

10-1-2006

Fantasy Football: Illegal Gambling or Legal Game of Skill

M. Christine Holleman

Follow this and additional works at: <http://scholarship.law.unc.edu/ncjolt>



Part of the [Law Commons](#)

Recommended Citation

M. C. Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill*, 8 N.C. J.L. & TECH. 59 (2006).
Available at: <http://scholarship.law.unc.edu/ncjolt/vol8/iss1/4>

This Notes is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Journal of Law & Technology by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

**FANTASY FOOTBALL:
ILLEGAL GAMBLING OR LEGAL GAME OF SKILL?**

M. Christine Holleman¹

*A lawsuit has been filed in the federal court system that threatens the continued success of online fantasy sports. The plaintiff in *Humphrey v. Viacom, Inc.* has sued the three main providers of online fantasy leagues, claiming that pay-to-play fantasy sports constitute illegal gambling. Since courts have traditionally distinguished between permissible and impermissible forms of gambling by looking to the requisite level of skill involved, this case will hinge on whether the court determines that skill or chance is the dominant factor in the outcome of fantasy games. The policy considerations weighing in favor of the fantasy sports leagues include: (1) traditional rationales for outlawing gambling do not apply to fantasy sports; (2) recent Congressional legislation evidences Congress's support for fantasy sports; and (3) an adverse decision would damage an innocuous billion-dollar industry.*

I. INTRODUCTION

At 12:45 p.m. on the second Sunday in September, Joe finalizes his lineup for the first week of the fantasy football season. He checks a variety of websites that enable fantasy football players to be sure none of their starters are out of this week's game due to injury. He checks another website to decide if the rain in Pittsburgh means he should start Michael Vick instead of Ben Roethlisberger. As the 1:00 p.m. kickoff time nears, he clicks on the submit button, convinces himself that he picked the best possible lineup, and parks himself in front of the television, within arm's reach of a computer. Joe has spent the last month researching the players, looking at the offensive style of various coaches, planning a draft strategy, and drafting his team for the

¹ J.D. Candidate, University of North Carolina School of Law, 2008.

current season. Joe hopes that Week One of the National Football League (NFL) season is when all his hard work and strategizing will start to pay off.

Joe will spend a significant portion of his Sunday afternoons and Monday nights between September and January waiting for the browser to refresh on his fantasy league websites and flipping between television channels to find the most current player statistics from games across the country. He does this to know whether he is gaining the upper hand in his head-to-head match-up this week. Sometimes Joe ends Monday night elated and looking forward to having bragging rights around the office or on the website's message board—at least until the next Sunday afternoon. Other times he returns to work, checking websites and strategizing, in hopes that his team does not meet the same disastrous fate the following week.

The scenario above has become the norm for a growing population of fantasy football players across the United States. Beginning in the early 1990's, fantasy football—and fantasy sports in general—ceased being an isolated cult activity and gained mass public appeal.² Since that time, an entire industry has developed to provide services to fantasy football players such as league hosting, expert information and analysis, and mobile means of checking fantasy scores on game days.³ These industries, as well as the entertainment of millions of fantasy football players, are now being threatened by a lawsuit filed in the Federal District courts of New Jersey.⁴

² Complaint at 9, *Humphrey v. Viacom, Inc.*, No. 2:06-CV-02768, 2006 WL 2300429 (D.N.J. Jan. 23, 2006) [hereinafter *Humphrey Complaint*], *available at* <http://www.gambling-law-us.com/Articles-Notes/Complaint.pdf> (on file with the North Carolina Journal of Law & Technology).

³ Chris Ballard, *Fantasy World*, *SPORTS ILLUSTRATED*, June 21, 2004, at 80, 86.

⁴ *Humphrey Complaint*, *supra* note 2.

A. History

Fantasy football began in 1962 when a group of men associated with the Oakland Raiders were looking for a way to pass the time during long road trips with the team.⁵ It quickly spread to sports bars in the Oakland area but did not immediately achieve mainstream popularity.⁶ Fantasy football finally gained national attention in 1988 when well-known regional newspapers such as the *L.A. Times*, *N.Y. Daily News*, and *Chicago Sun-Times* ran pieces instructing readers on how to form their own fantasy football leagues.⁷ As the Internet grew in popularity in the early 1990's, fantasy football moved into the mainstream and became a major industry.⁸ By the end of the 1990's, the growth of fantasy football prompted the formation of the Fantasy Sports Trade Association (FSTA), which tracks its growth and promotes the industry's economic interests.⁹ According to the FSTA, between fifteen and eighteen million people will play fantasy sports this year.¹⁰ That number is increasing by seven to ten percent each year.¹¹ The mass appeal of fantasy football and its remarkable growth has transformed it from a hobby to big business.¹² As the president of the FTSA, Greg Ambrosius, commented in a *Sports Illustrated* article, "It used to be thought of as [something for] just geeks and hard core fans. But this isn't a small closet hobby

⁵ Andy Mousalimas, Fantasy History (2006), <http://www.nflplayers.com/fantasy/history.aspx> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology). The men who are credited with developing the fantasy football concept are Bill Winkenbach, a former Raiders limited partner, Bill Tunnell, a member of the Raiders's public relations office, and Oakland Tribune employees Scotty Stirling and George Ross. The concept was developed while they were on a three-week road trip with the football team. *Id.*

⁶ Howard Lestrud, Fantasy Football Season In The Air For Would-Be Coaches (2006), <http://www.hometownsource.com/2006/September/6lestrud.html> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

anymore. This sumbitch is a big, big industry, and it's all due to the Internet."¹³

