator of MLB.com, signed a contract with the players’ union agreeing to pay \$50 million for the Internet and wireless rights over the next five years.⁹⁴ In 2006, the minimum license fee was raised from \$25,000 to \$2 million.⁹⁵ Some suggest that this move was

86. Tameka Kee, *Online Sports Spending to Hit \$1 Billion by 2011*, MEDIA POST PUBLICATIONS, July 24, 2007, http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticleHomePage&art_aid=64461.

87. Leporini, *supra* note 49.

88. Williams, *supra* note 3.

89. Kee, *supra* note 86.

90. *Id.*

91. Leporini, *supra* note 49.

92. Williams, *supra* note 3.

93. Chris Isidore, *Fantasy ‘Rights’ and Wrongs*, (NN.COM, Aug. 11, 2006, <http://money.cnn.com/2006/08/11/commentary/sportsbiz/index.htm>); Alan Schwarz, *Baseball Is a Game of Numbers, But Whose Numbers Are They?*, N.Y. TIMES, May 16, 2006, at A1.

94. Isidore, *supra* note 93.

95. Kurt Badenhausen, *Foul Ball*, Feb. 27, 2006, FORBES, Feb. 2006, at 52.

driven by MLB's intent to take its Internet arm (MLB Advanced Media) public in a deal valuing the company at \$3 billion.⁹⁶ The demand for increased licensing fees drove some media companies out of the industry.⁹⁷ Some fantasy vendors were asked to pay the higher licensing fees, and some were denied licenses altogether.⁹⁸ One online baseball fantasy league operator, C.B.C. Distribution and Marketing, fought back and sued MLB, claiming that the First Amendment gave it the right to publish players' stats and names since they were in the public domain (available for anyone to use for free).⁹⁹ The argument made by MLB was that the players' "right of publicity," or ability to control their names in commercial ventures, trumped the constitutional press protections of the First Amendment.¹⁰⁰

The federal magistrate judge deciding the case ruled that even if players have a claimed right of publicity, "the First Amendment takes precedence over such a right."¹⁰¹ Following the decision, Doug Allen, president of Players Inc. (the marketing arm of the NFL Players Association which declared its intention to join MLB in the fray), said "[w]e believe upon reflection the appeals court will take a different view," and shamelessly quipped "[i]t's the end of the first quarter, not the end of the game."¹⁰² The Eighth Circuit has since affirmed the lower court's ruling.¹⁰³

It has also declined a request to rehear the appeal in the case.¹⁰⁴ With only an appeal to the United States Supreme Court remaining, Mr. Allen may be relying on his two-minute offense. Rudy Telscher, a lawyer who represented C.B.C., pointed out:

It's not hard to figure out what's going on here. This is moving toward a monopolistic market where M.L.B. controls everything that happens, when it was these smaller companies that built the fantasy industry into what it is today. This is not good for consumers. The reason that beer costs \$10 at the ballpark is because there's no competition, and that's what M.L.B. is doing here.¹⁰⁵

Another lawyer who submitted an amicus brief for the FSTA emphasized the importance of the statistics licensing issue, stating that MLB was trying to scare the smaller companies out of the market to collect a bigger

96. *Id.*

97. Isidore, *supra* note 93.

98. Dawson, *supra* note 18.

99. Isidore, *supra* note 93.

100. Schwarz, *supra* note 93.

101. Michael McCarthy, *Stats Ruled Free for Use in Fantasy Games*, USA TODAY, Aug. 9, 2006, at 3C; C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media, L.P., 443 F. Supp. 2d 1077, 1099 (E.D. Mo. 2006).

102. Isidore, *supra* note 93.

103. See *C.B.C. Distrib. and Mktg., Inc. v. Major League Baseball Advanced Media*, L.P., 505 F.3d 818, 820 (8th Cir. 2007).

104. Bob Van Voris, *Court Won't Reconsider Decision Favoring Fantasy Sports Leagues*, BLOOMBERG.COM, Nov. 26, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aGSQgvgz.LvI>.

105. Schwarz, *supra* note 93.

share of the industry.¹⁰⁶ Had MLB prevailed, some believe that the centralization of fantasy sports would have driven the price to a level that would have excluded some otherwise loyal fans.¹⁰⁷ Others fear that the cost of joining a fantasy league might even have rivaled the unchecked cost of attending the baseball games themselves.¹⁰⁸ Perhaps the truest fantasy sports enthusiasts would simply have gone back to its pen and paper roots.¹⁰⁹ While the industry seems to have survived this legal assault, other dangers may yet be afoot.

