ARTICLES

Emerging Legal Issues in the Sports Industry: Are Trading Cards a Form of Gambling?[1]

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INTRODUCTION

Trading cards, particularly baseball cards, have been an integral part of American popular culture for decades (Bloom, 1997). Originally produced and distributed with tobacco products, and then later with bubble gum, today's cards are sold separately in retail stores and hobby shops. Demand is also supported by a strong secondary collector's market, where used individual cards and sets of cards are bought and sold (Bloom). After enjoying an industry-wide boom in the early 1990s, trading cards remain a popular hobby for children, and a money-making opportunity for investors, accounting for approximately one billion dollars in sales annually in recent years (Belk, Wallendorf, Sherry, Holbrook, & Roberts, 1988; Federal Bureau of Investigation, 2000).

As card technology has become more sophisticated, and competition amongst card manufacturers has continued, the industry has witnessed the emergence of "insert" or "chase" cards (Williams, 1995). Chase cards represent special premium cards randomly inserted into regular packages of trade cards. These chase cards can carry a significant value on the secondary

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card market. As will be discussed in this article, it has been suggested that the search for chase cards often influences purchasing decisions as collectors sift through regular cards in search of these prized, and allegedly rare, insert cards.[2]

However, as this article will show, concerns have been raised that purchasing card packages in an attempt to obtain valuable chase cards represents a form of gambling. In particular, concern surrounds this behavior as it pertains to children, and the possibility that it encourages the development of gambling behavior at an early age. As a result, in the mid 1990s a number of lawsuits arose against card manufacturers, professional sports leagues and their respective players' associations, and other entertainment companies, who have allowed the likenesses of their athletes and characters to be produced on trading cards and packaged with chase cards. The following section provides an overview of the baseball trading card industry and the development of the collectibles industry. This is followed by an overview of how one company, Topps Chewing Gum, Inc. (Topps), was able to develop and maintain its strong market position, and a discussion of the legal challenges that Topps faced. Growth and changes to the trading card industry are then reviewed, including the development of chase cards. The cases that have been brought against the leagues, players' associations, and card manufacturers are then reviewed, along with the legal arguments and results of the suits. The article concludes with some suggestions for leagues and their players' associations regarding their decisions to license chase cards.

II. BASEBALL TRADING CARD INDUSTRY

The trading card industry has evolved dramatically since its inception in the 1880s when James Buchanan Duke, a tobacco farmer, began placing cardboard in tobacco packages to help prevent the cigarettes from being crushed (Bogira, 1977; Williams, 1995). Pictures of actors and actresses were placed on these early cigarette cards, and in 1886 the Old Judge Cigarette Company issued the first baseball cards, featuring players from teams such as the St. Louis Browns and the New York Metropolitans (Williams, 1995; Yabush, 1973). Over time, baseball cards were also placed in candy packages. However, it was not until the 1930s that baseball cards began appearing in the product most associated with the baseball trading card industry – bubble gum packages (Bogira, 1977). Initially, baseball cards were merely viewed as premiums included along with the item being purchased, such as cigarettes,

2. Throughout this paper the terms "insert" and "chase" will be used interchangeably.

candy, and gum, yet the card inserts eventually became the items of interest in their own right, and the driving force in many people's purchasing decisions (Eskenazi, 1964).

Creating a Collectibles Market

More widespread collecting of cards occurred after the end of World War II as a new generation of youngsters began actively buying and trading cards (Eskenazi, 1964). As previously noted, youngsters in the 1950s generally did not purchase baseball cards as collectible items. Rather, the cards were used as toys in a variety of games (Solomon, 1973). For example, popular children's games included flipping trading cards against a wall with the person whose card landed the closest to the wall being named the winner, and placing cards in bicycle spokes to serve as noisemakers (Lamey, 1992; Solomon, 1973; Springer, 1986; Thomas, 1986). Since most baseball trading cards were used as toys during the 1950s, they were subject to frequent use and often suffered wear and tear. As the children grew up, many parents discarded the trading card collections because the cards were considered nuisances taking up household space, rather than valuable collector items. Thus, with the future development of the collectibles market, the scarcity and condition of cards from this era would increase the price that cards would later attain on the secondary market.