B. Rules

Fantasy football leagues consist of any number of participants, but most leagues have eight to twelve owners.¹⁴ These leagues are often made up of groups of friends, but many also consist of co-workers or unaffiliated groups of players formed via the Internet.¹⁵ In order to participate in the league, participants often pay preliminary dues; the price varies, but the average cost is ninety-five dollars.¹⁶

The first phase of a fantasy football league each season is the draft, where each player is assigned a draft position.¹⁷ The participants go in order, selecting NFL players until their rosters are full.¹⁸ An NFL player is no longer available once he has been drafted, which means the best players are generally selected first.¹⁹ The numbers of rounds in the draft also vary by league, but most leagues have a fifteen to seventeen round draft.²⁰

Each week during the football season participants are paired in head-to-head games,²¹ and each participant selects a starting lineup for the week.²² Lineup requirements vary by league, but a common lineup would include "one quarterback, two running backs, two

¹³ Ballard, *supra* note 3, at 85.

¹⁴ See, e.g., FFSpiral, An Introduction to Fantasy Football (2005), <http://www.ffspiral.com/basics/fantasyintro.php> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

¹⁵ See, e.g., Ballard, *supra* note 3, at 80.

¹⁶ *Id.* at 83.

¹⁷ Fantasy Sports Trade Association, How to Play Fantasy Football (2005), <http://www.fsta.org/faq/howtoplay/football.php> [hereinafter FSTA] (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² James Alder, Fantasy Football 101 (2006), <http://football.about.com/od/fantasyfootball/a/fantasy101.htm> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

wide receivers, one tight end, one kicker,” and a team defense.²³ Throughout the season, participants can add and drop players as new stars emerge or as injuries occur.²⁴ Participants receive points based on how their players perform in the actual games that week.²⁵ For example, if a wide receiver in a participant’s starting lineup scores a touchdown, that fantasy team receives six points.²⁶ Points are also commonly awarded based on yardage gained, such as one point for every ten yards rushing that a running back has in a game (hence, a running back that rushes for 100 yards would score ten fantasy points).²⁷ Point systems vary by league, but the most common system points are for touchdowns and yardage for offensive players.²⁸ Team defenses score points for categories such as sacks, interceptions, and fumble recoveries.²⁹

While the NFL regular season has seventeen weeks, a regular season for a fantasy football league usually encompasses the first thirteen weeks.³⁰ At that point, the top teams in the fantasy league are arranged in a playoff system.³¹ The playoff structure mimics the NFL playoff system, with the fantasy league championship normally held during week sixteen of the NFL season.³² In addition to bragging rights, the league champion also wins a percentage of the registration fees.³³ The runner-up also typically receives a smaller award.³⁴

²³ *Id.*

²⁴ *Id.*

²⁵ FSTA, *supra* note 17.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See, e.g., AntSports, Inc., General Rules for all AntSports Leagues (2005), http://www.antsports.com/info/General_Rules.asp (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

³⁰ FSTA, *supra* note 17; see, e.g., AntSports, Inc., AntSports High Performance Scoring System (2004), http://www.antsports.com/info/HP_Scoring.asp (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

³¹ FFSpiral, *supra* note 14.

³² *Id.*

³³ Humphrey Complaint, *supra* note 2, at 12.

³⁴ *Id.* at 11–15.

Other fantasy sports utilize variations of this same concept.³⁵ National Hockey League (NHL) and National Basketball Association (NBA) based fantasy games operate very similarly to NFL fantasy football.³⁶ The outcomes of head-to-head fantasy match-ups depend on the performance of a team's players during a specified time period.³⁷ Major League Baseball fantasy games are often based on a rotisserie scoring system.³⁸ This means the cumulative stats of the members of a team are compared with those of the other teams to determine the winner.³⁹ NASCAR based fantasy games typically determine the winner based on the cumulative finish position of the members of a fantasy team.⁴⁰ The general concept—that team owners research players and statistical information to build teams that win or lose based on the success of the players on these teams—does not change from sport to sport.⁴¹

C. *Economic Impact*

The economic impact of fantasy sports industry is staggering. The total impact is an estimated \$1.65 billion each year.⁴² Fantasy sports not only generate extensive revenues directly, but they have also been credited with causing the soaring popularity of several media endeavors such as Fox NFL Sunday, ESPN's Baseball Tonight, and DirecTV NFL Sunday Ticket.⁴³ While the total

³⁵ *Id.* at 16–17.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See, e.g., Yahoo!, Fantasy Sports, <http://fantasysports.yahoo.com> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

⁴⁰ *Id.*

⁴¹ Humphrey Complaint, *supra* note 2, at 16–17.

⁴² Ballard, *supra* note 3, at 83. Statistics are courtesy of Fantasy Sports Trade Association and University of Mississippi. These figures include \$150 million in advertising and branding deals, \$50 million in Gameplay Web services, \$5 million in fantasy publications, and \$3 million paid for web tips and expert services. The remaining \$1.44 billion consists of league entry fees. *Id.*

⁴³ Ballard, *supra* note 3, at 83.

impact is difficult to calculate precisely,⁴⁴ the FSTA estimates it could be as high as \$4 billion.⁴⁵

The fantasy sports industry obviously has a large economic impact on the companies which host the leagues and provide fantasy content. SportsLine.com, Inc. ("SportsLine") is one of the major fantasy sports providers.⁴⁶ In 2003, SportsLine generated \$56.6 million in revenue, and of that money, \$15.9 million came directly from payments made by fantasy team owners.⁴⁷ In the month of October, during the heart of the NFL season, sixty-six percent of the website's hits were fantasy team owners, and they stayed on the site an average of one hour and forty-two minutes.⁴⁸ SportsLine's Senior Producer of Fantasy Sports, Scott Engel, notes, "I've seen our [fantasy sports content] go from having a minor cult following to being a major part of our success."⁴⁹