B. GAMBLING OR NOT

A serious legal pitfall for the fantasy sports industry is the blurry line between fantasy sports and gambling.¹¹⁰ Gambling has been recognized as a touchy subject for the FSTA.¹¹¹ For three decades, even the NFL distanced itself from fantasy football because of its gambling connotations.¹¹² Those connotations are tied to the roots of fantasy sports.¹¹³ Okrent, Rotisserie baseball's founding father,¹¹⁴ recalls how the first league's founders settled on \$250 as a draft-day salary cap for bidding on players.¹¹⁵ "[U]ltimately \$250 prevailed because it seemed a reasonable amount to ante into what was essentially a summer-long poker game."¹¹⁶

Along with this element of consideration, one factor that commonly determines whether an enterprise is considered illegal gambling is whether the outcomes are based on an element of chance.¹¹⁷ Some advocates suggest one need not look further than extensive draft day preparation to recognize that the game is indeed one of skill.¹¹⁸ Others, however, recognize that regardless of the amount of preparation, one cannot begin to imagine how the die will be cast.¹¹⁹ Charles Humphrey, the plaintiff in a case described below, pointed out in an interview that "[m]ajor league baseball player John Smoltz burned his chest while ironing a shirt that he was wearing, and Wade Boggs hurt his back when he lost his balance while trying to put on cowboy boots."¹²⁰ He asked, "[h]ow do you factor those things into the skill of selecting players to play that week, that

106. *Fantasy Leagues Permitted to Use MLB Names, Stats*, ESPN.COM Aug. 8, 2006, <http://sports.espn.go.com/mlb/news/story?id=2543720>.

107. *See, e.g., Sean AQUI, MLB's Assault on Fantasy Leagues*, July 28, 2007, <http://donkeyphant.com/2006/07/28/mlbs-assault-on-fantasy-leagues>.

108. Dawson, *supra* note 18.

109. *See generally id.*

110. Ecker et al., *supra* note 47.

111. *Id.*

112. Magee, *supra* note 27.

113. *Id.*

114. Colston, *supra* note 30.

115. *Id.*

116. *Id.*

117. Levy, *supra* note 58, at 335.

118. *See id.* at 342.

119. Libby Lewis, *Fantasy Sports: Only a Game, Or Is It Gambling?*, June 23, 2006, <http://www.npr.org/templates/story/story.php?storyId=5507139>.

120. *Id.*

game?"¹²¹ Fantasy players themselves recognize that winning is a combination of both luck and skill.¹²² If pay-to-play fantasy sports were deemed to be illegal gambling, the impact on this vast industry would obviously be considerable.

C. FEDERAL STATUTES

The transmission of gambling information in interstate or foreign commerce is prohibited by several federal statutes.¹²³ Federal anti-gambling statutes also prohibit gambling generally.¹²⁴ Gambling on sporting events is specifically banned by the Professional and Amateur Sports Protection Act.¹²⁵ None of these acts, however, directly addresses fantasy sports.¹²⁶

A law which does address fantasy sports, the Unlawful Internet Gambling Enforcement Act of 2006, was finally forced through Congress in the remaining minutes before an election period recess.¹²⁷ The Act is contained in a completely unrelated bill, the Safe Ports Act, which deals with port security.¹²⁸ It is based on two Internet gambling bills, HR 4411 and HR 4777, originally proposed by Congressmen Jim Leach and Bob Goodlatte, respectively.¹²⁹ The Congressmen had demonstrated their commitment to prohibiting Internet gambling in the United States in the past by trying to file Leach's HR 4411 as an amendment to lobbying reform bill HR 4975.¹³⁰ Their efforts were denied then, however, in part because the bill was not germane.¹³¹ This unusual attempt, the equivalent to asking a generous favor of the Republican leadership, was a testament to the commitment of the two Congressmen with respect to their efforts to prohibit Internet gambling in the U.S.¹³² Yet, despite not wanting the Internet "to become the Wild West of the 21st century," Congressman Goodlatte was willing to allow for some exceptions within the bill that he was going to use to battle the "host of ills" that would otherwise accompany Internet gambling.¹³³ The Unlawful Internet Gambling Enforcement Act, as it was passed, defines a "bet or wager" as:

121. *Id.*

122. Dorman, *supra* note 27. Worth noting is that Okrent, the creator of Fantasy sports, never himself won his league. Whether that is more a reflection of the impact of chance, or of his lack of skill, however, cannot be determined. Colston, *supra* note 30.

123. Levy, *supra* note 58, at 332.

124. *Id.*

125. *Id.*

126. *Id.* For a thorough discussion of what each of these acts do cover, along with other valuable insight, this author recommends reading the entirety of Aaron Levy's article.

127. I. Nelson Rose, *The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, http://www.gamblingandthelaw.com/columns/2006_act.htm (last visited Feb. 5, 2008).

128. *Id.*; See also Security and Accountability for Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat 1884 (2006).

129. Rose, *supra* note 127.

130. Bradley Vallerius, *House Rules Committee Nixes Surprise Attempt to Move Leach Bill*, Apr. 28, 2006, <http://www.igamingnews.com/index.cfm?page=artlisting&tid=6649>.

