

## FAIR OR FOUL: EXAMINING INCOME SHARE AGREEMENTS IN PROFESSIONAL FOOTBALL AND BASEBALL

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*Becoming a professional athlete may be prohibitively expensive for many talented individuals. Athletes often earn very low salaries prior to reaching the highest level in their sport. For example, prior to entering Major League Baseball, players often earn below minimum wage and may stop pursuing their dreams of playing professionally in order to support themselves. Income Share Agreements (“ISAs”) may provide a solution for poor, talented athletes by providing an alternative source of funding.*

*Under an ISA, an individual is given funding up front by an organization in exchange for a percentage of her future income related to her sports career for life. An ISA may also be a lucrative option for an established professional player because it is a guaranteed source of income and offers a sort of insurance in the event she is injured and loses a portion of her professional salary.*

*ISAs are gaining popularity amidst significant controversy. The leading organizations providing funding see it as an investment, albeit a risky one, in a player with potential. A player may see an ISA as a way to obtain a secure source of funding, which is especially important if her professional earnings are not guaranteed. However, some critics of ISAs argue that the agreements take advantage of poor athletes and may be akin to indentured servitude. While that is an extreme view, even more moderate critics are still concerned that ISAs are not true investments, but more of a gamble. Because ISAs seem to be here to stay, there is a need to regulate ISAs to protect both athletes and investors.*

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*This Note explores the use of ISAs in professional baseball and football, and examines the different ISA structures that have gained prominence. Further, this Note discusses why ISAs are attractive to both athletes and investors, and addresses the current regulatory environment. Lastly, this Note argues that even though ISAs carry a potential for abuse, these contracts should still be available to athletes because they offer a substantial benefit and the risks can be mitigated with adequate regulations.*

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## INTRODUCTION

Athletes are increasingly entering into Income Share Agreements (“ISAs”) to secure alternative sources of funding. An ISA is a contract in which an individual “seeking immediate financing obtains funds by pledging a percentage of her future income to investors for a certain number of years.”<sup>1</sup> For example, an athlete may pledge 10% of his future life earnings related to the sport he plays in exchange for \$500,000 at signing. The concept of

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1. Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 VAND. L. REV. 684 (2015).

ISAs is not new,<sup>2</sup> and exists in varying forms, in fields such as education, start-up financing, and, professional sports.<sup>3</sup>

ISAs are still mostly unknown by the general public, and literature addressing their use and the legal and regulatory issues they raise is lacking. Any attention that these contracts have garnered is generally negative, with detractors arguing that the agreements are akin to indentured servitude.<sup>4</sup> Others have derided offerings of shares in future athletes' earnings on a public exchange as a risky gamble, not an investment.<sup>5</sup> One minor league baseball player even filed a lawsuit against an ISA provider, arguing that the deal he had signed was unconscionable.<sup>6</sup> While this lawsuit was ultimately dismissed, it brought attention to the increasing popularity of ISAs in the sports world.<sup>7</sup>

This Note will compare the ISAs used in professional baseball and football in the United States and will show that the differences in ISA structures are a result of the unique circumstances surrounding each sport. Factors such as injury risk, career length, bargaining associations, federal laws, and eligibility requirements create starkly different incentives for players to enter into ISAs.<sup>8</sup> This Note argues that the resulting ISAs reflect distinct differences between the sports. While there may be utility in athletes seeking out ISAs, there are many social policy issues that should be

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2. MILTON FRIEDMAN, *The Role of Government in Education*, ECONOMICS AND THE PUBLIC INTEREST 123, 140 (1955) (proposing the idea of giving individuals a monetary advance in exchange for a fraction of future earnings to finance education).

3. See, e.g., *A Tax Shelter for Students: Yale's Tuition Postponement Option*, 81 YALE L.J. 1392 (1972) (discussing Yale University's Tuition Postponement Option where students borrowed money from the University in exchange for a percentage of the individual's future income earned during the repayment period); *Upstart Income Share Agreement*, UPSTART, [https://www.upstart.com/funding\\_terms](https://www.upstart.com/funding_terms) [https://perma.cc/3XTK-XGC4] (describing the terms of Upstart's income share agreement to fund entrepreneurs through investors); Oei & Ring *supra* note 1, at 714-18 (discussing the emergence of Fantex, Inc., which allows "the public to buy and sell shares that track the brand performance of a professional football player.").

4. Oei & Ring, *supra* note 1, at 714-18.

5. *Fantex: Is Buying Shares in Athletes Risky Business?*, U. PENN: KNOWLEDGE @ WHARTON (Dec. 4, 2013), <http://knowledge.wharton.upenn.edu/article/fantex-buying-shares-athletes-risky-business/> [https://perma.cc/5B68-QM77].

6. The Associated Press, *Indians Prospect Sues Over Deal That Ties Up Future Earnings*, 101SPORTS.COM (Apr. 17, 2018), <https://www.101sports.com/2018/04/17/indians-prospect-sues-over-deal-that-ties-up-future-earnings/> [https://perma.cc/2XQ7-LXDF].

7. *Id.*

8. See, e.g., Kyle Carlson, Joshua Kim, Annamaria Lusardi, & Colin F. Camerer, *Bankruptcy Rates Among NFL Players With Short-Lived Income Spikes*, (Nat'l Bureau of Econ. Research, Working Paper 21085, Apr. 2015); Average playing career length in the National Football League (in years), Statista, <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/> [https://perma.cc/FAM9-75NW].

considered, such as the fairness of these agreements.<sup>9</sup> This Note will argue that because players continue to enter into ISAs, there needs to be appropriate regulation to protect both players and investors.

Part I of this Note provides an introduction to ISAs, covering their history and the basic concept behind them. Included in this section is a discussion of other uses of ISAs, such as the adoption of these contracts in higher education. Part II of this Note delves into the two primary forms of ISAs in the sports world: stock-like ISAs popularized by Fantex, Inc., which are primarily used by football players, and venture capital-like ISAs used by Big League Advance to invest in baseball players.<sup>10</sup> This section provides information on the structure of both companies and the ISAs they offer. It also addresses the different motivations among baseball players and football players to enter into ISAs. Part III addresses social policy issues implicit in ISAs and considers whether ISAs should be eliminated or encouraged. Part IV of this Note provides a brief survey of proposed regulations of ISAs or similar contracts, and provides recommendations on how to best regulate ISAs in order to protect both players and investors. Lastly, this Note concludes by emphasizing the importance of addressing the emergence of ISAs and arguing that ISAs are beneficial and should be encouraged.

## I. HISTORY OF INCOME SHARE AGREEMENTS

Milton Friedman, a prominent twentieth century economist, first proposed ISAs in 1955 as an alternative method of financing higher education.<sup>11</sup> Friedman noted that one could “buy” a share in an individual’s earning prospects by providing an upfront advance in exchange for a fraction of the individual’s future earnings.<sup>12</sup> However, Friedman argued that such agreements had not gained popularity due to the high costs of administering the contracts, the long periods over which the contracts would run, and the “irrational public condemnation” of investing in human beings.<sup>13</sup>

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9. See, e.g., Complaint at 1, *Mejia v. Big League Advance Fund I*, 18 D. Del. 296 (2018) (alleging that the contract which Minor League player, Francisco Mejia, entered into was unconscionable) [hereinafter *Compl. Mejia*]; Oei & Ring, *supra* note 1, at 714-715.