The impact of fantasy sports in the marketplace is just beginning to be felt. New companies are looking for ways to benefit from this phenomenon.⁵⁰ Best Buy built an entire marketing campaign around fantasy football contests.⁵¹ The highly popular Madden NFL Football series by EA Sports has bought the rights to use fantasy football games run by the NFL so it can allow gamers to build their Madden teams around their fantasy football teams.⁵² The possibilities for future economic growth are considerable.⁵³

⁴⁴ *Id.* The total economic impact of fantasy sports includes items difficult to separate from normal expenditures, such as increased phone bills due to fantasy discussions and increased ratings on shows like Fox NFL Sunday and ESPN's Monday Night Countdown. It would also include losses in productivity resulting from people changing their lineups and preparing for drafts while at work. *Id.*

⁴⁵ Lestrud, *supra* note 6.

⁴⁶ Ballard, *supra* note 3, at 86. SportsLine.com, Inc. is a wholly owned subsidiary of Viacom, Inc. See Humphrey Complaint, *supra* note 2, at 5.

⁴⁷ Ballard, *supra* note 3, at 86.

⁴⁸ *Id.* at 87.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

II. THE THREAT: AN ATTEMPT TO CLOSE THE DOOR ON FANTASY SPORTS

Fantasy sports leagues that utilize up-front entry fees (“pay-to-play leagues”⁵⁴) are currently facing a significant legal challenge. On June 20, 2006, Charles E. Humphrey, Jr. filed a complaint in the federal district courts in the state of New Jersey alleging that the pay-to-play leagues are illegal Internet gambling.⁵⁵ He filed this suit under the Qui Tam Gambling-Loss Recovery Laws of New Jersey and similar provisions in other states.⁵⁶

A. *Basis for Suit*

New Jersey Qui Tam laws provide that if a person who loses money gambling does not sue to recover the lost money within six months, a third party may sue and recover on behalf of the person who lost the money.⁵⁷ If the third party who brings suit wins, proceeds are split with the state.⁵⁸ This lawsuit is brought under

⁵⁴ Humphrey Complaint, *supra* note 2, at 6.

⁵⁵ *Id.* The plaintiff here only challenges the leagues with up-front entry fees. Leagues offered by the defendants—where money does not change hands—are not threatened by this suit.

⁵⁶ *Id.* at 4. The complaint asserts federal subject matter jurisdiction on the basis of diversity jurisdiction. The defendant claims no federal question here and, therefore, state law should be applied. *Id.*

⁵⁷ N.J. STAT. ANN. § 2A:40-6 (West 2006). Qui Tam laws were derived from English Common Law and served two purposes. ESPN Motion to Dismiss at 10, Humphrey v. Viacom, Inc., No. 2:06-CV-02768, Document 5-3, (D.N.J. 2006). First, they were intended prevent gamblers and their families from becoming destitute due to gambling losses. *See, e.g., Berkebile v. Outen*, 426 S.E.2d 760, 763 (S.C. 1993) (holding Qui Tam law applied because the use fell within the intended purpose of the statute). Second, they were meant to supplement states’ anti-gaming provisions during a time when local governments’ enforcement powers were insufficient to effectively deter gamblers. *See, e.g., Vinson v. Casino Queen, Inc.*, 123 F.3d 655, 657 (7th Cir. 1997) (holding “[t]he Illinois Loss Recovery Act was intended to deter illegal gambling by using its recovery provisions as a powerful enforcement mechanism”). These laws are not often the basis for suits, but when they are, the cases generally involve a plaintiff with a connection to the actual gambling loss. *See* ESPN Motion to Dismiss at 9, Humphrey v. Viacom, Inc., No. 2:06-CV-02768, Document 5-3, (D.N.J. 2006).

⁵⁸ N.J. STAT. ANN. § 2A:40-6 (West 2006). A bill has passed the New Jersey Senate and is pending in the General Assembly that would repeal the Qui Tam

New Jersey Qui Tam laws and similar laws in seven other states, as well as the District of Columbia.⁵⁹ In order to fall under this statute, the activity in which the money was lost must be classified as an illegal gaming activity.⁶⁰ Therefore, the validity of this suit rests on the plaintiff's assertion that pay-to-play fantasy football leagues constitute illegal gambling.⁶¹

B. Parties

The plaintiff bringing this suit is Charles E. Humphrey, Jr.⁶² He is a member of the State Bar Associations of Colorado, Michigan, and Texas, and actively practices law in Colorado.⁶³ He is also an avid poker player and helped found Tournament of Champions of Poker in 1999.⁶⁴ His law practice focuses on business matters, which include gambling law, structuring transactions, and securities and venture capital law.⁶⁵

laws as they currently exist. The new rules would allow only the state to bring suit to recover gambling losses. S.B. 1106, 212th Leg., 1st Ann. Sess. (N.J. 2006).

⁵⁹ Humphrey Complaint, *supra* note 2, at 22–23. Qui Tam Gambling-Loss Recovery Laws exist in some variation in New Jersey, Georgia, Illinois, Kentucky, Massachusetts, Ohio, South Carolina, and the District of Columbia. The variations in the statutes involve who shares the winnings in a successful suit and the length of time the gambler has to file suit for the damages on their own before they are eligible for Qui Tam recovery. *Id.*

⁶⁰ N.J. STAT. ANN. § 2A:40-1 (West 2006) (defining gaming transactions as “[a]ll wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event”).