131. *Id.*

132. *Id.*

133. Frank Ahrens, *Bill to Ban Gambling Online Gets 4th Chance*, WASH. POST, May 25, 2006, at D01.

[T]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.¹³⁴

The Act also provides that “bet or wager” does not include a number of things. Among the things not included as a “bet or wager” is the

participation in any fantasy or simulation sports game or educational game or contest 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 (as those terms are defined in section 3701 of title 28 [U.S.C. § 3701]) 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 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.¹³⁵

In short, fantasy sports leagues would be exempt.¹³⁶

D. *Humphrey v. Viacom, Inc.*

The muscle of the new statutory carve-out has already been flexed by the court in *Humphrey v. Viacom, Inc.*¹³⁷ Humphrey, a lawyer from Colorado, was familiar with gambling law.¹³⁸ Arguing that participation in fantasy sports leagues entailed illegal gambling, and making use of New Jersey’s *qui tam* statute, which allows gambling losers and informers to sue to recover losses incurred while gambling, Humphrey targeted the operators of the major pay-to-play fantasy-league websites.¹³⁹ The court

134. 31 U.S.C. § 5362(1)(A) (2006).

135. § 5362(1)(E)(ix).

136. Ahrens, *supra* note 133, at D01.

137. See *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *11 (D.N.J. June 20, 2007).

138. Holleman, *supra* note 10, at 67.

139. See *Humphrey*, 2007 WL 177648, at *2.

found that, while the Unlawful Internet Gambling Enforcement Act of 2006 broadly prohibits gambling and related transactions, the law confirms that fantasy sports like the ones operated by the defendants do not constitute gambling as a matter of law, and Humphrey's case should consequently be dismissed.¹⁴⁰

E. CRITICAL ANALYSIS AND RECOMMENDATIONS

1. *Negative Social Externalities and Social Ills*

Advocates of fantasy sports, namely those who do not wish to see it labeled illegal gambling, have turned to a number of arguments to make such a distinction.¹⁴¹ One of these involves attacking as misapplied the use of the classic social ills argument of gambling.¹⁴² Community leaders perceive gambling as likely to accompany increases in indebtedness, youth crime, forgery, and credit card theft.¹⁴³ Studies have found that gambling is correlated with an increase in suicide, divorce rates, homelessness, and domestic violence in communities where it has been legalized.¹⁴⁴ Although correlations have not been found between gambling and social ills such as drug use and crime, the common perception is that gambling does cause these types of societal ills. This perception drives much of the anti-gambling legislation in this country.¹⁴⁵ In her article, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, an apparent defense of the industry, M. Christine Holleman declares that "the public policy rationale for outlawing gambling simply does not apply to fantasy sports."¹⁴⁶ She attempts to bolster her 'lack of social ills argument' with the proposition that "[t]he people who play fantasy sports are typically normal and well-adjusted people who do not allow this activity to have an impact on their daily lives."¹⁴⁷ Yet she neither adequately cites nor supports this proposition.

Fay Shutzer, 60, has always been an avid sports fan. The New York native spends [fifteen] to [thirty] minutes per day doing what she refers to as "probably an incredible waste of brain cells and time."

Kent Thomas Spellman, 58, says his life has been permanently changed. "I once found myself out of bed at 3 a.m. checking the West Coast stats," says Spellman of Weston, Mass. .

140. *Id.* at *11 (citing § 5362 (1)(E)(ix)).

141. Holleman, *supra* note 10, at 76-77; *see also* Levy, *supra* note 56, at 330-31.

142. Holleman, *supra* note 10, at 76-77.

143. *Id.* at 74.

144. *Id.* at 74-75.

145. Holleman, *supra* note 10, at 75. Congressman Goodlatte, a major house supporter of the Unlawful Internet Gambling Enforcement Act of 2006, has himself said that he opposes gambling because it leads to "a whole host of ills in society." Ahrens, *supra* note 133, at D01.

146. Holleman, *supra* note 10, at 76.

147. *Id.*

Chicago resident Josh Jackson, 25, admits he thinks about “this obsession” all day and all night.¹⁴⁸

According to Holleman’s proposition, these three individuals are atypical fantasy sports players.

Ryan Lester trains for his NFL fantasy draft with the intensity of a Division I cyber-athlete. The 30-year-old Minnesotan spends hours online researching players’ health histories, analyzing statistics, and reading scouting reports. He blogs theories on which prospective picks will have a good season, tweaking his would-be roster in response to posted opinions. He even practices for draft day in mock online drafts before officially choosing the lineups for his several teams.¹⁴⁹

Is it likely that these preparations have no impact on Mr. Lester’s daily life? Another fantasy owner admits to having actually attended an NFL training camp in the summer to “scout” talent.¹⁵⁰ Some sources report that participants spend an average of three hours a week managing teams, while at least one fantasy website claims that its registered users spend as many as seven hours running theirs.¹⁵¹ A survey released by the FSTA in 2003 predicted that participants are likely to become even more involved in the hobby in the future.¹⁵² Logic would suggest that the amount of time individuals spend on this obsession will be directly proportional to the impact it will have on their daily lives.

