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# Updating Your Fantasy Lineups and the Federal Law: The Case for Federal Regulation of Daily Fantasy Sports

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Updating Your Fantasy Lineups and the Federal Law:  
The Case for Federal Regulation of Daily Fantasy Sports

I. INTRODUCTION

Jared Beisel’s Daily Fantasy Team was leading by a small margin in the closing minutes of what had become an uncompetitive National Football League game—that is, in the real world.<sup>1</sup> The San Francisco 49ers had time on their side, not to mention a seventeen point advantage over a desperate Minnesota Vikings, with two minutes remaining in the final game of week one.<sup>2</sup> Essentially, the game was over.<sup>3</sup> In theory, no remaining performances could affect the outcome of the game: the 49ers possessed the ball, the Vikings were out of time-outs, and “victory formation”<sup>4</sup> was inevitable.<sup>5</sup> Put straightforwardly, most avid football fans would have lost interest and, by this point, tuned in elsewhere. But for an interested fantasy participant, drastic implications loomed upon whether the 49ers decided to kneel<sup>6</sup> or run the ball in order to drain the clock and win the game. Unfortunately for Beisel, the 49ers opted for the latter, sealing not only the week one fate of the Vikings, but Beisel’s chances at winning an additional one million dollars.<sup>7</sup> Ultimately, Carlos Hyde provided the necessary sum of fantasy points to the then second place contestant to win the contest, edging Beisel out of first place.<sup>8</sup>

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<sup>1</sup> ESPN Front Row, DraftKings Millionaire Maker Runner-up Nets \$1M, plus \$1M for his ESPN Fantasy Leagues, <http://www.espnfrontrow.com/2015/09/draftkings-millionaire-maker-runnerup-nets-1m-plus-1m-for-his-espn-fantasy-leagues/> (last accessed Nov. 4, 2015).

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

<sup>3</sup> *See id.*

<sup>4</sup> An event where a team’s quarterback kneels down with possession of the football in order to keep the game clock running. By deploying this technique, a team seeks to preserve a victory by draining the game clock and depriving the opponent of any possible chance to gain additional possession and possible points. *See Sports Lingo: Definition for Common Sports Slang & Jargon, Victory Formation*, <http://www.sportslingo.com/sports-glossary/v/victory-formation/> (last accessed Oct. 30, 2015).

<sup>5</sup> *See* ESPN Front Row, *supra* note 1.

<sup>6</sup> *See* Sports Lingo, *supra* note 4.

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

<sup>8</sup> Beisel did not come out empty-handed entirely. As the second place participant in the DraftKings “Millionaire Maker Contest,” Beisel was still rewarded a handsome sum of one million dollars. Had Beisel finished in first, his earnings would have doubled. *See* ESPN Front Row, *supra* note 1.

What exactly are the chances that, rather than solidify victory by conventionally “kneeling the football” in a scenario that begs for a team to do so, instead, the 49ers seal their victory with a Carlos Hyde run netting five redundant yards? Can an individual possibly have predicted this type of event to occur and chalk it up having a skill or being savvy to the game? This is precisely the scenario that repeats itself week in and week out for millions of Daily Fantasy Sports (“DFS”) participants across the nation.

Through persistent advertising campaigns, Nigel Eccles and Jason Robins, Chief Executive Officers of the two leading DFS websites, FanDuel and DraftKings respectively, have revolutionized *traditional* fantasy sports—the social competition that allows friends and family to test one another’s sports knowledge by assigning point values to each professional or collegiate athlete’s earned statistic, tallying the aggregate amount of points that one fantasy participant’s assembled roster earns, and rewarding the individual fantasy participant with the most points come season’s end. DFS are the latest phenomenon that has invaded every consumer’s living room with commercial advertisements in between their favorite sitcoms and the 11 o’clock news. “Scott H.,” the face of the now infamous FanDuel television advertisement, proclaims the universal ease of winning up to two million in cash prizes by depositing as little as thirty five dollars.<sup>9</sup> DFS’s affordability, coupled with allowing participants to draft new teams on a far more frequent basis (daily) than season-long traditional fantasy sports, has transformed fantasy sports into a growing commercial enterprise.<sup>10</sup>

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<sup>9</sup> FanDuel’s greatest expense is advertising, having spent roughly twenty million dollars in the month of August 2015 for their advertisement to run 7,500 times. DraftKings is even more committed to advertising, spending roughly eighty-one million dollars for their advertisements to air 22,000 times in the same time period. Steven Perlberg, *Are DraftKings and FanDuel Bombarding Fans With Too Many Ads?*, THE WALL STREET JOURNAL (Sep. 16, 2015, 6:00 AM), <http://blogs.wsj.com/cmo/2015/09/16/are-draftkings-and-fanduel-bombarding-fans-with-too-many-ads/>.