⁶¹ Humphrey Complaint, *supra* note 2, at 3.

⁶² *Id.* at 4.

⁶³ Gambling Law US, <http://www.gambling-law-us.com> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology).

⁶⁴ *Id.*

⁶⁵ *Id.* The plaintiff, Charles Humphrey, does not openly purport to be an advocate for anti-gambling laws; however, he is the primary author of articles available at <http://www.gambling-law-us.com>. This site features numerous articles written by Mr. Humphrey which analyze the validity of different contests that are on the border between games of skill and chance. Each article concludes that the contest at issue is actually illegal gambling. The types of contests analyzed include online poker, bar poker leagues, online casinos, and fantasy sports. While the plaintiff does stand to make a large amount of money

The defendants named in the suit operate the major pay-to-play fantasy league websites.⁶⁶ The parent companies of these sites, which include media giants The Walt Disney Company, CBS Television Network, The Sporting News, and Viacom, Inc. were originally named in the lawsuit, but were voluntarily dismissed by the plaintiff.⁶⁷ The remaining defendants are the three major fantasy league hosts: the SportsLine Leagues run by defendant SportsLine.com, Inc., the ESPN Leagues run by defendant ESPN, Inc., and the TSN Leagues run by defendant The Sporting News.⁶⁸

III. ANALYSIS

The only games that fall under the gambling statutes are those classified as games of chance rather than games of skill.⁶⁹ In this case, the court must decide whether fantasy football is a game of skill or a contest determined by chance in order to determine if it falls under the gambling statutes. This suit is the first to challenge the legality of fantasy sports, and therefore the court has no on-point authority in any American jurisdiction to follow in making its determination.⁷⁰ However, video poker machines have been the topic of several court cases discussing games of skill and games of

if this case is decided in his favor, it seems that his beliefs on gaming are his motivation for filing this suit. *Id.*

⁶⁶ Humphrey Complaint, *supra* note 2, at 2.

⁶⁷ Dismissal of Certain Defendants, *Humphrey v. Viacom, Inc.*, No. 2:06-CV-02768 (D.N.J. 2006) (dismissing without prejudice, pursuant to Fed. R. Civ. P. 41(a)(1)(i)). Other motions filed in this case since the filing of the complaint include a Motion to Dismiss filed by two of the defendants pursuant to Fed. R. Civ. P. 12(b)(6). In this motion, the defendants ask the Court to dismiss the case for several jurisdictional reasons and because the plaintiff failed to state a claim. They argue that the pay-to-play leagues do not constitute illegal gambling, and therefore the plaintiff has no basis for this suit. ESPN Motion to Dismiss, *Humphrey v. Viacom, Inc.*, No. 2:06-CV-02768 (D.N.J. 2006); Sportsline.com Motion to Dismiss, *Humphrey v. Viacom, Inc.*, No. 2:06-CV-02768 (D.N.J. 2006). There does not appear to be a genuine issue of material fact in this case and, therefore, it is a likely candidate for decision by summary judgment pursuant to Fed. R. Civ. P. 56.

⁶⁸ Humphrey Complaint, *supra* note 2, at 5–8.

⁶⁹ *Ruben v. Keuper*, 127 A.2d 906, 907 (N.J. Super. Ct. Ch. Div. 1957).

⁷⁰ Tresa Baldas, *Are Fantasy Sports Real-Life Gambling?*, NAT'L L.J. 4, Aug. 14, 2006, at Col. 1.

chance.⁷¹ The discussion and analysis by the courts in those cases is helpful in understanding the issue here.

A. *Fee and Prize vs. Wager and Winnings?*

For the court to hold that the facts of this case bring it under the Gambling-Loss Recovery Acts, it must first decide that the actions promoted by the defendants in the case are, in fact, gambling.⁷² New Jersey, for example, only allows recovery of “wagers, bets or stakes made to depend upon any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event.”⁷³ Other jurisdictions involved in this case have similar requirements.⁷⁴ Therefore, for the plaintiff to recover, the money paid to the defendants must be deemed wagers, bets, or stakes.⁷⁵ The defendants in this case claim that entry fees paid to play in their leagues are not bets or wagers.⁷⁶ In support of this assertion, the defendants explain that the amount of entry fees is fixed and unconditional, the prizes are guaranteed regardless of the number of participants,⁷⁷ and “the party offering the prize . . . is not also competing for it.”⁷⁸

⁷¹ See generally *State v. Hahn*, 586 N.W.2d 5 (Wis. 1998); *Collins Coin Music of N.C., Inc. v. N.C. Alcoholic Beverage Control Comm’n*, 451 S.E.2d 306 (N.C. App. 1994).

⁷² N.J. STAT. ANN. § 2A:40-6 (West 2006).

⁷³ *Id.* § 2A:40-1.

⁷⁴ See, e.g., 720 ILL. COMP. STAT. 5/28-1 (2006); OHIO REV. CODE ANN. § 3763.01 (LexisNexis 2006). These laws are similar to those in the other jurisdictions under which suit is brought in this case. In general, they each outlaw making a wager on a game of chance, but allow prizes to be received by contestants in a game of skill. See 720 ILL. COMP. STAT. 5/28-1 (2006); OHIO REV. CODE ANN. § 3763.01 (LexisNexis 2006).

⁷⁵ 720 ILL. COMP. STAT. 5/28-1 (2006); OHIO REV. CODE ANN. § 3763.01 (LexisNexis 2006).