Okrent, the game’s creator, admits he does not miss the letters wives would write him to accuse him of creating the game that ended their marriages.¹⁵³ Jason Kint, general manager of Sporting News, recognized that a league’s commissioner would need to spend hours crunching numbers each week: “He couldn’t be married—or wouldn’t be married for long.”¹⁵⁴ Robert Sklar, an original Rotisserie fantasy league member and moreover, Okrent’s likely inspiration for the game, was given an ultimatum by his girlfriend just before the first fantasy baseball draft: “If you participate in this crazy draft, we are through.”¹⁵⁵ Okrent recalls that “Sklar didn’t spend enough on pitching but otherwise thought he had a pretty decent draft.”¹⁵⁶ Edgar Chou, a physician from New Jersey who has played in multiple fantasy sports leagues, recalls recently having been bribed by his wife with an offer to match the \$300 league pot in an effort

148. Ecker et al., *supra* note 47.

149. Holahan, *supra* note 52.

150. Caplan, *supra* note 42.

151. *Compare Fantasy Sports Participation on the Rise, Association Says*, ST. LOUIS BUS. J., Aug. 14, 2003, <http://stlouis.bizjournals.com/stlouis/stories/2003/08/11/daily62.html>, with Holahan, *supra* note 52.

152. *Fantasy Sports Participation on the Rise, Association Says*, *supra* note 151.

153. Colston, *supra* note 30. Okrent’s wife, for that matter, is referred to by “Rotisseries” as “The Long Suffering Becky.” *Id.*

154. Hu, *supra* note 52. The advent of Internet-assisted statistical tracking has relieved some of the mathematical burden on fantasy league commissioners, and hopefully the accompanying matrimonial burden as well.

155. Colston, *supra* note 30.

156. *Id.*

to get him to focus on more important things like investing their money.¹⁵⁷ Vice president of games at ESPN, Raphael Poplock, confessed that he found himself sneaking out to login to complete fantasy sports transactions on his wedding day, and that he “had an itch the whole time” and experienced “withdrawal” during his honeymoon in Greece.¹⁵⁸

Aside from denying the public policy rationale with respect to gambling and disregarding the negative impact of fantasy sports on the lives of at least some of its participants, Holleman also points to the difference in the perceived moral value that distinguishes fantasy sports and gambling.¹⁵⁹ She cites Michael Mann of the Mississippi College School of Law, who argues that “fantasy sports just don’t strike people as immoral.”¹⁶⁰ Mann continues by suggesting that, even if Humphrey’s¹⁶¹ argument were technically correct, it would lack moral weight.¹⁶² Lastly, Holleman includes that Mann “comments that the term ‘fantasy’ attempts ‘to suggest that it’s not real, that there’s an innocence to it.’”¹⁶³ However, it can also be argued that a dangerous children’s toy is no safer if it is sold with the name “Happy Fun Ball,”¹⁶⁴ and that the drug ecstasy is no less dangerous for sporting a more seductive moniker. Holleman also points out that classifying pay-to-play fantasy sports as illegal gambling could potentially cut a significant financial stream for the government, as the multibillion dollar industry generates considerable tax revenue.¹⁶⁵ Again, it would be imprudent to determine the propriety of an industry based merely on the amount of tax dollars that could be raised by allowing it to flourish. If the ability to generate tax revenue were the measure of an industry’s legality, the drug industry would have been legalized long ago. Serious consideration of the personal impact of fantasy sports should be given before the game is dismissed as harmless or “innocent,” and before it is given a free pass on account of the tax revenue it generates.

Addiction is defined by Miriam-Webster as the “compulsive need for and use of a habit forming substance.”¹⁶⁶ Evan Kamer, NFL senior director of new media, admits of fantasy sports that, “once the bug bites you, you’re hooked.”¹⁶⁷ Although he does add that “when that happens, the game can be like an addiction, but it’s a good kind of addiction, one you can be proud of.”¹⁶⁸ Kamer’s is, at best, a subjective conclusion. There is

157. Hu, *supra* note 52. Eventually, he convinced his wife to let him play. *Id.*

158. Chaffin, *supra* note 38.

159. Holleman, *supra* note 10, at 76.

160. *Id.* at 76.

161. Humphrey is the Colorado lawyer who attacked fantasy sports as illegal gambling under New Jersey’s *qui tam* statutes in *Humphrey v. Viacom, Inc.*

162. Holleman, *supra* note 10, at 76.

163. *Id.* at 76-77.