<sup>10</sup> See Drew Casey, *DraftKings, FanDuel Make Millions, and Give Them Away, as Fantasy Revs Up*, CNBC (Sep. 20, 2015), <http://www.cnbc.com/2015/09/20/draftkings-fanduel-make-millions-and-give-them-away-as-fantasy-revs-up.html>; see also Chris Grove, *Here’s How The One Day Fantasy Sports Industry Hits \$2.5bn By 2020*, LEGAL

But how has fantasy sports become such a ubiquitous and inescapable pillar of American sports? The answer is that DFS mesh together and makes available to the consumer two tantalizing concepts: money and sports—a combination that is taboo in America.<sup>11</sup> But the answer begs the question: does DFS amount to unlawful sports gambling? Certainly, wherever money is to be earned, laws are to be established; however, the latter has not yet occurred, at least in workable way. The residual debate leaves lobbyists calling for regulation in the uncharted legal territory of DFS. Different legal challenges to the two leading DFS online platforms, FanDuel and DraftKings, are now exploding into mainstream media.

Two competing notions prevail in the debate over DFS legality. On one hand, skill is a prerequisite to win in DFS. This theory presumes that a majority of DFS winners are sufficiently skilled, and when unskilled players win, luck or chance is not a predominant factor. On the other hand, assembling a fantasy roster that out-performs other participants' rosters is in large part a result of chance. Nonetheless, DFS are entertaining, appealing, and above all else, extremely lucrative.<sup>12</sup> Popular demand, massive sponsorship, and the deeply rooted tradition and compatibility of fantasy sports and real sports indicates that DFS are here to stay. While it may be argued against, it cannot be denied that DFS have become, albeit in exceptionally rapid fashion, a meaningful part of American culture.

This note seeks to introduce the various concerns and conflicts between state gaming laws arising in conjunction with the exponential growth of DFS. In doing so, it will become apparent that uniform regulation at the Federal level is necessary to corral this quasi-gambling, skill-based phenomenon. Moreover, the latest proposed New Jersey and California regulations should be a

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SPORTS REPORT (Dec. 19, 2014), <http://www.legalsportsreport.com/170/revenue-projections-for-daily-fantasy-sports-sites/>.

<sup>11</sup> See discussion *infra* Part II.b.

<sup>12</sup> See *supra* note 10.

model for federal amendment. Part II discusses the history and background of Fantasy Sports with emphasis on its underlying purpose and evolution. Parts III, IV, and V explain the tension brewing between federal law enactments and the different dynamics that have resulted at the state law level using state case studies with emphasis on New Jersey. However, rather than absolutely deny access to DFS, the multi-variable game allows issues to be addressed through regulation. Part VI offers an analysis using the Predominant Purpose Test that argues that while DFS are a game that is predominantly based on skill, residual dangers and harms linger given DFS's resemblance to gambling. Part VII provides resolution that will, once and for all, establish a broad enough standard allowing DFS to operate while maintaining state sovereignty in accordance with each State's constituency. Finally, Part VIII concludes this note.

## II. FANTASY SPORTS FIASCO: THE DIFFERENCES BETWEEN DAILY FANTASY SPORTS AND ITS COUNTERPARTS

For those less athletically inclined individuals excluded from playing on an organized sports team, fantasy sports has served to fill that void. Dan Okrent and Lee Eisenberg, two Manhattan-based journalists, created what would become contemporary fantasy sports, capable of being played by people of all shapes, sizes, and athletic ability.<sup>13</sup> The origin of fantasy sports, which is crucial to the pro-fantasy argument in contemporary legal debate, ironically came to Okrent in a dream.<sup>14</sup> What started as a mere fascination and obsession over box scores, became a platform for the fantasy framework—or at the time, “Rotisserie Baseball.”<sup>15</sup>

### a. THE ORIGIN AND GROWTH OF FANTASY SPORTS: ROTISSERIE BASEBALL

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<sup>13</sup> *30 for 30: Silly Little Game* (ESPN television broadcast Apr. 20, 2010).