⁷⁶ ESPN Motion to Dismiss at 29, *Humphrey v. Viacom, Inc.*, No. 2:06-CV-02768, Document 5-3, (D.N.J. 2006).

⁷⁷ *Id.*

⁷⁸ *Id.*

B. *Games of Skill and Chance*

In most states “[t]he test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game.”⁷⁹ In general, the rule for determining whether an activity is gambling rests on the answers to two questions: “Is the result of an activity separable from the element of chance, so that skill can be determinative, at least in some cases? Or is the result always sufficiently affected by the operation of chance that chance could always account for the result?”⁸⁰ In determining *Humphrey v. Viacom, Inc.*, these are the questions the court will be forced to decide regarding fantasy football.⁸¹ The plaintiff asserts that fantasy sports are games of chance, just like betting on actual sporting events, and therefore are illegal.⁸² Supporters of fantasy sports leagues are adamant in their belief that the elements of skill involved in drafting players and setting lineups make it a game of skill, and hence a legal activity.⁸³

⁷⁹ *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 755 (N.Y. 1904); *see also* 38 C.J.S *Gaming* § 2 (2006).

⁸⁰ R. Randall Bridwell & Frank L. Quinn, *From Mad Joy to Misfortune: The Merger of Law and Politics in the World of Gambling*, 72 MISS. L.J. 565, 646 (2002).

⁸¹ *But see Boardwalk Regency Corp. v. Att’y Gen.*, 457 A.2d 847 (N.J. Super. Ct. Law Div. 1982). In this case, New Jersey state courts explicitly rejected the dominant factor test adhered to in most states in favor of a material factor test. *Id.* at 849. This rule appears more restrictive but does not change the analysis in this case and would likely not affect the decision. In *Boardwalk*, the court focused heavily on the outcome of the game being determined by an uncontrollable roll of the dice. Unlike fantasy sports, the elements of chance exist before the elements of skill even come into play. *See* Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW J. 21, 29 (2001).

⁸² *Humphrey Complaint*, *supra* note 2, at 17.

⁸³ *Baldas*, *supra* note 70.

C. *Fantasy Sports—Much More Than a Toss of the Dice*

The plaintiff in *Humphrey v. Viacom* claims that fantasy sports fundamentally involve predicting the outcome of a future event over which the player has no control.⁸⁴ He notes that the winners are determined by the statistics of the players playing in sporting events and asserts that this activity is analogous to betting on the teams.⁸⁵ The plaintiff also focuses on the variety of factors that have an effect on the outcome of a fantasy contest that are out of the fantasy team owner's control.⁸⁶

No other court in any jurisdiction has decided the issue of whether fantasy sports are games of chance or skill.⁸⁷ However, an analogous issue has been litigated concerning the legality of video poker machines.⁸⁸ In this line of cases, courts in several federal and state jurisdictions have made similar "chance versus skill" determinations, examining each case on a game-by-game basis.⁸⁹

⁸⁴ Humphrey Complaint, *supra* note 2, at 17.

⁸⁵ *Id.*

⁸⁶ *Id.* at 17–21. The factors listed as having an effect on the outcome but being out of the control of the fantasy team owner include injuries to players, late announcement of these injuries, tragedies in the players' lives, the weather, coaching decisions, off the field conduct of the players, and luck in general. *Id.*

⁸⁷ Baldas, *supra* note 70. One source of authority supporting the plaintiff's assertions and actually involving fantasy sports is a 1991 advisory opinion issued by the Florida Attorney General that states that pay-to-play fantasy sports leagues are illegal under Florida's Gambling Statutes. The Florida Attorney General stated: "It might well be argued that skill is involved in the selection of a successful fantasy team by requiring knowledge of the varying abilities and skills of the professional football players who will be selected to make up the fantasy team." However, the opinion says that the Florida statutes prohibit bets of money to be laid on games of chance and contests of skill. See Lawson Lamar, AGO 91-03 (1991), available at <http://myfloridalegal.com/ago.nsf/Opinions/> (Select "1991" from "Jump To" drop-down menu; then follow "Last Page" hyperlink; then follow "AGO 91-03" hyperlink); see also FLA. STAT. § 849.14 (2006).

⁸⁸ Commonwealth v. Two Elec. Poker Game Machines (*Two Elec.*), 465 A.2d 973, 977 (Pa. 1983) (holding some, but not all, video poker machines are gambling *per se* devices).

⁸⁹ *Id.*; see also Mullins v. State, 198 S.W.3d 504, 506 (Ark. 2004) (finding that arcade games with payout dependent on outcome were illegal gambling machines because there was no skill involved in determining the outcome); Thole v. Westfall, 682 S.W.2d 33 (Mo. Ct. App. E.D. 1984) (holding video

While many of the video poker machines with fee and reward systems have been deemed games of chance, even these cases have noted that a “showing of a large element of chance, without more, is not sufficient”⁹⁰ to classify the activity as gambling *per se*. “Nor must the outcome of a game be wholly determined by skill in order for the machine to fall outside the *per se* category.”⁹¹

While the factors involved in video poker are very different from those involved in fantasy sports, the test is the same. As in video poker machine cases, the *Humphrey* court must decide whether fantasy sports are games of skill or games of chance.

The defense will attempt to prove that fantasy sports are games of skill. Numerous authorities on the subject came forward to offer support to this position. One such authority, Glenn Colton of Wilson Sonsini Goodrich & Rosati, pointed out that there are many “ways in which someone can skillfully and intellectually predict how a player is going to perform.”⁹² A fantasy football player can control many of the factors that determine the outcome in a fantasy football contest.⁹³ For instance, “a fantasy football player can study offensive coordinators’ techniques, evaluate who gets the ball more often—wide receivers or running backs—or study a quarterback’s performance.”⁹⁴ These are all examples of using skill to control the outcome of the contest.