10. See Minor League Player Investment, BIG LEAGUE ADVANCE, <https://bigleagueadvance.com/minor-league-player-investment/> [<https://perma.cc/83PB-KXZL>]; Oei & Ring, *supra* note 1, at 683-84.

11. MILTON FRIEDMAN, *supra* note 2.

12. *Id.*

13. *Id.*

While ISAs come in various forms, they are essentially agreements for present compensation in exchange for some future payoff.<sup>14</sup> When simplified to that level, an ISA seems to resemble a loan. Yale University attempted a form of ISAs in the 1970s, where participating students agreed to pay Yale 0.04% of their future earnings for every thousand dollars they borrowed.<sup>15</sup> Students were required to make payments for 35 years or until each participating graduating class paid off its aggregate debt, whichever came first.<sup>16</sup> Students were frustrated with the program and Yale cancelled it in 1999.<sup>17</sup> Frustrations included the repayment program's long length and the fact that the collective compliance of all participants affected an individual's repayment.<sup>18</sup>

Private companies such as Lumni have created their versions of ISAs to fund students.<sup>19</sup> Lumni manages diversified investment funds in the United States, Chile, Colombia, Mexico, and Peru.<sup>20</sup> The company "receives financing from investors interested in financing students' education."<sup>21</sup> In exchange for upfront funding for their education, students agree to pay Lumni a percentage of their income for a fixed period after graduation.<sup>22</sup>

Using the concept of an ISA, one individual, Mike Merrill, offered stocks in himself which could be bought and traded on his personal stock exchange.<sup>23</sup> Merrill described his system as a "personal decision-making engine modeled after a stock market."<sup>24</sup> Merrill subjected himself to the common experiences of a traded commodity, such as competing shareholder interests and stock price manipulation, as well as to "investors' decisions at the expense of his well-being."<sup>25</sup> Shareholders took an active role in shaping Merrill's life by deciding matters such as "(1) whom Merrill should date, (2) that he must register as a Republican, (3) that he should become a vegetarian, (4) that he should stop sleeping through the

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14. Oei & Ring, *supra* note 1, at 684.

15. *A Tax Shelter for Students: Yale's Tuition Postponement Option*, *supra* note 3; The Associated Press, *Yale to Erase Alumni Debt in 2 Loan Plans*, N.Y. TIMES (Apr. 13, 1999), <https://www.nytimes.com/1999/04/13/nyregion/yale-to-erase-alumni-debts-in-2-loan-plans.html> [<https://perma.cc/F59Y-9EK8>].

16. The Associated Press, *supra* note 6.

17. *Id.*

18. Oei & Ring, *supra* note 1, at 702.

19. Nicole Medeiros, *From Sports Stadiums to the Stock Exchange: The Economic Agency Costs of Fantex's Income Share Agreements with Professional Athletes*, 13 HASTINGS BUS. L. J. 373, 377 (2017) (citing *See About Us*, LUMNI, <http://www.lumni.net/about/> [<https://perma.cc/NWA8-UR9W>]).

20. *Id.*

21. *Id.* at 377.

22. *Id.*

23. Oei & Ring, *supra* note 1, at 699.

24. *Id.*

25. *Id.*

night, and (5) that he should not get a vasectomy.”<sup>26</sup> While it is unlikely that other individuals will subject themselves to this level of manipulation, Merrill stands as an extreme example of the shape that an ISA can potentially take on. Merrill shows the amount of control and manipulation that can be handed over in an ISA, but that has not stopped this contract from gaining popularity in the sports world.

## II. ISAS IN PROFESSIONAL BASEBALL AND FOOTBALL

Baseball players and football players have different reasons for entering into ISAs due to factors unique to each sport, such as injury risk, career length, bargaining associations, federal laws, and eligibility requirements. The resulting ISAs that are available to the players are structured to reflect the differences between the sports.

There are two primary forms of ISAs in the sports world: stock-like ISAs popularized by Fantex, Inc., which are primarily used by football players,<sup>27</sup> and venture capital-like ISAs, used by Big League Advance to invest in baseball players.<sup>28</sup> Fantex combines fantasy football with the stock market by allowing the public to buy and sell shares that track the brand performance of a professional football player.<sup>29</sup> Big League Advance’s ISAs are exclusively between the athlete and the company – avoiding the stock market component of Fantex ISAs.<sup>30</sup> While the concept behind ISAs is the same for both companies – money paid upfront in exchange for a percentage of future revenue – Fantex and Big League Advance have come up with distinctly different ISA structures. The different structures are arguably due to the differing types of contracts in the football and baseball industries, which in turn result in varying incentives for players to enter into ISAs.

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26. *Id.*

27. *Id.* at 683.

28. See Minor League Player Investment, BIG LEAGUE ADVANCE, <https://bigleagueadvance.com/minor-league-player-investment/> [https://perma.cc/4BD8-MX86] (last visited Nov. 12, 2019).

29. Oei & Ring, *supra* note 1, at 683.

30. See *Minor League Player Investment*, *supra* note 28.

### A. *Professional Football: Contracts and Incentives to Enter into ISAs*

#### 1. Making it to the NFL

Before playing football at the highest level – the NFL – players must be three years removed from high school graduation.<sup>31</sup> Because there is no minor league in football, most players choose to play football in college for three years in order to further develop their skills.<sup>32</sup> The National Collegiate Athlete Association (NCAA), which regulates athletes in over 1,100 higher education institutions,<sup>33</sup> prohibits college athletes from accepting any form of payment before signing a contract in the NFL.<sup>34</sup> Once eligible, players can then opt to register for the NFL Draft.<sup>35</sup> NFL teams then select players and enter into agreements.<sup>36</sup> Out of the 16,236 players eligible for the 2017 NFL Draft, only 253 were selected for the NFL.<sup>37</sup> Because the NCAA controls football players until the Draft, players only have the opportunity to enter into ISAs after entering the professional league.<sup>38</sup>

#### 2. Structure of NFL Contracts

At first glance, NFL contracts seem to offer most players large sums of money to play on a team. However, the majority of NFL contracts include significant amounts of money that *might* be paid out, but a much smaller percentage of *guaranteed* payments.<sup>39</sup> For example, NFL player Donovan McNabb signed a five-year contract extension theoretically worth \$78 million, but he was only

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31. *The Rules of the Draft*, NFL, <https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/> [https://perma.cc/KAL6-JTT8] (last visited Oct. 11, 2019).

32. *See id.*; *see also Estimated Probability of Competing in Professional Athletics*, NCAA, <http://www.ncaa.org/about/resources/research/estimated-probability-competing-professional-athletics> [https://perma.cc/M7WZ-CBJ6] (stating that 256 athletes were drafted in the 2018 NFL draft and 255 athletes attended NCAA schools).