164. Happy Fun Ball, Saturday Night Live Transcripts, <http://snltranscripts.jt.org/90/90mhappyfunball.phtml> (last visited Feb. 6, 2008).

165. Holleman, *supra* note 10, at 78.

166. MIRIAM-WEBSTER’S COLLEGIATE DICTIONARY 13 (10th ed. 1996).

167. Magee, *supra* note 26.

168. *Id.*

an argument to be made for further investigation into the harmful impact of fantasy sports. Blasphemy,¹⁶⁹ unusual post-coital routines,¹⁷⁰ and countless broken relationships; each is a testament to the potential underlying dysfunction that stems from an obsession with this hobby. In a chapter on mental and behavioral disorders in the International Classification of Diseases, the World Health Organization defines pathological gambling as a disorder consisting of “frequent, repeated episodes of gambling that dominate the patient’s life to the detriment of social, occupational, material, and family values and commitments.”¹⁷¹ In a world where truth is stranger than fiction, it is all but certain that the anecdotes reported above are merely the tip of the iceberg.

2. Gateway Gambling

In an article for the Sports Lawyers Journal, Michael Thompson also suggested that the negative societal effects stemming from traditional gambling are inapplicable in the context of fantasy sports.¹⁷² In an attack on Thompson’s logic (namely on his suggestion that fantasy sports are incapable of harming the morals of a participant), Aaron Levy pointed out that:

The knowledge that a fantasy sports participant accumulates leading up to and throughout the course of a season is identical to the information that a sports gambler would arm his or herself with prior to making a bet. Fantasy sports participants study a players’ trends, scrutinize match-ups between teams, factor weather conditions into their managerial decisions, and even make determinations based on hunches. The similarities between elements that make up a successful fantasy league manager mirror those of an educated sports gambler.¹⁷³

One might also recall Levy having reported that fantasy sports are used by some as a means to satisfy a desire to gamble.¹⁷⁴ Similarities between gambling and fantasy sports participation can hardly be denied. Even if some argue that participation in fantasy sports is not, in itself, illegal gambling, one might consider the possibility that fantasy sports may be found to function as a “gateway drug” to illegal gambling. The gateway drug theory is based on the belief that use of a less addictive drug can lead to

169. Granted, the likening of the draft day distribution of the league’s talent to the widely recognized celebration of the birth of the Christian Lord and Savior is blasphemy in its broader sense, as irreverence toward something considered sacred or inviolable, and not the direct disrespectful use of the name of one or more gods.

170. Lorge, *supra* note 5, at D6.

171. Pathological Gambling, World Health Organization’s International Classification of Diseases, <http://www.who.int/classifications/apps/icd/icd10online/?gf60.htm#30> (last visited Nov. 5, 2008).

172. Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW. J. 21, 40 (2001).

173. Levy, *supra* note 58, at 331.

174. *Id.* at 329.

the subsequent use of more addictive drugs.¹⁷⁵ The concept was first proposed as the “stage model of drug involvement,” and published in *Science* in 1975 in a study that showed how users of alcohol and tobacco were more likely to progress to marijuana and harder, more illicit, drugs.¹⁷⁶ The study showed that:

. . . [m]ore adolescents start with alcohol than with cigarettes. Many more of those who start with cigarettes proceed to use alcohol than those who start with alcohol proceed to smoke. . . [and that]. . . the highest rates of progression [to harder, and more illicit drugs] were observed for those who had tried both legal drugs.¹⁷⁷

The study’s author suggests that the use of a lower-stage drug like marijuana might prime the brain for use and dependence on higher stage substances like cocaine and opiates.¹⁷⁸ She further suggests that “[t]he underlying mechanism appears to be a surge in dopamine release through neurophysiological processes common across drugs.”¹⁷⁹ It is also possible that the preparation for competition in fantasy sports might be “priming” the brains of participants for dependence on more illicit forms of sports gambling. It would not be a surprise to learn that the physiological and neurological reactions triggered by the competition in fantasy sports mirrors the physiological and neurological reactions triggered by gambling on the big game with a Vegas sports book. Finally, the study’s author points out that a thorough understanding of drug consumption would require an understanding of biological, sociological, and physiological factors underlying drug use and addiction.¹⁸⁰ It is conceded, similarly, that a thorough understanding of the possible progression from the allegedly innocent participation in fantasy sports to compulsive problem gambling would require an careful analysis of the same biological, sociological, and physiological factors. It should not be too great a stretch to imagine how a participant involved in a hobby as addictive as fantasy sports could make the leap.