The NFL agrees that fantasy sports are a game of skill. In 2003, Evan Kamer, the NFL’s senior director of news media told

poker and slot machines were illegal gambling machines because the outcome depended on elements of chance).

⁹⁰ *Two Elec.*, 465 A.2d at 977.

⁹¹ *Id.*

⁹² Baldas, *supra* note 70. Glenn Colton, a partner in the New York office of Wilson Sonsini Goodrich & Rosati, recently spoke at the 14th Fantasy Sports Trade Association Conference in Las Vegas on August 30, 2006. He was one of several attorneys invited to “discuss the potential impact of the suit” at the conference. *Id.*

⁹³ Baldas, *supra* note 70.

⁹⁴ *Id.*

reporters, “[y]ears back, there was a misconception of what fantasy football really was.”⁹⁵ Kamer went onto explain that:

[Fantasy football] had gambling connotations, and for a long time that put us off a bit. But once we took a good look at what the game actually involved and the kind of information that was required to be successful, we realized it wasn’t a gambling activity, and that helped move us past some hurdles.⁹⁶

The NFL goes a step further in support of fantasy football by allowing active players to participate in fantasy football.⁹⁷ Although the league is aware that significant sums of money are at stake in many of these leagues, the NFL has no rules keeping players, officials, or anyone else from participating in fantasy football.⁹⁸ In an interview with the *Washington Post*, NFL spokesman Brian McCarthy said “players are not warned about playing and that the league draws a strict delineation between fantasy sports and betting on games.”⁹⁹ McCarthy said that line is based specifically on the fact that “fantasy football is a game of skill, and gambling is not.”¹⁰⁰

Many sports industry authorities support the assertion that fantasy sports are games of skill. Moreover, the general population seems to echo these sentiments. Since the filing of the complaint in *Humphrey v. Viacom*, various blog¹⁰¹ sites have been inundated with posts describing the extensive research and effort involved in preparing for fantasy football games.¹⁰²

⁹⁵ Jerry Magee, *It's No Fantasy—NFL Puts Its Stamp on Gambling*, SAN DIEGO UNION-TRIB., Aug. 17, 2003, at C17.

⁹⁶ *Id.*

⁹⁷ Jason La Canfora, *Beating Yourself Takes New Meaning*, WASH. POST, Aug. 13, 2006, at E1.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Wikipedia, Blog, <http://en.wikipedia.org/wiki/Blog> (last visited Oct. 23, 2006) (on file with the North Carolina Journal of Law & Technology). A blog is a website that allows ordinary people to make entries in journal style, often on a particular topic, which are then displayed for public viewing.

¹⁰² See, e.g., Posting of Michael McCann to Sports Law Blog, <http://sports-law.blogspot.com/2006/08/new-federal-lawsuit-on-whether-fantasy.html> (Aug. 15, 2006, 20:55 EST) (on file with the North Carolina Journal of Law & Technology).

D. Public Policy Considerations

Even if fantasy football is held to be a combination of skill and chance with neither being sufficiently dominant, the court should still find fantasy football to be a legal activity on the basis of public policy. The primary reason cited by legislatures in passing laws creating both criminal and civil consequences for participating in illegal gambling is that gambling is seen as a detrimental activity.¹⁰³ Courts have condemned gambling due to its “anti-social effects” that result from the “lure of the chance for ‘easy money.’”¹⁰⁴ They note that gambling preys on “the weakness of those whom the statute aims to protect, primarily for the benefit of society in general.”¹⁰⁵ In other words, legislatures and courts have largely deemed gambling illegal because of the social ills it creates.

According to a recently conducted national study, “[i]n the past, reasons for outlawing or limiting gambling included its negative impact on character and concern about promoting the myth that ‘lady luck’ was more likely to improve one’s situation than would hard work, education, and perseverance.”¹⁰⁶ The general perception is that the more vulnerable segments of the population, such as immigrants and the poor, are more susceptible to the temptation of gambling.¹⁰⁷ There is also the “wide-spread perception among community leaders that indebtedness tends to increase with legalized gambling, as does youth crime, forgery and credit card theft, domestic violence, child neglect, problem gambling, and alcohol and drug offenses.”¹⁰⁸ A recent study of the effects of gambling found that it correlates to an increase in the

¹⁰³ *State v. Rucker*, 134 A.2d 409, 412 (N.J. Super. Ct. App. Div. 1957).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (referring to the rationale behind the New Jersey gambling laws).

¹⁰⁶ NAT’L GAMBLING IMPACT STUDY COMM’N REPORT 7-18 (June 18, 1999), <http://govinfo.library.unt.edu/ngisc/reports/7.pdf> (quoting Katherine Jensen & Audie Blevins, *THE LAST GAMBLE: BETTING ON THE FUTURE IN FOUR ROCKY MOUNTAIN MINING TOWNS* 9 (Univ. of Ariz. Press 1998)) (on file with the North Carolina Journal of Law & Technology).

¹⁰⁷ *Id.* at 7-18.