33. *What is the NCAA?*, NCAA, <http://www.ncaa.org/about/resources/media-center/ncaa-101/what-ncaa> [https://perma.cc/E392-9PTY] (last visited Oct. 11, 2019).

34. NCAA, SUMMARY OF NCAA REGULATIONS – NCAA DIVISION I 2 (2011-12).

35. *The Rules of the Draft*, NFL, <https://operations.nfl.com/the-players/the-nfl-draft/the-rules-of-the-draft/> [https://perma.cc/KAL6-JTT8] (last visited Oct. 11, 2019).

36. *Id.*

37. NCAA, *supra* note 32.

38. *See* NCAA, *supra* note 32; NFL, *supra* note 31.

39. Dom Cosentino, *Why Only the NFL Doesn't Guarantee Contracts*, DEADSPIN (Aug. 1, 2017, 11:38 AM), <https://deadspin.com/why-only-the-nfl-doesn-t-guarantee-contracts-1797020799> [https://perma.cc/L49U-ZHRF].

guaranteed to earn \$3.5 million in the first season.<sup>40</sup> In 2013, Darrelle Revis signed a massive six-year \$96 million deal to join the Tampa Bay Buccaneers.<sup>41</sup> However, not a single dollar of the contract was guaranteed.<sup>42</sup> After playing one year with the team and earning \$16 million, Tampa Bay released Revis, who wound up signing a new contract with another team eleven months after signing his six-year deal.<sup>43</sup> One major outlier is Kirk Cousins, who signed a three-year, \$84 million, and fully-guaranteed contract in 2018.<sup>44</sup> At the time, securing a fully guaranteed contract in the NFL was “unprecedented”<sup>45</sup> even though NFL rules do not require any portion of a player’s contract to be non-guaranteed.<sup>46</sup>

NFL contracts are governed by the NFL Collective Bargaining Agreement, which reflects negotiations by NFL teams and NFL players. The 2015 Collective Bargaining Agreement states that, “each player will be paid at the rate of 100% of his salary . . . over the course of the regular season . . . (emphasis added).”<sup>47</sup> Therefore, the text of the Collective Bargaining Agreement seems to assume that players will enter into fully guaranteed contracts. The NFL has a specific contract that must be used for all agreements between teams and players.<sup>48</sup> However, this contract may be amended extensively,<sup>49</sup> and it is in these independently negotiated provisions where contracts move from guaranteed to non-guaranteed.<sup>50</sup>

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40. J.S., *How NFL Contracts Give Players so Little Power*, THE ECONOMIST (Oct. 9, 2018) <https://www.economist.com/the-economist-explains/2018/10/09/how-nfl-contracts-give-players-so-little-power> [<https://perma.cc/2VQ3-87FR>].

41. Pat Yasinkas, *Breaking Down Darrelle Revis’ Contract*, ESPN (Apr. 24, 2013), [http://www.espn.com/blog/nflnation/post/\\_id/75975/breaking-down-darrelle-revis-contract](http://www.espn.com/blog/nflnation/post/_id/75975/breaking-down-darrelle-revis-contract) [<https://perma.cc/U2LD-VPXH>].

42. *Id.*

43. Gregg Rosenthal, *Darrelle Revis, New England Patriots Strike Deal*, NFL.COM (Mar. 17, 2014, 1:38 PM), <http://www.nfl.com/news/story/0ap200000333649/article/darrelle-revis-new-england-patriots-strike-contract> [<https://perma.cc/4F3T-39J9>].

44. Courtney Connley, *Why Kirk Cousins Turned Down \$90 Million from the Jets to Join the Vikings*, CNBC: MAKE IT (Oct. 19, 2018, 5:13 PM), <https://www.cnbc.com/2018/08/30/-kirk-cousins-turned-down-90-million-from-the-jets-to-join-the-vikings.html> [<https://perma.cc/7LYQ-RU5X>].

45. Adam Stites, *Kirk Cousins’ Fully Guaranteed Deal Could Set a Standard for Years to Come*, SBNATION (Mar. 15, 2018, 3:13 PM), <https://www.sbnation.com/2018/3/13/17114902/kirk-cousins-guaranteed-contract-nfl-free-agency-aaron-rogers-matt-ryan> [<https://perma.cc/J2ZA-4KL2>].

46. See Collective Bargaining Agreement Between the National Football League & the National Football League Players Association Art. 26 § 5 (2011) (amended Jan. 2015).

47. *Id.*

48. *Id.* Art. 4 § 1.

49. *Id.* Art. 4 §§ 3, 4.

50. Chris Deubert & Glenn M. Wong, *Understanding the Evolution of Signing Bonuses and Guaranteed Money in the National Football League: Preparing for the 2011 Collective Bargaining Negotiations*, 166 UCLA ENT. L. REV. 180, 190-97 (2009) (discussing negotiated compensation).

Generally, there are far fewer guaranteed contracts in the NFL as compared to contracts in other professional sports, including the MLB, the National Basketball Association (“NBA”), and the National Hockey League (“NHL”).<sup>51</sup> Since NFL players have traditionally received significantly less than the value of their contracts, ISAs are becoming a popular option to secure money upfront.

The NFL uses various payment provisions to entice players, such as signing bonuses and performance incentives, but these may or may not be guaranteed. One of the most common provisions for guaranteed money in the NFL comes in the form of a signing bonus, where players are promised an amount when joining a football team.<sup>52</sup> NFL contracts may also include option bonuses, which allow a team to choose to extend the player’s contract for an additional time period and, in return, the player receives additional guaranteed money.<sup>53</sup> Other incentive provisions are “within the sole control of the player,” and include actions like reporting to the team on time and participating in off-season workouts.<sup>54</sup> The last primary type of payment provision in NFL contracts is based on predetermined amounts earned for participating in a number of post-season games, and on individual playing time.<sup>55</sup> Therefore, when an NFL player is not given guaranteed money, the true value of a particular contract depends on many factors, such as the player’s performance or the organization’s decision to keep the player.<sup>56</sup> Given the number of conditional provisions in NFL contracts, an NFL player might face significant financial uncertainty. This uncertainty may act as motivation for NFL players to enter into an ISA.

### 3. Additional Incentives to Enter into ISAs

However, money is not the only reason that NFL players choose to enter into ISAs. One Fantex-affiliated NFL player, Vernon Davis, noted that while receiving money was a major benefit of his contract with Fantex, the primary purpose was to help him build his own brand as a player.<sup>57</sup> Because a player’s income

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51. *Id.* at 195.

52. *Id.* at 194.

53. *Id.* at 196.

54. *Id.* at 197-98.

55. *Id.* at 199-200.