It was not until the 1970s that baseball cards became widely known as true collectible items. At this time, many adults began collecting baseball cards of players from their youth as a way to recapture part of their childhood (Bozanich, 1987; Gupte, 1978). According to Belk (1995), collecting is "the process of actively, selectively, and passionately acquiring and possessing things removed from ordinary use and perceived as part of a set of non-identical objects or experiences" (p. 479). Thus, collectors were not purchasing cards as toys anymore. However, because of their earlier use as toys, pristine cards were very rare and highly sought after by collectors.

With the evolution of the collectibles market for trading cards, the quality, condition, and rarity of cards became important for the first time as the value of cards was strongly influenced by these factors. Given the popularity of baseball trading cards in bubble gum packages during the 1950s and the development of the collectibles marketing in the 1970s, there were many companies interested in producing baseball trading cards. However, as will be discussed later in this paper, one company, Topps, was able to monopolize the sports trading card market for approximately 20 years (Bloom, 1997). Topps would face legal challenges that ultimately shaped the trading card industry.

These will be discussed in the following section in order to further review the development of the trading card market and to identify some of the legal issues that have impacted this industry.

Topps Controls the Baseball Trading Card Industry: Early Legal Challenges

As previously noted, trading cards were issued in a variety of products, but eventually packaging cards with bubble gum became the most popular means of distribution. Initially, there were many companies that issued baseball cards with bubble gum including Goudey, Fleer, Leaf, Bowman, and Topps (Bogira, 1977; Conley, 1962; Phillips, 1964a; Phillips, 1964b). In 1951, Topps had begun packaging baseball cards with bubble gum and within five years had signed nearly all of the major and minor league players to exclusive contracts (Conley, 1962; Phillips, 1964a; Phillips, 1964b; Van Gelder, 1975). As a bonus for signing with Topps, players received payment of $5 and players who had cards that were issued by Topps were paid $125 per year (Williams, 1995). Additionally, the Topps' contract covered a period of five major league seasons and had a clause forbidding players from signing a picture-card contract with any other gum or candy manufacturer while the Topps contract was in force (Conley, 1962; *Fleer Corp. v. Topps Chewing Gum, Inc.*, 1980; Phillips, 1964a; Phillips, 1964b; Van Gelder, 1975). Through its use of exclusive contracts, Topps became the sole producer of bubble gum trading cards in 1956 by creating barriers to entry that prevented other manufacturers from engaging in the production of baseball cards (Conley, 1962; Phillips, 1964a; Phillips, 1964b).

As the only producer of baseball cards issued with bubble gum, Topps faced various legal challenges to its monopoly position from the government and other card manufacturers. The Federal Trade Commission (FTC) investigated Topps in 1962 because FTC believed that Topps' control of the bubble gum baseball trading card market may have been gained unfairly (*In the Matter of Topps Chewing Gum, Inc,* 1965; "Bubble Gum Maker," 1965; Phillips, 1964a). One of the charges against Topps was that the company forced merchants to buy large quantities of other products, such as Bazooka gum, in order to purchase the popular baseball card bubble gum packets (*Fleer Corp. v. Topps Chewing Gum, Inc.*, 1980; Phillips, 1964a). After three years of investigation, the FTC alleged that Topps had established a monopoly in the sale of baseball picture cards without using methods that were illegal per se or that involved unfair trade practices (*In the Matter of Topps Chewing Gum, Inc,* 1965; "Monopoly in Baseball Cards," 1964). Topps was allowed to continue

its practices and maintained exclusive contracts with nearly all professional baseball players.

However, during the 1970s Topps faced additional legal challenges to its monopoly status. In June 1975, the Fleer Corporation (Fleer) filed a lawsuit in Federal District Court accusing Topps of illegal restraint of trade and named Major League Baseball in the suit (*Fleer Corp. v. Topps Chewing Gum, Inc.*, 1976, p. 178). Fleer claimed that Topps' exclusive contracts with nearly all major and minor league baseball players made it impossible for competitors to enter the bubble gum card market (Van Gelder, 1975). Believing they had faced this same issue back in 1965 when the FTC brought its case, Topps attempted, unsuccessfully, to get the Supreme Court to intervene and help Topps retain its status as the sole producer of trading cards (Rosen, 1978).