Some unnerving data gathered in a study on video gaming machines might foreshadow an ominous future for fantasy sports participants. The study was conducted by Robert Breen, a clinical psychologist and the director of a gambling treatment program in Rhode Island.¹⁸¹ The study revealed that video gaming machine players, those who use slot machines, become addicts far quicker than those who play scratch tickets,

175. Gateway Drug Theory, <http://www.enotes.com/public-health-encyclopedia/gateway-drug-theory> (last visited Nov. 5, 2008).

176. DENISE KANDEL, *STAGES AND PATHWAYS OF DRUG INVOLVEMENT: EXAMINING THE GATEWAY HYPOTHESIS* 87 (2002).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. Sarah Liebowitz, *Gateway to a Gambling Problem*, CONCORD MONITOR, Nov. 9, 2007, <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20071109/FRONTPAGE/711090363>.

play poker, or engage in other forms of gambling.¹⁸² The study, which was inspired by anecdotal accounts that Breen had gathered from patients, has since been duplicated and shows that video gaming machines were by far the most addictive.¹⁸³ Video gaming machine users were found to have become addicted, on average, after about only one year, compared to the three and a half years it took for those who were hooked on other forms of gambling.¹⁸⁴

While it is still unclear why video slot machines are so addictive, Breen has several hunches.¹⁸⁵ He points out that slot machines require no prior knowledge, like other games such as poker.¹⁸⁶ “Anybody can push a button. Anybody can put \$20 in the machines. Elderly people or people on their 21st birthday are unintimidated to walk in and sit down and start playing one of these things,” said Breen.¹⁸⁷ While participation in fantasy sports used to require long hours of pouring over stats and working to compile fantasy scores, the advent of technology now allows participants to simply point and click players they wish to choose, as programs track and report the fantasy team’s progress. Participation in fantasy sports has certainly gotten, and will likely continue to get, easier. When you can build your team in front of a computer in the privacy of your own home, there is no reason to be too intimidated to participate.

Breen also believes that the machine’s design makes it more addictive.¹⁸⁸ “It’s very, very simple to program a machine to show somebody lots of potential winning combinations, but they’re just not quite lined up,” he says, adding that “losing on that push of the slot machine can be just as exciting physiologically, brain-chemistry-wise, as an actual jackpot.”¹⁸⁹ It is also simple for fantasy sports participants to imagine what their players need to accomplish in order to enable them to win their weekly head-to-head match-ups. Who has not sat on the edge of their seats at one point or another and visualized their team winning a game? When victory can all but be tasted, and the would-be game-winning swing and the last pitch are “just not quite lined up,” it is not hard to see how watching your players strike out in the bottom of the ninth inning might provide just as much excitement, as those pitches are being delivered, as when you actually win that week’s match-up.¹⁹⁰

Particularly frightening when considered in light of these studies is the NanoGaming product described above, which provides a real-time predict-the-play system that turns a live event into hundreds of real-time prediction opportunities, “transforms the passive viewing experience into an

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

interactive game—where every batter gives viewers a chance to win points, challenge friends, support their team, and climb the leader board.”¹⁹¹ This would seem to be bringing fantasy sports a step closer to video gaming slot machines and may be cause for concern.

The circumstances warrant further research. It might well be determined that participation in fantasy sports, in fact, decreases an individual’s future inclination to gamble, perhaps by providing an outlet for gambling urges which may otherwise lead to problem gambling. While sports fans, amateur psychologists, and even legal academics can postulate to their hearts’ content, the true relationship between participation in fantasy sports and problem gambling will only be revealed through careful study and research.

With regard to the discussion of fantasy sports as a dysfunctional addiction, much of the evidence that has been presented is merely anecdotal. In order to establish a more solid criticism of the “lack of social ills” argument, additional, non-anecdotal research would need to be conducted. However, the presence of anecdotal data should, at the very least, suggest that an investigation into such future study of the issue is warranted.

3. *Not Playing by the Rules*

Another reason the statutory carve-out provided in the Unlawful Internet gambling Enforcement Act should be reconsidered is the suspect fashion by which it became law. Aside from the suspect manner by which it was enacted at the zero-hour, within an unrelated bill, the players with key roles in its fashioning are themselves suspect.

One opponent of Congressman Goodlatte’s efforts to ban Internet Gambling was lobbyist Jack Abramoff.¹⁹² While representing a gambling services company that opposed the bill, Abramoff funneled \$50,000 of the company’s money to the wife of Tony Rudy, a key aide to former House majority leader Tom Delay. Rudy later plead guilty to charges that he conspired with Abramoff to corrupt public officials.¹⁹³ The scandal led to guilty pleas from Abramoff and four former associates, three of whom were former congressional aides.¹⁹⁴ On June 20, 2006, one longtime friend and associate of Abramoff’s, David Safavian, was ultimately convicted of lying and obstruction.¹⁹⁵ A visit to the FSTA’s Advocacy News web site reveals the extent to which Safavian was involved in the FSTA’s efforts to track and battle anti-gambling bills like the ones proposed by Congressmen Leach and Goodlatte.¹⁹⁶ In one of the updates, Safavian

191. LiveHive Systems Press Release, *supra* note 79.

192. Ahrens, *supra* note 133, at D01.

193. *Id.* Suspicion surrounding Delay’s role would ultimately factor into his resignation from Congress. *Id.*

194. *Id.*

195. *Ex-Aid to Bush Found Guilty; Safavian Lied in Abramoff Scandal*, WASH POST, June 21, 2006, at A1.