¹⁰⁸ *Id.* at 7-14.

suicide and divorce rates in communities in which it is legal.¹⁰⁹ Evidence also exists that gambling contributes to homelessness and an increase in rates of domestic violence in communities in which legalized gambling is prevalent.¹¹⁰ However, the correlation between gambling and social ills, such as drug use and crime, have not been clearly proven.¹¹¹ Despite the inconclusiveness of the empirical data in these areas, the perception of government officials and communities is that gambling causes significant societal ills and specifically preys on the economically disadvantaged. This perception remains the driving force behind many of the anti-gambling laws that exist in this country.¹¹² The legislature's desire to protect the community from these social ills

¹⁰⁹ *Id.* at 7-25. Visitors to and residents of communities where gambling is prevalent have significantly higher suicide rates than the normal population. In fact, Nevada, known for its legalized gambling, regularly has the highest suicide rate of the fifty states. For divorce rates, 53.5% of pathological gamblers have been divorced as compared with 18.2% of non-gamblers. *Id.*

¹¹⁰ NAT'L GAMBLING IMPACT STUDY COMM'N REPORT, *supra* note 106, at 7-25. Between eighteen and thirty-three percent of the homeless interviewed in several surveys cite gambling problems as a factor contributing to their homelessness. Many domestic abuse shelters have reported a significant increase in the number of people seeking help after the opening of local casinos. *Id.*

¹¹¹ NAT'L GAMBLING IMPACT STUDY COMM'N REPORT, *supra* note 106, at 7-29 to -30.

¹¹² H152 CONG. REC. H4987 (daily ed. July 11, 2006) (statement of Rep. Bachus). An example of the legislature's reliance on this assumption can be seen in the debate on the Internet Gambling Prohibition and Enforcement Act, in which Representative Bachus from Alabama stated:

The negative effects of gambling have been widely documented. All too often, gambling results in addiction, bankruptcy, divorce, crime and moral decline. Internet gambling magnifies the destructiveness of gambling by bringing the casino into your home. According to an extensive survey done by the University of Connecticut Health Center, 74[%] of those who have used the Internet to gamble have serious problems with addiction, and many of those have resorted to criminal activities to pay for the habit. We heard testimony at one of our hearings that Internet gambling is proving to be a serious problem for many college students. One student reportedly lost \$10,000 on Internet sports gambling over a three-month period.

Id.

should not be overlooked in determining the purpose or scope of the anti-gambling statutes.¹¹³

However, the public policy rationale for outlawing gambling simply does not apply to fantasy sports. Although some variation exists among sources of demographic information, the average fantasy sports player is a forty-one-year-old male who has a bachelor's degree or higher, and makes almost \$90,000 per year.¹¹⁴ They devote only \$500 annually to their fantasy sports endeavors—an investment less than one percent of their annual income. Fantasy players are educated professionals who live in the suburban United States.¹¹⁵ On average, they have played fantasy sports for nine years and are involved in six leagues per year.¹¹⁶ They typically spend between one and a half and three hours each week managing their teams.¹¹⁷ They are typically sports fans who buy tickets to games and play fantasy football for enjoyment rather than to make a quick buck.¹¹⁸ The 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. It seems that the majority of fantasy sports players do not fall into the vulnerable segment of society that the anti-gambling laws have sought to protect.

In addition to the demographic differences between gambling and fantasy sports, there is a difference in the perceived moral value that distinguishes these two activities as well. Michael Mann of the Mississippi College School of Law argues, “[f]antasy sports just don’t strike people as immoral. Even if [Humphrey’s] argument is technically correct, it lacks the moral weight that is so

¹¹³ *State v. Rucker*, 134 A.2d 409, 412 (N.J. Super. Ct. App. Div. 1957).

¹¹⁴ Ballard, *supra* note 3, at 85.

¹¹⁵ See Fantasy Sports Trade Association, Fantasy Sports Conference to Unveil Demographic Survey and Discuss Legal Battle (Mar. 11, 2006), <http://www.fsta.org/news/pressreleases/> (follow hyperlink to “FSTA 2006 Post Conference Press Release”) (on file with the North Carolina Journal of Law & Technology).

¹¹⁶ *Id.*

¹¹⁷ Ballard, *supra* note 3, at 85.

¹¹⁸ Jim Meskauskas, “The Plane! The Plane!” (Apr. 29, 2004), <http://www.imediaconnection.com/content/3306.asp> (on file with the North Carolina Journal of Law & Technology).

crucial in many other litigations.”¹¹⁹ He also comments that the term “fantasy” attempts “to suggest that it’s not real, that there’s an innocence to it.”¹²⁰

A bill has passed the House of Representatives and is pending in the Senate in which Congress acknowledges the difference between gambling and fantasy sports.¹²¹ The Unlawful Internet Gambling Enforcement Act is aimed at outlawing Internet gambling, mainly poker, but the Act specifically carves out an exception for fantasy sports.¹²² The proposed legislation states that fantasy or simulation sports games are legal as long as the “winning outcomes reflect the relative knowledge and skill of the participants.”¹²³ The court deciding *Humphrey v. Viacom* should not strike down fantasy sports in clear violation of Congressional intent shown in this act. While the passage of the Unlawful Internet Gambling Enforcement Act by Congress with the fantasy sports exemption does not prevent the New Jersey state legislature from outlawing fantasy sports, the exemption does send a strong signal that the fantasy sports industry has the support of the federal government. By specifically creating this exemption, Congress indicates that fantasy sports do not fall into the category of illegal gambling activities.

The plaintiff claims this pending legislation still does not exempt fantasy sports because fantasy sports are predominantly games of chance, and do not reflect the skill of the participants.¹²⁴

¹¹⁹ Baldas, *supra* note 70.

¹²⁰ *Id.*

¹²¹ Unlawful Internet Gambling Enforcement Act of 2005, H.R. 4411, 109th Cong. (2d Sess. 2006).