<sup>14</sup> *Id.*

<sup>15</sup> The fantasy founding fathers dubbed their game Rotisserie Baseball, named after the site where the first agreement to and in-depth discussion of the game's rules took place: the La Rotisserie Française in New York City. *Id.*

Late in 1979, a clear set of rules emerged and was codified in the *Official Constitution of Rotisserie League Baseball*.<sup>16</sup> The concept of the game was centered on meticulously collecting baseball statistics in order to challenge one another's baseball knowledge.<sup>17</sup> Each participant assembled an imaginary baseball team consisting of players from either Major League Baseball's American or National Leagues.<sup>18</sup> The owners of the ten imaginary teams acquired their players through an "auction draft."<sup>19</sup> Statistics were arranged categorically, in order to determine who had the best team.<sup>20</sup> The course of the game ran concurrent with the MLB season and the team with the best stats at the end of the season won the "Wiggy Cup" and became subject to the Yoo-Hoo ceremony.<sup>21</sup>

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<sup>16</sup> The Rotisserie League Constitution parodied the United States Constitution with a preamble that stated:

We, the People of the Rotisserie League, in order to spin a more perfect Game, drive Justice home, kiss domestic Tranquility good-bye, promote the general Welfare in Tidewater – where it's been tearing us the International League – and secure the Blessings of Puberty to ourselves and those we've left on Base, do ordain and establish the Constitution for Rotisserie League Baseball, and also finish this run-on sentence.

GLEN WAGGONER & ROBERT SKLAR, *ROTISSERIE LEAGUE BASEBALL—THE OFFICIAL RULEBOOK AND COMPLETE GUIDE TO PLAYER VALUES 10–30* (Bill Gray et al., Bantam Books 1989) (available at <http://www.c-r-l.org/rules/origcon.htm>).

<sup>17</sup> See *30 for 30: Silly Little Game*, *supra* note 13.

<sup>18</sup> Because statistic gathering was done manually—i.e., before the internet tallied up individual statistics in an convenient format—the Rotisserie League required that teams be composed entirely of either AL or NL players for simplification. See *30 for 30: Silly Little Game*, *supra* note 13 (noting the tedious efforts in collecting statistics manually); see also WAGGONER, *supra* note 16 (suggesting that NL and AL players should be kept separate because mixing the two leagues is "silly and unrealistic"). Rosters were composed according to positions: "five outfielders, two catchers, one second baseman, one shortstop, one middle infielder (either second baseman or shortstop), one first baseman, one third baseman, one corner man (either first baseman or third baseman), one utility player (who may play any non-pitching position), and nine pitchers." WAGGONER, *supra* note 16.

<sup>19</sup> The auction draft format was the means chosen to acquire 23 players through purchase not to exceed \$260. The bid for a player subject to draft started at \$1. Each team owner would have an opportunity to bid on the player through \$1 increment bids. The owner with the highest bid earned the player at that price. See WAGGONER, *supra* note 16.

<sup>20</sup> The criteria used to determine the best team and standings included: (1) batting average, (2) home runs, (3) runs batted in, (4) stolen bases, (5) earned run average, (6) wins, (7) saves, and (8) the composite ratio of bases acquired on balls plus hits divided by innings pitched. *Id.* To count and award points, Okrent went line-by-line in the box scores and collected each player's individual statistics with a ledger sheet, a calculator, a pen and paper at his exposal. See *30 for 30: Silly Little Game*, *supra* note 13.