In 1980, Fleer brought an antitrust action against Topps and the Major League Baseball Players Association (MLBPA), alleging that Topps and MLBPA had monopolized and restrained trade in the baseball card market, by acting to exclude competitors seeking to market baseball cards with low cost premiums (in lieu of bubble gum). The USDC for the Eastern District of Pennsylvania decided that "Topps will be permanently enjoined from enforcing the exclusivity clause in its form contract, and it will be prohibited from entering into any contract with any major or minor league player that reserves to Topps any exclusive rights to sell that player's picture" (*Fleer Corp. v. Topps Chewing Gum, Inc.*, 1980, p. 515). It was also put forth that MLBPA would be required to enter into at least one new licensing agreement for baseball cards by January 1, 1981, with Fleer receiving the right of first refusal. This course of action was decided upon, "guided by the proposition that the relief granted should remedy those conditions which impede fair competition, without unnecessarily penalizing the defendants [Topps and MLBPA]" (p. 514).

As a result, Fleer was able to begin manufacturing baseball trading cards in bubble gum packages in 1981 (*Fleer Corp. v. Topps Chewing Gum, Inc.*, 1980; Haitch, 1985). In addition another card manufacturer, Donruss, entered into contracts with MLBPA to issue baseball cards with gum, and in doing so, introduced competition into the market for the first time in approximately two decades (Williams, 1995).

However, the legal battles were not yet over. Topps appealed the ruling to the United States Court of Appeals for the Third Circuit and forced Fleer and Donruss to discontinue placing baseball cards in gum packages (*Fleer Corp. v. Topps Chewing Gum, Inc.*, 1981; Haitch, 1985; Williams, 1995). The Court of Appeals determined that Fleer's argument that Topps' use of exclusive contracts created an environment where it would take several years before a

rival could produce a marketable product (by signing minor league players to contracts and waiting for them to make it to the Major Leagues) was a characteristic of the MLB industry, and not an illegal restraint of trade (*Fleer Corp. v. Topps Chewing Gum, Inc.*, 1981, p. 150).

While Topps regained control of the bubble gum market, this legal battle was still able to create changes within the industry. Originally, the MLBPA had been named as a co-defendant in the suit filed by Fleer, however, the Player's Association had received an additional $600,000 from the contracts signed with Fleer and Donruss during the 1981 season (Williams, 1995). Since the time that Topps had enjoyed its monopoly position in the baseball card industry, Marvin Miller, head of the MLBPA, had made some strides in gaining more rights and sources of income for his players. One included creating a group licensing program that allowed players to market the rights to their likenesses on products such as trading cards. This provided the players' association with some much needed revenues during the late 1960s and early 1970s, and also a new way of negotiating with trading card companies. Thus, with the increase in revenue the MLBPA was not interested in returning to a one-company market and supported the other card manufacturers' attempts to develop new ways to issue cards to compete with Topps (Williams, 1995). To circumvent rules forbidding the production of cards with gum, Fleer began offering baseball trading cards in packages with stickers of major league baseball team logos (in lieu of bubble gum), while Donruss issued cards with pieces of a jigsaw puzzle of Babe Ruth (Haitch, 1985; Hammonds, 1982). Thus, although Topps won the legal battle to once again become the sole producer of bubble gum cards, competition had now entered the market. Although no other card manufacturer would be allowed to produce cards with bubble gum packages, Topps now had competitors in the baseball card market. Interestingly, Topps stopped placing gum inside their card packages in 1991 because the bubble gum could leave a residue on the cards, which was affecting the value that collectors could realize in the secondary market (Gitman, 1994).