¹²² *Id.* In this resolution, fantasy sports are specifically listed as an exemption provided: (1) the membership of the fantasy team is not based on the membership of any actual team; (2) prizes are made known to the participants and do not depend on the number of participants or size of their fees; (3) the winning outcomes reflect the knowledge or skill of the participants; and (4) the outcome is not based on the outcome of any single contest or single athlete’s performance. *Id.*

¹²³ Unlawful Internet Gambling Enforcement Act of 2005, H.R. 4411, 109th Cong. (2d Sess. 2006).

¹²⁴ Chuck Humphrey, *Lawsuit Seeks to Recover Sports Gambling Losses* (Aug. 12, 2006), <http://www.gambling-law-us.com/Articles-Notes/fantasy->

However, the bill's language clearly assumes that a vast majority of fantasy sports fall under the fantasy exemption, otherwise the exemption is moot. The fantasy sports exemption was carved out at the request of Major League Baseball and fan organizations¹²⁵ and it has the backing of the NFL, NHL, and NBA.¹²⁶ The support of these organizations is an indication that the fantasy games based on their leagues are intended to fall within the exemption.

In addition, holding pay-to-play fantasy sports to be an illegal gambling activity would cut off a significant revenue stream for the government. As mentioned previously, fantasy sports currently have an estimated \$1.65 billion total economic impact each year and this number is still growing.¹²⁷ Companies bringing in these revenues, like the defendants in this case, pay considerable taxes on their earnings. New Jersey, like many states, has significant budgetary concerns.¹²⁸ For the 2005 fiscal year, New Jersey had a \$3.5 billion deficit despite a \$2.4 billion increase in tax revenue from the previous year.¹²⁹ The federal government is experiencing similar financial difficulties, projecting the 2007 deficit at \$354 billion.¹³⁰ The taxable revenues from an industry as large as fantasy sports are significant in preventing further deficits and should not be eliminated without considerable justification. Grouping fantasy sports into the class of illegal gambling, in the face of contrary congressional intent, does not provide such justification.

sports-lawsuit.htm (on file with the North Carolina Journal of Law & Technology).

¹²⁵ 152 CONG. REC. H4974 (daily ed. July 11, 2006) (statement offered by John Conyers, Ranking Member, House Judiciary Comm., by Kathryn A. Wolfe).

¹²⁶ 152 CONG. REC. H4971 (daily ed. July 11, 2006) (statement of Rep. Goodlatte).

¹²⁷ Ballard, *supra* note 3, at 83.

¹²⁸ OFF. OF LEGISLATIVE SERVICES, EXEC. OFF. OF THE N.J. GOVERNOR, COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE FISCAL YEAR ENDED JUNE 30, 2005, 22-23 (2006), *available at* <http://www.state.nj.us/treasury/omb/publications/05cafr/pdf/finsect.pdf>.

¹²⁹ *Id.*

¹³⁰ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE U.S. GOV'T, FISCAL YEAR 2007 at 4 (2006), *available at* <http://www.gpoaccess.gov/usbudget/FY07/index.html>.

The government has shown support for fantasy sports, recognizing that they are not accompanied by the same social ills as other games where elements of chance are involved. To decide the case at issue in favor of the defendants would be consistent with the actions already taken by the federal government.¹³¹ Furthermore, to decide that fantasy sports constitute illegal gambling would cut off a significant revenue stream for the government and unnecessarily end a fun and harmless activity for millions of people.

IV. CONCLUSION

Fantasy sports involve entry fees paid and prizes received, not wagers and winnings. They involve elements of both skill and chance, but the skill elements are dominant. Through research, intelligence, and skill, the participants can control the outcome of the contests.

Furthermore, even if chance is a significant factor in determining the outcomes, the policy reasons underlying gambling restrictions are absent in the context of fantasy sports. Fantasy sports do not promote the social ills which have historically been the rationale for anti-gambling laws. They do not cause participants to lose massive amounts of money in the hopes of making a quick buck. They do not result in fraud, theft, or violence. Additionally, the segment of the population that typically plays fantasy sports is wealthy enough to afford the relatively small amount of money they spend on fantasy entry fees each year. Money is not the primary factor motivating the players, and the relative payoff is extremely small when compared to the number of hours spent playing the game. Unlike some activities which include elements of chance, fantasy sports are not accompanied by significant societal harms.

¹³¹ C.B.C. Distribution & Mktg. v. Major League Baseball Advanced Media, 443 F. Supp. 2d 1077 (E.D. Mo. 2006) (upholding the rights of fantasy operators to use players' statistics in running their leagues). If the fantasy operators had not prevailed in that case, they would have had to obtain a license from Major League Baseball before using the statistics. Baldas, *supra* note 70. Obtaining a license would have been a hardship for the fantasy industry. *Id.*

Public policy dictates that this case should be decided in favor of the fantasy operator defendants. Millions of people belong to fantasy sports leagues, and nearly every mass media outlet in the country is involved with them in some way.¹³² Fantasy sports are a growing phenomenon and a billion-dollar industry.¹³³ Holding fantasy sports to be a legal venture benefits the government by creating a large revenue stream from this billion-dollar industry. It also benefits the general population by allowing them to continue participating in an entertaining pastime that millions of people take part in each year.

There is no reason not to allow the proliferation of fantasy sports and many reasons to allow it. Congress agrees with this because they have recently taken steps that support the growth of the fantasy sports industry. The New Jersey federal district court, like Congress, should recognize that fantasy sports are not illegal gambling.

¹³² Baldas, *supra* note 70.

¹³³ Lestrud, *supra* note 6.