56. *See id.*

57. William Alden, *Vernon Davis Breaks Silence Over Fantex I.P.O.*, NY TIMES (June 14, 2014, 1:12 PM), [https://dealbook.nytimes.com/2014/06/04/vernon-davis-breaks-his-silence-over-fantex-i-p-o/?\\_r=0](https://dealbook.nytimes.com/2014/06/04/vernon-davis-breaks-his-silence-over-fantex-i-p-o/?_r=0) [<https://perma.cc/LK3F-NY95>].

may depend on a team's decision to keep him,<sup>58</sup> and 15% of NFL players are bankrupt within 12 years of retiring,<sup>59</sup> building a brand may be crucial for long-term financial security. Fantex assigns a brand liaison to each affiliated player to help "extend the reach of their brands across multiple marketing mediums, including broadcast, print, digital, live events and social."<sup>60</sup> Since many NFL salaries ultimately depend on the decisions of the team owners,<sup>61</sup> developing a brand may give individual players more control over their future earnings.

Along with the uncertain nature of NFL contracts, players may also be motivated to receive guaranteed money through an ISA because of the unpredictability of a career in the NFL.<sup>62</sup> When thinking about the average NFL career and salary, the average person might expect that players have success similar to Peyton Manning, an NFL quarterback who played in the league for 18 years and retired with \$400 million in career earnings.<sup>63</sup> However, the reality is that the average career length for an NFL player is 3.3 years<sup>64</sup> and the average earnings across all players is \$3.2 million.<sup>65</sup> The striking difference between Manning's career earnings and the average NFL player's seems like an obvious incentive for a player to enter into an ISA, but it begs the question – why do companies engage in ISAs with professional athletes? Given the susceptibility of football players to injury, and thereby the varying career lengths, some financial analysts are highly skeptical of Fantex stocks and are hesitant to even call them investments, but instead "a risky bet."<sup>66</sup>

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58. See Deubert & Wong, *supra* note 50, at 196.

59. Kyle Carlson, Joshua Kim, Annamaria Lusardi, & Colin F. Camerer, *Bankruptcy Rates Among NFL Players With Short-Lived Income Spikes* 8, (Nat'l Bureau of Econ. Research, Working Paper 21085, 2015).

60. Medeiros, *supra* note 19, at 382 (quoting FANTEX, INC., ANNUAL REPORT (Form 10-K) 8 (Dec. 31, 2015)).

61. See Deubert & Wong, *supra* note 50, at 196.

62. Compare Kurt Badenhausen, *Peyton Manning Retires with Record \$400 Million In Career Earnings*, FORBES (Mar. 7, 2016, 11:01 AM), <https://www.forbes.com/sites/kurtbadenhausen/2016/03/07/peyton-manning-retires-with-record-400-million-in-career-earnings/#75f4fe5e488f> [https://perma.cc/CFA4-38YB] (describing one NFL player's career length of 18 years) with Christina Gough, *Average Playing Career Length in the National Football League (in years)*, STATISTA (Sept. 10, 2019), <https://www.statista.com/statistics/240102/average-player-career-length-in-the-national-football-league/> [https://perma.cc/TN73-4UDJ] (showing that the average NFL player's career length is 3.3 years).

63. Badenhausen, *supra* note 62.

64. Gough, *supra* note 62.

65. Carlson, Kim, Lusardi, & Camerer, *supra* note 59, at 5.

66. Medeiros, *supra* note 19, at 375.

#### 4. Fantex's ISA Structure

Since incorporating in 2012, Fantex has had twenty athletes on their roster, half of whom are NFL players.<sup>67</sup> Fantex has secured minority interests in the future income of those athletes through ISAs and launched public offerings of stocks tied to each individual's "brand" contract.<sup>68</sup>

While individual player performance is important, Fantex is concerned with many additional factors. Before offering an ISA, Fantex conducts an in-depth analysis of the prospective athlete's brand. Fantex believes this analysis involves "a complex set of associations people make with respect to an individual, including performance, appearance, history and personal story, products or services they are associated with, public statements or positions on matters of public concern, and how an individual acts or the image they project to the world."<sup>69</sup> Any player's professional future is uncertain, but key indicators, such as the player's position and draft pick, may predict longer careers and salaries.<sup>70</sup> Fantex assesses the prospective athlete's brand by analyzing the player's performance metrics, as well as his reputation and character through background checks and personal references.<sup>71</sup> A holistic assessment of a prospective athlete and their future career is essential because, as part of the ISA agreement, Fantex is entitled not only to the athlete's salary, but also to income *related* to his career, such as endorsement contracts and media appearances.<sup>72</sup>

As part of the agreements, Fantex may also opt to co-invest with an athlete on new ventures. For example, when NFL player Vernon Davis decided to purchase Jamba Juice franchises, Fantex chose to co-invest in those franchises with him.<sup>73</sup> Therefore, when a new business opportunity arises for a Fantex-affiliated athlete, Fantex may also gain an additional investment opportunity.<sup>74</sup>

An examination of the deals that Fantex negotiated with various athletes and the result of those deals highlight the risks

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67. *Fantex, Inc. Announces Completion of \$59.3M Offering of Fantex Professional Sports Portfolio I Units*, BUSINESS WIRE (July 25, 2016, 11:22 AM), <https://www.businesswire.com/news/home/20160725005917/en/Fantex-Announces-Completion-59.3M-Offering-Fantex-Sports> [<https://perma.cc/Z2YQ-7LZD>].

68. Medeiros, *supra* note 19, at 374.

69. *Id.* at 379 (citing FANTEX, INC., ANNUAL REPORT (Form 10-K) 6 (Dec. 31, 2015)).

70. Gough, *supra* note 62 (showing that first-round NFL draft picks have an average career of 9.3 years as compared to the average NFL career of 3.3 years. Further, quarterbacks have an average career of 4.44 years, while running backs have a significantly lower career average of 2.57 years).

71. Medeiros, *supra* note 19, at 379.

72. *Id.*

73. *Id.* at 380.

74. *Id.* at 380-81.

and rewards for athletes and investors alike. Fantex's first signing in 2013 was Arian Foster, a star running back for the Houston Texans.<sup>75</sup> Fantex purchased 20% of his future income for \$10 million, meaning that Fantex's valuation of Foster's future earnings was \$50 million.<sup>76</sup> Prior to Fantex's investment, Foster earned \$19.3 million over his four-year career.<sup>77</sup> After signing with Fantex, Foster suffered a string of injuries that diminished his effectiveness and shortened his career.<sup>78</sup> Foster made \$18.44 million over the last three and a half seasons of his career,<sup>79</sup> far short of Fantex's projections. Fantex terminated their agreement with Foster in 2015 without ever taking his stock public.<sup>80</sup> Including Foster, six Fantex NFL players have grossly underperformed their projected valuations for several reasons.<sup>81</sup> For example, quarterback EJ Manuel and offensive lineman Jack Mewhort never developed into effective players and were out of the league without ever signing a contract after their rookie deals.<sup>82</sup> Wide receiver Kendall Wright has struggled on the field, and Fantex even had to sue Wright for money owed under the contract after he refused to pay out the allotted percentage.<sup>83</sup> Linebacker Ryan Shazier was one of the rising talents in football before he

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75. Eric Chemi & Jessica Golden, *Fantex Pulls IPO for Arian Foster. What's next?*, CNBC: THE BIG CRUNCH (Nov. 23, 2015, 4:58 PM), <https://www.cnbc.com/2015/11/23/fantex-pulls-ipo-whats-next.html> [<https://perma.cc/6RMP-93BL>].