Topps continued to use legal channels in an attempt to limit competition. In 1982, Topps filed a lawsuit against Fleer asking to be awarded the revenues that Fleer generated during the 1981 season from card sales, which had been produced prior to Topps' successful appeal described above (Haitch, 1985; *Topps Chewing Gum, Inc. v. Fleer Corp.*, 1982). Then in 1986, Topps sued Fleer again, this time claiming that issuing baseball cards with stickers was illegal, as stickers were argued to be too similar to cards, and violated Topps' right as producer of baseball cards with bubble gum (*Topps Chewing Gum, Inc. v. Fleer Corp. & Major League Baseball Players' Assoc.*, 1986). Topps

alleged that an item packaged along with baseball cards would avoid infringing on Topps' rights only if the cost of the item included in the package was at least equal to the production costs of the cards themselves. Otherwise, as Topps argued, the sticker or other item was really a "sham" product and not central to the purchasing decision of the consumer (*Topps Chewing Gum, Inc. v. Fleer Corp. & Major League Baseball Players' Assoc.*, 1986). However, the 2nd Circuit Court of Appeals noted that "if the premium [in this case the sticker] is marketed to the public as something worth buying, that is some indication that it is not a sham product" (p. 857). For this reason, Fleer and Donruss were allowed to continue issuing baseball cards in packages of stickers and puzzle pieces and the monopoly control that Topps had for over two decades in the baseball trading card market had effectively ended (Haitch, 1985; Hammonds, 1982).

Changes in the Collectibles Market

The collectibles market for baseball trading cards, which had first developed in the 1970s, faced many changes as new companies, including Donruss, Fleer, Score, and Upper Deck, began producing baseball trading cards in the 1980s (Williams, 1995). During this time, the sport collectibles market grew into a multi-billion dollar business with sports memorabilia (including cards) becoming the fastest growing segment of the overall collectibles market (Osterland, 1994). Furthermore, the 1980s witnessed a growth in the number of baseball trading card collectors, making card collecting the third largest hobby in the United States behind stamp and coin collecting (Davis, 1983). At the peak of the baseball card-collecting boom in the late 1980s, there were an estimated 700,000 baseball card collectors and nearly 25,000 trading card hobby shops throughout the United States, as compared with approximately 2,500 hobby shops in 2000 (Springer, 1986; Vella, 2000).

Much of the growth in the collectibles market during this time period came from individuals entering the market as investors rather than "true" collectors (Lamey, 1992; O'Keeffe, 1997). True collectors were motivated to buy and sell cards because of their love of sports, collecting, and an attempt to recapture their childhoods. Conversely, investors participated in buying and selling baseball trading cards as a way to make money (Lamey, 1992; O'Keeffe, 1997).

Investors speculating on player performance and card values drove prices up and many collectors and investors alike profited, further enticing more individuals to begin collecting (Lamey, 1992; O'Keeffe, 1997). The industry

also grew as new people began collecting/investing after learning about the high prices and investment value that baseball cards were earning (Williams, 1995). An article appearing in *Money* magazine in 1988 revealed that baseball card prices listed in the industry price guides from 1980 to 1987 had earned a compound average return of 42.5%, outperforming all other traditional investments, such as stocks and bonds (Krause, 1988). Due to the increased production from new manufactures, the presence of more individuals collecting or investing in trading cards, and the greater media coverage such as that provided by the *Money* magazine article, the sports trading card industry grew into an approximately billion-dollar industry ("Hardball," 1996; McGregor, 1999b).

In 1988, within the context of the growth described above, one of the biggest changes to the baseball card industry came as the Upper Deck Company (Upper Deck) began to manufacture baseball trading cards for the 1989 season. Upper Deck revolutionized the trading card industry by producing high quality cards with vivid action pictures and quickly captured the high-end market (Landsbaum, 1990; Williams, 1995). Topps had already introduced a high-quality, premium card with its Topps Tiffany cards in the mid 1980s, but these were not regular-issue cards and were only sold as complete sets. Distinctive features of Upper Deck's cards were holograms printed on cards to reduce possible counterfeits, high-gloss color photos on the front and back, and the use of premium card stock (Landsbaum, 1990; Williams, 1995). Upper Deck's cards were priced at nearly double other card packets, yet they were extremely popular from the outset with high-end collectors (Williams, 1995). A package of Upper Deck cards sold for 89 cents, while competitors' cards sold for 45 cents per package (Williams). Upper Deck would become instrumental in developing new and innovative ways to produce and market trading cards.