<sup>21</sup> The "Wiggy Cup" was passed along to the winner at the end of each season. The winning owner's team name was inscribed on the trophy. The Yoo-Hoo ceremony was the Rotisserie League's equivalent to the traditional "champagne baths" that major league teams engaged in to celebrate playoff victories. The Rotisserie League's

According to Okrent, each participant studied statistics for endless hours in order to prove who the most knowledgeable baseball fan was.<sup>22</sup> Eisenberg proclaimed that the primary objective of the game was to “use baseball insight, combined with poker skills, to outfox opponents around the draft table” and to “try to improve [the owners’] teams through furious trading.”<sup>23</sup> In addition, owners actively sought “sleeper picks” to substantiate their superior knowledge over other owners. For instance, Neil Allen, at the beginning of the 1980 season, was not the designated Mets closer; however, he usurped the Mets’ original closer by season’s end and helped propel the Getherswag Goners—the Rotisserie team that owned him—to win the first ever Rotisserie League Championship.<sup>24</sup>

Rotisserie Baseball generated massive interest due to the connections and affiliations that the Rotisserie founders’ had with various media outlets.<sup>25</sup> The founders attempted to exploit this growing interest by trademarking Rotisserie Baseball, selling merchandise, and producing marketing videos.<sup>26</sup> However, the game they had invented had unequivocally outgrown them as participants grew into the millions.<sup>27</sup> The birth of the internet provided the Rotisserie Baseball

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tradition consisted of the winning team being doused with chocolate milk in the presence of the other losing teams. Of course, the auction draft fees collected by the league’s treasurer was divvied up based on final standings: first place received half of the pool; second place received 25 percent; third place received 15 percent; and fourth place received 10 percent. WAGGONER, *supra* note 16.

<sup>22</sup> See *30 for 30: Silly Little Game*, *supra* note 13.

<sup>23</sup> Lee Eisenberg, *Views of Sport; The Awful Truth About Rotisserie League Baseball*, NEW YORK TIMES (Apr. 8, 1990), <http://www.nytimes.com/1990/04/08/sports/views-of-sport-the-awful-truth-about-rotisserie-league-baseball.html> (noting that Rotisserie baseball eradicated the boundaries of loyalty when real sports and imaginary sports intersected, pitting the owned players on a Rotisserie team against real life favorite teams). Trading players between owners became such a significant strategic aspect of the game that in order to acquire Bill Buckner, the Chicago Cubs first baseman, Eisenberg offered his trade partner a brand new dress shirt, which was accepted. See *30 for 30: Silly Little Game*, *supra* note 13.

<sup>24</sup> Allen was purchased for two dollars and subsequently outperformed his bargain price by pitching approximately thirty saves by the end of the season. See *30 for 30: Silly Little Game*, *supra* note 13.

<sup>25</sup> Eisenberg estimated that approximately half of a million people play the game; notably, Governor Mario M. Cuomo, Bryant Gumbel, and Jim Kaat owned Rotisserie teams. See Eisenberg, *supra* note 23.

<sup>26</sup> See *30 for 30: Silly Little Game*, *supra* note 13.

<sup>27</sup> See *id.*

market with a platform that facilitated mass participation.<sup>28</sup> The season-long game was adapted and offered for free by major sports conglomerates, such as ESPN and Yahoo! Sports.<sup>29</sup> Furthermore, these companies expanded the fantasy concept to other sports, such as football and basketball.<sup>30</sup> Cease and desist letters sent by the founders to program developers proved inefficient; instead, the name was simply changed to “Fantasy Sports” and rules could be adjusted per each individual league’s liking.<sup>31</sup> On average, the approximate thirty million fantasy users spend over ten hours a week researching about what is now considered traditional fantasy sports.<sup>32</sup>

b. TWEAKING TRADITION: THE DAILY FANTASY SPORTS PHENOMENON—WHAT IT IS AND HOW IT WORKS

Daily fantasy has commercialized fantasy sports by utilizing the internet to connect fans worldwide. DFS offer its participants an accelerated version of traditional fantasy sports with contests on a per day basis played primarily among large groups of strangers.<sup>33</sup> Furthermore, the concept of a draft is removed and replaced with a salary cap, similar to traditional Rotisserie Leagues, except every player in the league is available in every contest.<sup>34</sup> Each player is “priced” commensurate with their ability.<sup>35</sup> DFS websites offer various contests and tournaments with single entry fees ranging from \$0.25, for contests with lower payouts and more contestants, to as high as \$5,300, for contests with higher payouts and less contestants.<sup>36</sup>

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.*

<sup>31</sup> *See id.*

<sup>32</sup> *See 30 for 30: Silly Little Game, supra note 13.*

<sup>33</sup> Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, THE WASHINGTON POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html).