76. *Id.*

77. *Arian Foster*, SPOTRAC, <https://www.spotrac.com/nfl/miami-dolphins/arian-foster-7982/cash-earnings/> [<https://perma.cc/K6J4-N47F>] (last visited Oct. 10, 2019).

78. *Dolphins RB Arian Foster Announces Retirement After Latest Injury*, SPORTS ILLUSTRATED (Oct. 24, 2016), <https://www.si.com/nfl/2016/10/24/arian-foster-retirement-announcement-miami-dolphins-injury> [<https://perma.cc/6VMV-AWA8>].

79. SPOTRAC, *supra* note 77.

80. Myles Udland, *Arian Foster isn't Going Public Anymore*, BUSINESS INSIDER (Nov. 18, 4:04 PM), <https://www.businessinsider.com/fantex-pulls-ipo-2015-11> [<https://www.businessinsider.com/fantex-pulls-ipo-2015-11>] (last visited Oct. 10, 2019).

81. *Jack Mewhort*, SPOTRAC, <https://www.spotrac.com/nfl/indianapolis-colts/jack-mewhort-14469/cash-earnings/> [<https://perma.cc/AAG3-2SMQ>] (last visited Oct. 10, 2019); *Kendall Wright*, SPOTRAC, <https://www.spotrac.com/nfl/arizona-cardinals/kendall-wright-9830/cash-earnings/> [<https://perma.cc/DVH4-L83V>] (last visited Oct. 10, 2019); *Ryan Shazier*, SPOTRAC, <https://www.spotrac.com/nfl/pittsburgh-steelers/ryan-shazier-14424/cash-earnings/> [<https://perma.cc/QX4D-YEG9>] (last visited Oct. 10, 2019); *Terrance Williams*, SPOTRAC, <https://www.spotrac.com/nfl/dallas-cowboys/terrance-williams-12355/cash-earnings/> [<https://perma.cc/7572-GBHG>] (last visited Oct. 10, 2019).

82. *EJ Manuel*, SPOTRAC, <https://www.spotrac.com/nfl/oakland-raiders/e.j.-manuel-12296/cash-earnings/> [<https://perma.cc/8D2P-33JK>] (last visited Oct. 10, 2019); *Jack Mewhort*, SPOTRAC, <https://www.spotrac.com/nfl/indianapolis-colts/jack-mewhort-14469/cash-earnings/> [<https://perma.cc/AAG3-2SMQ>] (last visited Oct. 10, 2019).

83. Tim Daniels, *Kendall Wright Ordered to Pay Nearly \$400,000 in Fantex Suit*, BLEACHERREPORT (Aug. 18, 2018), <https://bleacherreport.com/articles/2791557-kendall-wright-ordered-to-pay-nearly-400000-in-fantex-suit> [<https://perma.cc/6HDY-7ET6>] (adding insult to injury, Wright had to pay for Fantex's attorneys' fees).

suffered a devastating spinal injury in 2017 that is almost certainly career ending.<sup>84</sup>

However, Fantex has some success stories with other NFL players like Vernon Davis.<sup>85</sup> Before signing with Fantex, Davis had already earned more than \$44 million in his seven-year career.<sup>86</sup> Fantex paid \$4 million for 10% of Davis' future earnings and those of the marketing company he owned.<sup>87</sup> Since signing with Fantex, Davis has earned \$29.6 million and is under contract for another two years, with the potential to add another \$10 million.<sup>88</sup> Therefore, Davis has lived up to Fantex's valuation for him. Falcons wide receiver, Mohamed Sanu, has already exceeded Fantex's projections. Sanu was given \$1.56 million in exchange for 10% of his future earnings.<sup>89</sup> Since signing with Fantex, Sanu has already earned \$21.6 million (well above his valuation of \$15.6 million) and is set to earn at least another \$12.75 million in the next two years alone.<sup>90</sup>

Some NFL players, like Foster and Shazier, had shortened careers plagued by injuries, and got the better end of their deals with Fantex. Others, like Sanu, are exceeding their projected valuations, and show why companies like Fantex are willing to engage in risky ISAs in the first place.

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84. Jeanna Thomas, *Ryan Shazier Injury: What Happened to the Steelers LB and How's His Recovery Going*, SBNATION (Jan. 17, 2019, 3:49 PM), <https://www.sbnation.com/2018/1/14/16883184/ryan-shazier-injury-news-recovery-steelers> [<https://perma.cc/K96J-J4HJ>].

85. Press Release, Fantex, Inc., *Vernon Davis Inks Brand Contract with Fantex, Inc.* (2013) (available at [https://fantex.com/downloads/Vernon\\_Davis\\_Inks\\_Brand\\_Contract\\_with\\_Fantex.pdf](https://fantex.com/downloads/Vernon_Davis_Inks_Brand_Contract_with_Fantex.pdf) [<https://perma.cc/LUL7-EJ2G>]).

86. *Vernon Davis*, SPOTRAC, <https://www.spotrac.com/nfl/washington-redskins/vernon-davis-3356/cash-earnings/> [<https://perma.cc/L9UM-YCHA>] (last visited Oct. 10, 2019).

87. Press Release, Fantex, Inc., *supra* note 85.

88. *Davis*, *supra* note 86.

89. Ken Belson, *Want a Piece of Mohamed Sanu? Go Out and Buy Some Shares*, WALL ST. J. (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/sports/football/julio-jones-atlanta-falcons-mohamed-sanu.html> [<https://perma.cc/2SDF-J66W>].

90. *Mohamed Sanu*, SPOTRAC, <https://www.spotrac.com/nfl/atlanta-falcons/mohamed-sanu-9893/cash-earnings/> [<https://perma.cc/ZVL8-JVY6>] (last visited Oct. 10, 2019).

B. *Professional Baseball: Contracts and Incentives to Enter into in ISAs*

1. Making it to the MLB

Unlike NFL players, baseball players are often induced into ISAs even before their professional careers begin.<sup>91</sup> Prior to becoming a professional baseball player, almost every prospective player plays in Minor League Baseball (“MiLB”).<sup>92</sup> MiLB career lengths vary from player to player, and individuals may toil for years in the MiLB and never reach the pros.<sup>93</sup> During that time, minor league players earn far less than minimum wage.<sup>94</sup> In 2014, two collective action suits were filed against the Office of the Commissioner of Baseball alleging that players were often required to work 50 to 70 hours per week during the regular season and were also required to participate in mandatory, unpaid, off-season workouts, but were only paid a maximum of \$16,000 per year.<sup>95</sup> Seemingly in response to these lawsuits, President Donald Trump recently signed the Save America’s Pastime Act, which reclassifies minor league players as seasonal employees.<sup>96</sup> As a result, teams are only required to pay players for regular season games, but not for hours spent in mandatory trainings, workouts, and team appearances.<sup>97</sup> Under the Save America’s Pastime Act, minor league baseball players are exempt from the minimum wage requirements of the Fair Labor Standards Act (FLSA) and may struggle to make ends meet.<sup>98</sup>

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91. See *infra*, Section II, part B.