The Introduction of Insert or Chase Cards

In 1990, Upper Deck signed Reggie Jackson to be a spokesperson for the company and was looking for other ways to increase interest and demand in their cards. That year the Vice President of Marketing, Don Bodow, developed a new marketing plan in which the company would produce a special "insert" card that would be placed randomly into a few packages. It was hoped that collectors would seek out series that contained these cards and purchase packages due to the possibility of obtaining one or more of these scarce cards (Williams, 1995). Upper Deck called these cards "random insert cards," but these types of cards are also called "chase" cards because collectors

attempt to chase down the special cards by buying packages (Williams, p. 141). Recognizing the impact that a small, finite number of desirable cards would have on collectors, Upper Deck was hoping that collectors would rush to purchase the Upper Deck cards packages searching for the premium insert cards, and in doing so, the result would be increased sales for the company (Williams).

For the first special insert card the company created a 10-card subset[3] of the new company spokesperson, Reggie Jackson (Williams, 1995). Only 2,500 such cards were produced and to further entice collectors' interest, Jackson signed each of the cards (Williams). Upper Deck called the product the Reggie Jackson "Heroes" line and the company planned to introduce other special insert cards of additional all-time baseball greats. Other companies also began introducing chase cards. In addition to specially autographed cards, a variety of different chase cards began to be produced to attract collectors. These included special holograms or cards containing a small portion of a professional player's game-worn jersey or other piece of equipment (McGregor, 1999b).

Given the limited numbers of insert cards produced and the heightened interest of many collectors, these insert cards have had an increased value on the secondary collector's market (Cohen, 1994; McGregor, 1999a; McGregor, 1999b). Some cards may have a value of $50 right after they have been printed and that amount can continue to increase (Cohen, 1994). For example, a chase card featuring Wayne Gretzky has sold at auction for $14,000 (McGregor, 1999a; McGregor, 1999b). While most chase cards do not reach the price that the Gretzky card received, the rarity of these cards still makes them desirable to many collectors, which increases the value of the cards on the secondary market. A young collector summarized the interest that many collectors have in chase cards when he said "The insert cards are what everyone's after. When you buy a $3 pack, you are looking for the value that's hidden inside the pack. You might get nothing or you might get a $125 card" ("Hardball," 1996, p. 1C).

By the mid 1990s, chase cards had become a staple within the trading card industry, with some form of chase card appearing in virtually every regular issue of cards produced by the major card manufacturers in the trading card industry. It was within this context that that the issue of chase cards first emerged as a potential legal issue, as parents became concerned with the

3. A subset is a smaller, numbered set of cards that appears within a larger set. This subset may be numbered separately from the larger set (such as 1-10), or within the regular issue of cards (a themed subset numbered 451-460 within a 796-card set).

purchasing behaviors of their children. As one newspaper article explained, "Insert cards have become so desirable that a common sight at card shops and shows is young buyers checking the odds on the back of the pack, ripping open the wrapper, scanning for chase cards and tossing the leftovers aside" ("Hardball," 1996, p. 1C).

III. TRADING CARD INSERTS: ARE THEY IN VIOLATION OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT?

Early lawsuits were the brainchild of Alan Hock, a Garden City, New York, lawyer, who watched his 8-year old son get hooked on chase cards. "It took me three months of watching my son become addicted to this stuff before the illegality of this hit me in the face" ("Hardball," 1996, p. 1C). It was this concern that drove many of the lawsuits filed, a concern shared by some within the industry. "According to card shop owner, Jim Cregan, 'the insert cards promote gambling. People in my store tear open box after box of cards [trying to find chase cards],' Mr. Cregan said. 'That's not what collecting is all about'" (McGregor 1999a, p. A1).