196. See FSTA, Advocacy News, <http://www.fsta.org/news/advocacy> (last visited Nov. 5, 2008).

himself recognized one of the arguments suggested above, saying “this is a very serious matter and whether the industry likes it or not, the members of the House see fantasy games as the gateway drug to gambling.”¹⁹⁷ In a December 2000 update, Safavian writes:

With all of these dynamics going on, we did not want to let our momentum slip away in the closing days of Congress. As a result, our entire team has been essentially camped out on Capitol Hill and at the White House for the past two weeks, urging the negotiators to reject any Internet gambling rider that might come up.

I AM PLEASE [sic] TO LET YOU KNOW THAT WE WERE SUCCESSFUL. THERE ARE NO INTERNET GAMBLING PROVISIONS IN THE FINAL APPROPRIATION BILL.

We have gone three years in a row in defeating Senator Kyl.

Interestingly, Kyl continues to insist that he will NOT introduce legislation next year, although I don’t quite believe him. But Mr. Goodlatte will not let this go. His pride has been hurt, as has his credibility and his bonafides [sic] on Internet issues. As such, we have been told to expect legislation from Goodlatte early next year. What form is unclear, although we would expect it to be more like the H.R. 4419, the Leach-LaFalce banking bill, than Goodlatte’s H.R. 3125, the Internet Gambling Prohibition Act. (By pushing a banking bill, Goodlatte can help restore his reputation as a defender of the Internet, while make [sic] good on his promise to do something about Internet gambling.)

How we approach that issue will be the subject of much planning and discussion in the next couple of weeks. But for now, relax a bit. Policy beat politics once again. (Maybe the American system isn’t really that bad.) The good guys won.¹⁹⁸

Given what the future held for Safavian, it is difficult to tell what “approach” he might have supported with regards to Goodlatte’s bill.

Furthermore, Congressman Goodlatte himself has been the subject of scrutiny, for a matter which might suggest that the statutory carve-out provision for fantasy sports may have been born from less than the purest motives.¹⁹⁹ Knowing that Goodlatte was responsible for having written the details of the Unlawful Internet Gambling Enforcement Act and that he has taken campaign contributions from the horse racing industry forces critics to second guess Goodlatte’s intentions behind having drafted exceptions to various industries.²⁰⁰ Goodlatte is frequently quoted as criticizing online gambling as immoral, and his support of the

197. *Id.*

198. *Id.*

199. Bob Hartman, *Congressman Bob Goodlatte Accepted \$40,000 from Horse Racing Industry*, Nov. 30, 2007, http://www.casinogamblingweb.com/gambling-news/gambling-law/congressman_bob_goodlatte_accepted_40_000_from_horse_racing_industry_47825.html; 40,000 Reasons to Oppose Online Gambling, Dec. 1, 2007, <http://www.online-casinos.com/news/news5787.asp> [hereinafter 40,000 Reasons].

200. Hartman, *supra* note 197; 40,000 Reasons, *supra* note 197.

carve-out provisions creates dissonance.²⁰¹ One is left to wonder whether the exception is a function of Congress' true recognition of fantasy sports as an innocent game unrelated to the ills of gambling or if the law is simply the byproduct of effective lobbying. As was the case with the earlier proposition of the possible gateway gambling effect, the circumstances here, at best, warrant further investigation.

4. Prizes - A Technical Foul in the Carve-Out

It may also be argued that the provided statutory carve-out does not even apply to most pay-to-play fantasy sports contests. The statute requires that in order to qualify for the exception, a fantasy sports contest must meet several conditions. The first condition is that "[a]ll 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."²⁰² Yet, in addition to bragging rights, many league champions also win a percentage of the registration fees.²⁰³ In fact, several sources acknowledge that prizes often depend on the number of participants or the amount of entry fees.²⁰⁴ It might be argued that since many of these contests' prizes are, in fact, based on the number of participants or the amount of fees paid by those participants, they technically do not qualify for the exception.

IV. CONCLUSION

Since much of the rationale for excluding fantasy sports from the label of illegal gambling is specious, the impact of legalizing this type of gambling is uncertain and could potentially lead to more serious problem gambling, statutory language may in fact fail to adequately excuse the industry, and those exceptions may have been ill-procured, fantasy sports should not be excused from the gambling label, and should not be afforded special treatment under the anti-gambling statutes.