92. David M. Szuchman, *Step Up to the Bargaining Table: A Call for the Unionization of Minor League Baseball*, 14 HOFSTRA LABOR & EMP. L. J., 265, 280 (1996).

93. *Id.* at 284 (stating that only one of ten players eventually make it to the major leagues, and out of those, only one in fifty lasts more than six years).

94. Nathaniel Grow, *The Save America’s Pastime Act: Special-Interest Legislation Epitomized*, 90 UNIV. OF COLO. L. REV. 1013, 1017 (2019).

95. *Id.* at 1017.

96. *Id.* at 1015.

97. Joel Mendelson, *Major League Wage Theft: How Baseball Owners and Congress Exploit Minor League Players*, JOBS WITH JUSTICE, <http://www.jwj.org/major-league-wage-theft-how-baseball-owners-and-congress-exploit-minor-league-players> [<https://perma.cc/2H2S-WJUH>].

98. Grow, *supra* note 94, at 1014-15.

## 2. Minor League Contracts

Unlike their MLB counterparts, MiLB players are not represented by the MLB Players' Association,<sup>99</sup> which is the collective bargaining representative for all MLB players.<sup>100</sup> MiLB players are also not governed by the MLB Collective Bargaining Agreement,<sup>101</sup> which is a contract between the Players' Association and Major League Baseball that sets forth the terms of employment for professional players.<sup>102</sup> As a result, MiLB players have little bargaining power.<sup>103</sup> MiLB players are instead subject to The Minor League Uniform Player Contract, which sets forth the terms of MiLB players' employment and cannot be altered or negotiated.<sup>104</sup> When signing the Minor League Uniform Player Contract, players give up important freedoms, such as the right to earn money from "trading cards, photographs, movies, radio, television, commercials and sponsorships," without MiLB's authorization.<sup>105</sup>

Because minor league players have low wages, are not protected by federal law, and have little bargaining power over the terms of their employment, these players are especially in need of a secure source of income.

## 3. Big League Advance

Understanding the critical need for income in the minor leagues, former baseball player, Michael Schwimer, developed Big League Advance.<sup>106</sup> He wanted to give talented minor league baseball players a secure source of revenue to "help make their dreams a reality."<sup>107</sup> Big League Advance describes itself as an investment fund, where players "receive capital – not loans – and a player keeps the funds whether or not he ever makes it to the Major

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99. Nicholas Zych, *Collection and Ownership of Minor League Athlete Activity Biometric Data by Major League Baseball Franchises*, 14 DEPAUL J. OF SPORTS L. 129, 132 (2018).

100. MAJOR LEAGUE BASEBALL PLAYERS, <https://www.mlbplayers.com/about> [https://perma.cc/LY6G-9HHM].

101. Zych, *supra* note 99, at 132.

102. 2017 – 2021 Basic Agreement, Major League Baseball Collective Bargaining Agreement, [dol.gov/OLMS/regs/compliance/cba/2019/private/30MajorClubs\\_k9831\\_060122.pdf](https://www.dol.gov/OLMS/regs/compliance/cba/2019/private/30MajorClubs_k9831_060122.pdf) [https://perma.cc/JH3K-BHBK] (last visited Nov. 20, 2019).

103. Zych, *supra* note 99.

104. Szuchman, *supra* note 92, at 281.

105. *Id.* at 283.

106. Minor League Player Investment, BIG LEAGUE ADVANCE, <https://bigleagueadvance.com/minor-league-player-investment/> [https://perma.cc/RKE3-P4KV].

107. *Id.*

Leagues.”<sup>108</sup> In exchange, the player will give Big League Advance an agreed-upon percentage of his future Major League earnings.<sup>109</sup> Big League Advance makes its investment decisions based on a combination of analytics and the player’s background.<sup>110</sup> Players choose what percentage of their future career earnings they want to give Big League Advance.<sup>111</sup> Per the company’s website,

“Big League Advance may offer a player \$50,000 for every 1% of his future professional earnings. If a player wanted to sign a deal for 5%, he would receive \$250,000, or if he wanted to sign a deal for 10%, he would receive \$500,000. While our offer amounts are non-negotiable, the percentage the player would like to give up is up to the player.”<sup>112</sup>

Big League Advance acknowledges the high risk involved with their ISAs, and states that they expect to lose money “on the vast majority of players [they] sign.”<sup>113</sup> Unlike Fantex’s process, which involves football players already in the pros, Big League Advance takes a chance on minor league players who may never sign a professional contract or enter the major leagues. It is no surprise that ISAs are enticing to both minor league baseball players and football players, because baseball players are in a vulnerable bargaining position, and football players do not have guaranteed contracts.

### III. SHOULD ISAS EXIST?

ISAs undoubtedly provide athletes with a benefit by offering a secure source of income. However, the monetization of future human capital should and does raise some concerns due to the potential for abuse, including the reduction of personal autonomy and predatory behaviors by corporations.<sup>114</sup> On the side of investors, the main concern involves moral hazards.<sup>115</sup>

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *See infra*, Section III, part A.

115. *See infra*, Section III, part B.

### A. *Risks to Players*

At one extreme, some ISA critics are concerned that ISAs resemble indentured servitude:<sup>116</sup> “Even though ISAs obviously do not create direct property rights in humans, the worry is that they might approximate such property rights via financial contract.”<sup>117</sup> However, there are clear differences between ISAs and indentured servitude—importantly, ISAs do not make an individual someone else’s property and do not force funding recipients to work for funding providers.<sup>118</sup> Some commentators against ISAs are more concerned with the specific individuals involved, and argue that ISAs create “unacceptable ownership stakes in the young at the outset of their careers.”<sup>119</sup> Other arguments are that ISAs may raise consumer protection issues particularly among young and poor people, who may be at a disadvantage when entering into those agreements.<sup>120</sup> However, ISAs are heterogeneous, and therefore, not all agreements should raise the same policy concerns.<sup>121</sup> “Ultimately, whether a given agreement is desirable or problematic will depend in part on the economic terms of that particular contract, the circumstances surrounding its creation, and the relationship between the contracting parties.”<sup>122</sup>

ISAs are problematic in MiLB contracts because most players are at a disadvantage in negotiations due to a lack of bargaining power and insufficient pay.<sup>123</sup> ISAs involving foreign players should be examined with particular caution. While most minor league players face similar money shortages and have heightened incentives to enter into ISAs, the pressure is even higher for foreign players.

Historically, MLB teams have profited by signing Caribbean-born players under very cheap contracts.<sup>124</sup> Unlike American baseball players, foreign players are exempt from having to enter the First Year Draft.<sup>125</sup> As a result, there are few restrictions on how players are recruited and signed.<sup>126</sup> The lack of oversight and regulation of foreign recruitment has led to the emergence of

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116. Oei & Ring, *supra* note 1, at 714.

117. *Id.*

118. *Id.* at 716.

119. *Id.* at 708.

120. *Id.*

121. *Id.* at 709.

122. *Id.*

123. *See supra*, Section III, part B.