Professional sports leagues were targeted along with card manufacturers, as it was claimed that, in licensing their trademarks to card manufacturers, leagues and their respective players' associations were actively participating in the decision to use chase cards and to advertise trading cards in a manner that encouraged customers to specifically seek out chase cards. (McGregor, 1999a). Similarly, lawsuits led by Los Angeles-based lawyer, Kevin Roddy, argued that "the licensors exert tight control over the way the cards are marketed and are responsible for approving the 'addictive' chase card system" (McGregor, 1999B, p. A3), and "it was the licensor sports leagues and player associations that really control the way the cards are marketed" (McGregor 1999a, p. A1). In other words, in the minds of the plaintiffs, it was the Major Leagues and their respective players' associations that ultimately made the decision to associate their leagues with the product.

As the following overview will show, the lawsuits filed against card manufacturers have alleged that the chase cards placed into trading card packages constituted a form of illegal gambling and violated the Racketeer Influenced and Corrupt Organizations Act (RICO).

To begin, a brief overview of the RICO Act will be provided in order to clarify the basis for the lawsuits being brought against trading card manufacturers, professional sports leagues, and entertainment companies. According to the Interpretive Notes found after the definitional section in the annotated version of the Act, Congress passed the Racketeer Influenced and

Corrupt Organizations Act (18 USCS §§ 1961-1968) in 1970 in order to "prevent and punish financial infiltration and corrupt operation of legitimate business operations affecting interstate commerce." The RICO Act was enacted with a goal of attempting to "eradicate organized crime" and provided "new prohibitions, enhanced sanctions, and new remedies" to achieve that end (18 USCS § 1961: Interpretive Notes and Decisions). Although a major intent of the RICO Act was to address organized crime organizations, the Act could be applied to individuals and organizations that were not involved in organized crime syndicates (18 USCS § 1961: Interpretive Notes and Decisions). Thus, the RICO Act could be used to address issues of perceived illegal gambling by trading card manufacturers. The lawsuits filed based on the RICO Act claimed that the insertion of chase cards constituted illegal gambling and violated 18 USCS § 1962 a-d. The activities prohibited by 18 USCS § 1962 include the following:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate

> or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> (d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section. (18 USCS § 1962 a-d).

As will be discussed below, the lawsuits also sought to target §1964, which is concerned with any injury to a person's business or property as a result of a violation of §1962. According to 18 USCS §1964:

> (a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.
>
> (b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.
>
> (c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.
>
> (d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential

allegations of the criminal offense in any subsequent civil proceeding brought by the United States. (18 USCS §1964 a-d)."

Since 1996 plaintiffs have filed at least 17 separate cases involving four different federal judicial courts – Eastern District of New York, Southern District of California, Northern District of Texas, and District of New Jersey – alleging RICO violations (*Dumas v. Major League Baseball Properties, Inc.*, 1999, pp. 1185-1187). In general terms, the lawsuits filed have maintained that the marketing of insert cards encourages children to gamble, violates state and federal anti-gambling laws, and makes the defendants open to the scrutiny of the RICO Act.

The basic argument underpinning the suits was that chase cards satisfied the three necessary elements of illegal gambling, which include *consideration, chance*, and a *prize* (*Price, Laxer, Kuba, & Fishman v. Pinnacle Brands, Inc.*, 1998, p. 604-605). This was based on the rationale that chase cards took on the characteristics of an illegal lottery. For example in *Schwartz v. Upper Deck Co.*(1997a), it was argued that Upper Deck was in violation of New York gambling laws. However, as the court explained, illegal lotteries are governed by Article 225 of the New York Penal Code. According to section 225.00(10), illegal lotteries feature a gambling scheme where 1) players pay or give something of value for chances, one or more of which will be a winning chance (this constitutes consideration); 2) winning chances are determined by some type of randomness (constituting chance); and 3) holders of the winning chances (or winners) receive something of value (the prize). In the context of trading cards, it was argued in *Price, Laxer, Kuba, & Fishman v. Pinnacle Brands, Inc.* (1998) that the *consideration* portion of illegal gambling was fulfilled because "persons must purchase card packages in order to try to win a valuable chase card" (*Price, Laxer, Kuba, & Fishman v. Pinnacle Brands, Inc.*, p. 604). Next, the *chance* element of marketing chase cards represents illegal gambling because "valuable chase cards are randomly inserted in the packages (p. 605)." And lastly, chase cards represent a *prize* as outlined by the factors of illegal gambling because "chase cards have, and are perceived by class members to have, value, and obtaining a chase card in a package is winning a prize" (p. 605).