<sup>34</sup> *See id.*

<sup>35</sup> For instance, a player with a higher likelihood of scoring more fantasy points, such as Aaron Rodgers, will cost more than a player with a lower likelihood of scoring fantasy points, such as Robert Griffin III. *Id.*

<sup>36</sup> Drew Harwell, *The Rise of Daily Fantasy Sports, Online Betting’s Newest Empire*, THE WASHINGTON POST (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/>. Although there is typically a correlation in how payout and the maximum entries allowed relate to each other, contest structures can vary.



The origins of DFS trace back to 2007, where HubDub—a web-based prediction market in which users may wager on politics, sports, entertainment, technology, and other categories<sup>37</sup>—introduced its version of fantasy sports with a game called FanDuel.<sup>38</sup> HubDub received its first Series A funding led by Pentech Ventures and Scottish Co-Investment Fund.<sup>39</sup> From this capitalization, HubDub wisely chose to focus its attention on Nigel Eccles’ FanDuel.<sup>40</sup> As interest in FanDuel grew, investors continued to pour funding into the company and in 2013, FanDuel secured another major investor in Comcast Ventures.<sup>41</sup> Just this past year, FanDuel raised \$275 million in additional financing by drawing big-name investors such as Google Capital and Time Warner.<sup>42</sup> As a self-funding business driven primarily by entry fees, FanDuel raised roughly \$300 million in entry fees this past year alone.<sup>43</sup> By 2020, growth projections suggest that DFS could net a whopping \$2 billion in total annual revenue.<sup>44</sup>

Perhaps the most intriguing advocates of DFS involve partnership ventures between DFS providers and the four major American sports leagues; the very leagues that initiated a lawsuit opposing sports betting in the state of New Jersey.<sup>45</sup> The most logical explanation for these

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<sup>37</sup> *Hubdub Ltd.*, BLOOMBERG BUSINESS, <http://www.bloomberg.com/profiles/companies/0088055Z:LN-hubdub-ltd>.

<sup>38</sup> Mike Butcher, *HubDub Closes News Site to Focus on Fantasy Sports Spinoff FanDuel*, TECH CRUNCH (Apr. 14, 2010), <http://techcrunch.com/2010/04/14/hubdub-closes-news-site-to-focus-on-fantasy-sports-spinoff-fanduel/>.

<sup>39</sup> Mike Butcher, *HubDub’s News ‘Game’ Secures it a \$1.2m Series A Funding*, TECH CRUNCH (Jan. 14, 2009), <http://techcrunch.com/2009/01/14/hubdubs-news-game-secures-it-a-12m-series-a/>.

<sup>40</sup> See Butcher, *supra* note 38; see also Butcher, *supra* note 39.

<sup>41</sup> For its \$11 million investment, Comcast Ventures received an equity interest in FanDuel and assigned its partner Andrew Cleland to FanDuel’s board of directors. Darren Heitner, *Fantasy Sports Service, FanDuel, Secures \$11 Million Investment; Includes Money from Comcast Ventures*, FORBES (Jan. 30, 2013), <http://www.forbes.com/sites/darrenheitner/2013/01/30/fantasy-sports-service-fanduel-secures-11-million-investment-includes-money-from-comcast-ventures/>.

<sup>42</sup> Michael J. de la Merced, *FanDuel to Announce that it has Raised \$275 Million More*, NEW YORK TIMES (Jul. 14, 2015), [http://www.nytimes.com/2015/07/14/business/dealbook/fanduel-to-announce-it-has-raised-275-million-more.html?\\_r=0](http://www.nytimes.com/2015/07/14/business/dealbook/fanduel-to-announce-it-has-raised-275-million-more.html?_r=0).

<sup>43</sup> FanDuel reserves only about 10 percent of this intake for profit, while the rest is given away as contestant prizes. See Casey, *supra* note 10.

<sup>44</sup> See Grove, *supra* note 10.