124. Oei & Ring, *supra* note 1, at 700.

125. *Id.*

126. *Id.*

“buscones,” which are talent scouts.<sup>127</sup> Buscones help MiLB players bargain with MLB teams in exchange for a significant portion of the player’s signing bonus.<sup>128</sup> While the rise of buscones has helped increase signing bonuses for players, it has also led to heightened abuse.<sup>129</sup>

In 2010, the MLB conducted an investigation into the Dominican Summer League, where a large portion of professional players are recruited, due to a high rate of positive drug tests among players.<sup>130</sup> A majority of Caribbean-born players come from extreme poverty, making them particularly vulnerable to predatory behavior.<sup>131</sup> Buscones have been known to take advantage of desperate prospects by inducing them to take performance enhancing drugs, lie about their age and identity, and ultimately put an early halt to their careers.<sup>132</sup>

Individuals with limited current options but some future potential may have no choice but to promise a cut of their future earnings in order to improve their chances of securing that successful future. But monetization of future human capital may lead to exploitation, given power imbalances and information asymmetries. The question, then, is how the benefits of ISAs should be weighed against their potential risks.<sup>133</sup>

As Oei and Ring have noted, the emergence of buscones in amateur baseball may hold a cautionary tale for ISAs.<sup>134</sup> Like buscones, ISA lending companies provide a benefit to talented, but often poor, athletes that they would not otherwise have. However, this benefit leaves room for potential abuse and exploitation.

In an ideal world, parties would enter into ISAs with similar bargaining power and sufficient knowledge about the contract provisions to make informed decisions. Unfortunately, that is not

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127. Michael S. Schmidt, *Baseball Emissary to Review Troubled Dominican Pipeline*, NY TIMES, (Mar. 10, 2010), [https://www.nytimes.com/2010/03/11/sports/baseball/11dominican.html?\\_r=0](https://www.nytimes.com/2010/03/11/sports/baseball/11dominican.html?_r=0) [https://perma.cc/8ELQ-9MSK].

128. *Id.*

129. *Id.*

130. *Id.*

131. Mister Lizzie, *Big League Advance “Invests” in Prospects. Some Find that Problematic*, DRAYSBAY (Sep. 3, 2018), <https://www.draysbay.com/2018/9/3/17814788/big-league-advance-invests-in-prospects-some-find-that-problematic> [https://perma.cc/95CG-TXDE].

132. Rob Ruck, *Baseball’s Recruitment Abuses*, AMERICAS Q. (Summer, 2011) <https://www.americasquarterly.org/node/2745> [https://perma.cc/P4JM-ZHJR].

133. Oei & Ring, *supra* note 1, at 701.

134. *Id.*

always the case. MiLB player Francisco Mejia claimed that he was taken advantage of when he agreed to enter into an ISA with Big League Advance in 2016.<sup>135</sup> Mejia sued the company, claiming that the three contracts he entered into were unconscionable.<sup>136</sup> Mejia is a native Dominican who only speaks Spanish and has the equivalent of a 9th grade education.<sup>137</sup> According to the court filings from Mejia's law suit, Big League Advance signed Mejia to two contracts on September 21 and November 10, 2016.<sup>138</sup> Mejia signed both of those agreements without the benefit of an interpreter.<sup>139</sup> On December 20, 2016, Mejia signed a third contract, which ultimately led to the sale of 10 percent of his future earnings in exchange for \$360,000.<sup>140</sup> Mejia continued to sign these contracts due to ongoing and increasing medical costs for his severely-ill mother.<sup>141</sup> His story is illustrative of the unequal bargaining power of players and the investment companies.

The portrayal of Big League Advance and ISAs in these allegations paints a sinister picture: sophisticated, venture capital-backed investors pay relatively little to a young, less-educated, and desperate athlete in exchange for a huge chunk of that player's future salary. Some critics of ISAs see companies like Fantex as loan sharks that prey on poor players.<sup>142</sup> There appears to be a substantial imbalance in bargaining power, something pointed out in the complaint against Big League Advance.<sup>143</sup> Mejia ultimately dropped the lawsuit several months after filing it, and will pay out 10% of his earnings as contracted.<sup>144</sup> While that case is no longer pending, it does raise ethical questions over whether these kinds of contracts should be allowed. Some argue that the problem lies with organizations like MLB, not companies like Big League Advance.<sup>145</sup> As long as lending companies behave responsibly, the focus should be on MLB paying minor league players reasonable wages so that players do not have to enter into ISAs out of desperation.<sup>146</sup>

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135. Compl. Mejia, *supra* note 9, at 1.

136. *Id.*

137. *Id.* at 33.

138. *Id.* at 44.

139. *Id.* at 5.

140. *Id.*

141. *Id.* at 44.

142. Mister Lizzie, *supra* note 131, at 117.

143. See Compl. Mejia, *supra* note 9, at 5, 6.

144. Jerry Crasnick, *Padres Catcher Francisco Mejia Drops Lawsuit Over Earnings Cut*, ESPN (Aug. 30, 2018), [http://www.espn.com/mlb/story/\\_/id/24523401/padres-catcher-francisco-mejia-drops-lawsuit-disputed-payment](http://www.espn.com/mlb/story/_/id/24523401/padres-catcher-francisco-mejia-drops-lawsuit-disputed-payment) [https://perma.cc/F9D8-PLPC].

145. Mister Lizzie, *supra* note 131, at 117.

146. *Id.*

### B. Risks to Investors

The risks to companies like Fantex and Big League Advance are less obvious than those shouldered by the players, but are still significant.<sup>147</sup> A “principal-agent” problem may arise between ISA companies and players.<sup>148</sup> “The principal-agent problem stems from the differences between the motivations and interests of the parties and the accompanying asymmetries of information and control.”<sup>149</sup> If the interests between the two parties diverge, the agent – in this case, the athlete – who has more information and control over his actions, may face a moral hazard and choose to act in his best interest at the expense of the principal – the ISA company.<sup>150</sup> The ISA company may not have enough information or power to be able to detect or deter that behavior.<sup>151</sup>

Professional athletes presumably have an incentive to increase their earnings, which aligns with the interests of the investors.<sup>152</sup> However, what if an athlete decides to do what is in his best interest, but not the brand’s? For example, a player may opt not to negotiate for a higher salary because he prefers to remain with his current team.<sup>153</sup> One MLB player, Adam LaRoche, decided to retire early due to conflicts with the management team over allowing LaRoche’s son to spend time with him in the clubhouse.<sup>154</sup> As a result, LaRoche lost out on \$13 million dollars from his MLB contract.<sup>155</sup> LaRoche described the decision as a choice between his team and his family, and he decided to choose his family.<sup>156</sup> While LaRoche is not affiliated with either Fantex or Big League Advance, his decision to retire early for the sake of his family is an example of the principal-agent problem those companies may face. LaRoche chose to act in his best interest, even at the expense of losing \$13 million dollars.<sup>157</sup> Fantex specifically allows players to act in ways that reduce potential brand income and conflict with investors’ interests.<sup>158</sup>

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147. See *infra* Section III, part B.

148. *Medeiros, supra* note 19, at 384.