Despite the rationale provided above, suits against card companies and leagues have been unsuccessful to this point. The following section provides additional insights into the general arguments given by both the plaintiffs and defendants, and the resulting decisions. Because all of these cases employed the RICO act, several were consolidated and addressed together by the courts, and all have resulted in the same conclusion, the authors have chosen to

review the cases as a group, along with the overall viewpoints, arguments and themes that have emerged.

The plaintiffs sought out expert opinions and acquired the services of experienced and reputable legal counsel. For example in 1999, lawsuit was filed in California by a large class-action firm, Milberg, Weiss, Bershad, Hynes, and Lerach, on behalf of two teenaged card collectors. (*Dumas v. Major League Baseball Properties, Inc.*, 1999; McGregor 1999a, p. A1). Led by Kevin Roddy, opinions from gambling experts were sought out to support their lawsuit. As noted by Roddy, "What is particularly scary to the experts is that, whatever it is that makes certain adults get addicted to gambling, it's four times stronger in kids. They are less able to resist. And it's the only form of gambling available to kids" (McGregor 1999a, p. A1).

One such study saw researchers interview card collectors, who self-selected into card-buying motivational categories of "only buying" and "chasing inserts" groups. The study found that self-identifying insert chasers scored well above average on a "probable pathological gambling" scale, while regular collectors did not (Schaefer & Aasved, 1997).

At first, it seemed as though the lawsuits would be settled out of court. However, a settlement conference with the various sports leagues in September of 1998 collapsed after the leagues felt that Milberg Weiss' settlement demands were too high (McGregor, 1999a). Other opinions were offered as to the lack of consensus surrounding a possible settlement. According to John Coffee, a Columbia University law school professor, the leagues would be likely to resist settling so as not to encourage future lawsuits (McGregor 1999a). As will be shown below, a settlement was unnecessary.

Using the gambling/RICO argument, the plaintiffs moved forward with their suits. In *Schwartz v. Upper Deck Co.* (1997a), it was noted that racketeering includes gambling. In that case, there was no dispute that chase cards in packages produced by Upper Deck contained elements of chance and a prize. However, the plaintiffs failed to allege the element of consideration. As the suit continued, it was determined that Upper Deck's conduct vis-à-vis producing and selling chase cards violated the gambling laws of New York and New Jersey (governed by article 225 of the New York Penal code), and was deemed akin to scratch off lottery tickets purchased in convenience stores (*Schwartz v. Upper Deck Co.*, 1997b).

One reason why chase cards were considered analogous to lottery tickets was because chase cards have a secondary market value easily ascertained through hobby price guides (and easily converted into cash). The United States District Court for the Southern District of California noted that "it takes no more effort to sell them [chase cards] back to a hobby shop than it does to turn

in a winning scratch-off lottery ticket" (*Schwartz v. Upper Deck Co.*, 1997b, p. 413). In other words, "insert chasers" bought unopened packages of cards at a hobby store, opened them up, and immediately sold back the chase cards that they "won" if they happened to obtain one of the rare chase cards in their packages. This was done much in the same way that someone would cash in their winning scratch-off tickets in a convenience store. However, the difference was that scratch-off lotteries were legal. Thus, in *Schwartz*, the plaintiffs tried to show the element of consideration by arguing that a portion of the price of a package of Upper Deck cards was consideration for a chance at receiving chase card in that package. The plaintiffs alleged that it did not matter who was actually pictured on the card (such as a star player); rather, the insert chaser's only concern was the value of the card (the dollar amount it could be cashed in for) (p. 413).