It should be recognized, however, that the appeal of fantasy sports can be used to provide more than mere entertainment. Fantasy sports have been brought into the classroom to generate interest and assist in the instruction of mathematics and statistics.²⁰⁵ However, we need to be sure that teachers do not collect league entry fees and distribute shares thereof to the league winners upon the completion of the lesson plan. We need to be vigilant of the fact that the skills used to engineer and track a successful fantasy sports team are dangerously similar to those needed to run

201. Hartman, *supra* note 197; 40,000 Reasons, *supra* note 197.

202. 31 U.S.C. § 5362(1)(e)(ix)(1) (2006).

203. Holleman, *supra* note 10, at 63.

204. Holahan, *supra* note 52 (citing both the number of participants and the amount of entry fees); Caplan, *supra* note 42 (citing entry fees).

205. See John Barr, *Fantasy Football Adds up for Students*, ESPN.COM, Dec 9, 2006, <http://sports.espn.go.com/espn/news/story?id=2680335>.

a successful sports book. Most importantly, the fact that we can use fantasy football to educate the youth does not by default render fantasy sports a wholesome enterprise. We can teach children about units of measurement by having them push drugs, but that does not make the practice any less of a crime.

Further studies should be conducted to explore possible links between participation in fantasy sports contests and other gambling behaviors. While ethical constraints obviously limit our choice of methodology,²⁰⁶ it should be such that the research might unearth at least a correlation between participation in fantasy sports and gambling proclivity. Longitudinal or cross-sectional studies could be used.²⁰⁷ The recommendation of further study is by no means novel. The Poker Players Alliance, originally disappointed that the anti-gambling bill's proposed exceptions did not include poker, which they saw as a game of skill, voiced their support for an alternative bill, which called for a governmental study of regulation and licensing of the online gambling industry.²⁰⁸ That bill, H.R. 5474, was drafted in an effort to "create a commission to study the proper response of the United States to the growth of Internet gambling."²⁰⁹ Unfortunately, H.R. 5474 never became law. Fortunately, a similar bill, H.R. 2140, The Internet Gambling Study Act, is now pending.²¹⁰ If passed, this bill would "provide for a study by the National Academy of Sciences to identify the proper response of the United States to the growth of Internet gambling."²¹¹ This research, and research like it, might arm Congress with the information it needs to make more educated policy decisions when it comes to online gambling.

To be certain, fantasy sports have done much good for society. The games have kept us entertained, helped us to build and maintain friendships, and increased our passions for and involvement in the sports that are already such an important part of our lives. Yet, to turn a blind eye to the similarities between pay-to-play fantasy sports and gambling and to ignore the possibility of adverse impact from the growth of such an influential industry would be foolish. To grant the industry a wide berth simply because we are as yet too naïve to see the possible connections between innocent gaming and problem gambling, because we are too afraid to risk the loss of tax revenues, or because we are too caught up in

206. It is difficult to imagine that we could randomly assign subjects to a treatment that we suspect may be responsible for future adverse behavior.

207. A cross-sectional design might entail the selection and study of participants from each of a number of levels of involvement in fantasy sports and their respective levels of involvement with other types of gambling, while a longitudinal design might entail tracking a smaller group over a period of time. See KENNETH S. BORDENS & BRUCE B. ABBOTT, *RESEARCH DESIGN AND METHODS* 303-05 (McGraw-Hill 5th ed. 2002). The former, of course would provide a more rapid rate of return on data. *Id.* at 304.

208. Earl Burton, *Internet Gaming Prohibition Act Passes Committee, On To House*, May 26, 2006, <http://www.pokernews.com/news/2006/5/internet-gaming-act-passes-committee.htm>.

209. H.R. 5474, 109th Cong. (2006).

210. H.R.2140, 110th Cong. (2008).

211. *Id.*

the media hype and hysteria to stop, give pause, and thoroughly consider the repercussions of long-term participation in such activities, would indeed be foolish. We need to be vigilant as this industry continues to grow, and be sure not to allow this pastime to become little more than a form of legalized gambling. I believe that a soft stance on the regulation of the industry runs the risk of allowing such a corruption to occur.

Having taken a firm stance throughout the course of this Comment, I find it only fitting to reserve a line to apologize to the fantasy sports enthusiasts for any fouls I have committed and assure them that I, too, am a fan of the industry and a proud participant. At the end of the day, I know that fantasy sports can be a great thing, so long as the only things you are competing to win are some bragging rights and a cold Yoo-hoo shower.²¹²

212. Yoo-hoo, described by sports writer and original Rotisserie fantasy league member Steve Wulf as “runoff in the gutter outside a Carvel store,” is the chocolate flavored drink Rotisserians traditionally dump over the head of their league champion. *Colston, supra* note 30.

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