149. *Id.* at 85 (quoting Eric A. Zacks, *The Moral Hazard of Contract Drafting*, 42 FLA ST. U.L. REV. 991, 993 (2015)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 385-86.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (citing FANTEX, INC., Amendment No. 1 to Forms S-1., Sports Portfolio 1 (2016 Prospectus) 28-29 (“[A] contract party in the NFL may agree to a salary reduction to assist their team in staying within the league cap, to be on a more competitive team,

Another risk that ISA companies like Fantex and Big League Advance may face stems from the possibility of player injuries. In the event of an injury, Fantex does not require a player to pay back the advance payment.<sup>159</sup> This is particularly significant because “contracting with Fantex may serve as a form of insurance for professional players, and ‘[o]nce people purchase insurance that protects them from the downside of risky behavior, they have less incentive to avoid that behavior.’”<sup>160</sup>

### C. ISAs in Sports Should be Encouraged

ISAs have garnered a lot of criticism, mostly with good reason, because the monetization of human capital poses many dangers. Young, poor athletes may enter into agreements with little bargaining power or understanding of the agreement. However, ISAs should be allowed, even encouraged, in baseball and football because the benefits to players outweigh the negatives. ISAs offer opportunities to players that otherwise would not have them. As shown by Fantex’s history, some players have benefitted from the agreements, while the companies have lost on investments due to players underperforming or having shortened careers due to injury.<sup>161</sup> Companies like Big League Advance openly acknowledge the high likelihood of losing money on most of the players that they invest in.<sup>162</sup> However, the companies offering ISA agreements are relying on striking gold with a few players.

Further, a lot of the issues with ISAs in the sports world are not due to the contracts themselves, but instead are problems inherent in the sport – such as injury—or caused by the professional leagues – such as underpaying players.<sup>163</sup> Big League Advance was specifically formed to help address players’ need for income.<sup>164</sup> ISAs are responding to problems that have long been ignored or are being made worse by legislation, such as the Save America’s Pastime Act,

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or to stay with a specific team, all of which may have the effect of reducing potential brand income and conflict with stockholders’ interests in maximizing brand income.”)).

159. *Id.* at 385.

160. *Id.* (quoting Jeff Schwarts, *The Corporatization of Personhood*, U. ILL. L. REV. 1119, 1142 (2015)).

161. *See supra*, Section III, part A.

162. Minor League Player Investment, BIG LEAGUE ADVANCE, <https://bigleagueadvance.com/minor-league-player-investment/> [https://perma.cc/MKT5-LF3D] (last visited Oct. 8, 2019).

163. *See supra* Section III.

164. Minor League Player Investment, BIG LEAGUE ADVANCE, <https://bigleagueadvance.com/minor-league-player-investment/> [https://perma.cc/MKT5-LF3D] (last visited Oct. 8, 2019).

which leave athletes even more vulnerable.<sup>165</sup> Nevertheless, ISAs should only be allowed and encouraged if there is an appropriate regulatory regime in place to minimize the potential for abuse and bad actors.

#### IV. SURVEYING THE FIELD: PROPOSED REGULATIONS AND RECOMMENDATIONS

The emergence of ISAs as a viable funding and investment tool has revealed the need for more effective regulation. But because ISAs have yet to gain prominence, there is little regulation and scholarship on them. So far, there have been at least two proposed bills to regulate ISAs, neither of which have passed.<sup>166</sup>

The Investing in Student Success Act of 2014 regulates ISAs used for higher education.<sup>167</sup> Among the proposed restrictions were caps on the percentage of future income, minimum annual earnings that must be obtained before having to make the required payment, and limits on the length these agreements could run for.<sup>168</sup> The other proposed bill, the ISA Act of 2017, broadly addresses ISAs, the need for required disclosures in these agreements, and the need for early termination clauses.<sup>169</sup>

Some critics have argued that the best way to govern ISAs is through a case-by-case approach instead of sweeping regulations.<sup>170</sup> One proposed approach is to require legislators to examine the underlying economics of the particular ISA, and to draw analogies to an existing financial arrangement in order to determine how that ISA should be treated.<sup>171</sup> According to Oei and Ring, the basic elements of an ISA are similar to those of various established transactions.<sup>172</sup> Because there are pre-existing regulatory schemes for those established transactions, it would be more efficient and equitable to use their “regulation by analogy” proposal rather than to create a new overarching regulatory scheme for ISAs specifically.<sup>173</sup> To address concerns that ISAs may resemble indentured servitude too closely, some factors that should be

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165. See Nathaniel Grow, *The Save America's Pastime Act: Special-Interest Legislation Epitomized*, 90 UNIV. COLO. L. REV. 1013, 1013 (2019).

166. See Investing in Student Success Act of 2014, H.R. 4436, 113th Cong. (2014); ISA Act of 2017, H.R. 3145, 115th Cong. (2017).

167. See Investing in Student Success Act of 2014, H.R. 4436, 113th Cong. (2014).

168. *Id.*

169. See *id.*

170. See Oei & Ring, *supra* note 1.

171. *Id.* at 709.

172. *Id.* at 710.

173. *Id.* at 681.

considered are the parties' intent, the allocation of risk between parties, the duration of the contract, the percentage of income taken, and the amount of control over an individual's labor and personal choices.<sup>174</sup>

While Oei and Ring argue that the "regulation by analogy" approach to ISAs is best, they concede that their approach should be a placeholder until ISAs have developed enough for an overarching regulatory framework to be effective.<sup>175</sup> However, they argue that our society is not yet ready for a unified regulatory approach because the market for ISAs is still new and developing, and there is a lack of information and experience with them.<sup>176</sup>

Although legislators and critics disagree on how to govern ISAs – new regulations or "regulation by analogy" – both sides seem to agree that ISAs need oversight. Controlling the length of the contract and the percentage of income taken are good starting points for guarding against abuse.

## CONCLUSION

ISAs are gaining prominence in the professional sports world due to players' critical need for secure sources of income. Fantex and Big League Advance each developed different ISA structures in response to those needs – taking into account the unique circumstances of football players and baseball players, respectively. Due to factors such as high injury risk, short career lengths, lack of bargaining power, and eligibility requirements, many athletes have enticed incentives to enter into ISAs. The benefits of ISAs come with significant risks to both individual players and investors. Regardless, players will continue to seek out ISAs as long as professional sports leagues allow non-guaranteed deals or pay players below minimum wage, and investors will continue entering into ISAs so long as the agreements remain profitable.

Monetizing future human capital raises concerns due to the potential for abuse. Nevertheless, these alternative revenue streams should remain open for players because the risks can be minimized with effective regulation. Further, a lot of the issues with ISAs in the sports world are not due to the contracts themselves, but instead are caused by the professional leagues, such as by underpaying players. Investment companies that offer ISAs are creating much needed opportunities for athletes and

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174. *Id.* at 730.

175. *Id.* at 759.

176. *Id.*

should not be demonized for it. Athletes often get the better end of the bargain with ISAs as these contracts seem to carry more risk for investors. Players and investors that choose to enter into ISAs should do so with full confidence that there is a coherent set of regulations protecting them.