Due to the similar factual allegations and legal arguments described above, the various plaintiffs moved to consolidate their cases (*Dumas v. Major League Baseball Properties, Inc.*, 1999). California was determined to be a suitable site due to the fact that two defendants (Upper Deck and Disney) were California corporations. Thus in June of 2000 a number of case were addressed together (*Dumas v. Fleer/Skybox Int'l, LP*, 2000; *Dumas v. Major League Baseball Properties, Inc.*, 2000; *Dumas v. Pinnacle Brands, Inc.*, 2000; *Dumas v. Racing Champions Corp.*, 2000; *Dumas v. Upper Deck Company Vintage Sports Cards, Inc.*, 2000; *Imber v. Nintendo of Am.*, 2000; *Rodriquez v. Topps Co., Inc.*, 2000; *Schwartz v. Upper Deck Co., 2000; Torres v. Pacific Trading Cards, Inc.*, 2000).

Following consolidation, the plaintiffs attempted to narrow in on §1964 of the RICO Act, arguing that the allegation of unlawful gambling was sufficient to demonstrate standing under §1964. The basis of the argument was that, because there was a property interest in purchasing a package of trading cards, this constituted an economic loss that could be considered an "injury to one's business or property" under §1964. Judge Rudi Brewster agreed that the plaintiff's argument constituted a property interest as defined in state law; however, the plaintiffs failed to show "injury" to their business or property (*Dumas v. Pinnacle Brands, Inc.*, 2000, p.2). Moreover, the court found that, while showing a cause of action for illegal gambling on the part of the defendant, the act of gambling itself was not sufficient to show injury to business or property as defined by the Rico statute (*Dumas v. Pinnacle Brands, Inc.*):

> Plaintiffs must show that they have suffered an economic harm to business or property that would constitute the sort of injury contemplated under § 1964 as, for example, in the case of a fraudulent

> gambling scheme. Here, Plaintiffs allege no fraud or dishonesty with respect to Defendant's gambling activity. Plaintiffs struck a bargain with Defendant and received the benefit of their bargain. They paid for a pack of cards which included a bona fide "chance to win." See *Allard v. Flamingo Hilton* (In re Chomakos), 69 F.3d 769, 770 (6th Cir. 1995). Plaintiffs knew when they made their purchase that they might not draw a "chase card" and that the most they might receive would be a pack of non-chase trading cards. There is no allegation that Defendant has engaged in any sort of fraudulent or dishonest conduct such as misrepresenting to purchasers the odds of winning a chase card. (*Dumas v. Pinnacle Brands, Inc.*, p. 3-4)

As a result, the RICO cause of action was dismissed from each of the pending cases, noting that the plaintiffs "failed to allege even a scintilla of fraudulent conduct by Defendant. Therefore, the Court dismisses the RICO claim without leave to amend" (*Dumas v. Pinnacle Brands, Inc.*, 2000, p. 4). Thus, using the RICO Act did not prove to be a successful means of obtaining damages from manufacturers and licensors in this instance.

IV. CONCLUSION

The recent lawsuits filed concerning the production and consumption of chase cards raises some interesting questions regarding this billion-dollar sector of the sport industry. As evidenced by the decisions described above, the leagues and players' associations certainly have a high degree of control of the marketing and production of products that bear the likenesses and images associated with their respective sports. Thus, the onus must remain upon these organizations, more specifically those within those organizations in charge of decision-making, to carefully examine the manner through which licensing revenues are generated, the types of goods that are produced and distributed, and the potential effects that consuming such products may have on certain groups, especially children. At the very least these organizations should be aware that, should concerns continue to be raised regarding the impact of chase cards purchasing behaviors, other legal alternatives to the RICO act may emerge and prove more successful in future lawsuits.

As described above, the lack of success of the suits against trading card manufacturers, sports leagues, and players' associations, was due to the failure of the plaintiffs to show any injury to business or property as defined by §1964 of the RICO Act (*Dumas v. Pinnacle Brands, Inc.*, 2000). However, it was determined that the sale of chase cards did constitute a form of gambling (*Schwartz v. Upper Deck Co.*, 1997b). Thus, future lawsuits that do not argue

for violations of the RICO Act, but focus on the gambling implications of trading cards, may find more success in the future.

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