<sup>45</sup> See *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. N.J. 2013) (writ of certiorari denied) (affirming *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013)) (herein after “*Christie I*”).

partnerships is that they allow the leagues to exploit the increase in popularity resulting from the way fantasy has changed how fans follow the sport.<sup>46</sup> FanDuel first reached a deal with the MLB and shortly after the NBA followed, in which both organizations received a partial stake in the company.<sup>47</sup> Essentially, these major sports leagues have a stake in the entry fee earnings in exchange for sponsorship and advertisement rights.<sup>48</sup> The relationship the leagues have established with DFS appears hypocritical given their “integrity” argument made against sports betting.<sup>49</sup> If the leagues’ argument that sports betting may influence the “fixing” of professional sports games, then the fact that these leagues sponsor DFS contests is troubling. However, viewed from a different lens, their financial involvement insinuates that the very leagues, so passionately devoted to protecting the integrity of sports, stand squarely in support of DFS. Their support suggests that DFS pose no threat, given its multitude of variables, of influencing contests the same way sports betting does.<sup>50</sup>

To date, virtually all major American professional sports teams have entered into sponsorship agreements with either DraftKings or FanDuel magnifying the footprints DFS continues to leave behind in the American sports industry.<sup>51</sup> While the duopoly of FanDuel and DraftKings face little competition in the fantasy market, Yahoo! has recently launched its version

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<sup>46</sup> Local markets no longer consist of local teams only. Fantasy has evolved the way fans view the sport; it has created a fan interest in out-of-town teams and low standing teams, increasing those games’ value. DirecTV recently renewed its contract for the exclusive right to broadcast out-of-town games for \$1.5 billion per year—a \$500 million increase from the previous year. Chris Isidore, *How Fantasy Sports Changed the NFL*, CNN MONEY (Sept. 11 2015), <http://money.cnn.com/2015/09/11/news/companies/fantasy-football/>.

<sup>47</sup> See Kilgore, *supra* note 33.

<sup>48</sup> *Id.*

<sup>49</sup> See discussion *infra* Section III.a.

<sup>50</sup> *Id.*

<sup>51</sup> Dustin Gouker, *DFS Partnership/Sponsorship Tracker*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-sponsorship-tracker/>.

of DFS and could instantly challenge FanDuel and DraftKings as the leading DFS provider, just as it did to Rotisserie Baseball.<sup>52</sup>

### III. FEDERAL LAWS PROHIBITING SPORTS WAGERING AND ILLEGAL GAMBLING

#### a. PROTECTING INTEGRITY: PROFESSIONAL SPORTS' POLICY AND PERSPECTIVE

Sports betting has always carried a negative connotation in America. In 1989, Pete Rose was made permanently ineligible from playing Major League Baseball after violating Major League Baseball's Rule 21(d).<sup>53</sup> His lifetime ban was recently upheld in April 2015, showing MLB's commitment to the rule.<sup>54</sup> The rule prohibits those players, umpires, league officials, or employees with a duty to perform from betting on a Major League Baseball game.<sup>55</sup> However, sports betting concerns trace back further to a 1919 scandal in which eight Chicago White Sox players were banned from baseball for fixing that year's World Series.<sup>56</sup> This event led to the creation of the Office of the Commissioner of Baseball, and the insertion of anti-sports gambling measures for the professional affiliates of the league in its bylaws.<sup>57</sup> Similar measures followed in the other major sports as well.<sup>58</sup>

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<sup>52</sup> Chris Grove, *Yahoo Enters Daily Fantasy Sports Market: Impacts And Analysis*, LEGAL SPORTS REPORT (July 8, 2015), <http://www.legalsportsreport.com/2152/yahoo-enters-daily-fantasy-sports-market/>.

<sup>53</sup> *The Pete Rose Case; The 2 Rules in the Rose Case*, NEW YORK TIMES (Aug. 25, 1989), <http://www.nytimes.com/1989/08/25/sports/the-pete-rose-case-the-2-rules-in-the-rose-case.html>.

<sup>54</sup> Bob Nightengale, *Pete Rose's Reinstatement Bid Denied by MLB Commissioner Rob Manfred*, USA TODAY (Dec. 14, 2015), <http://www.usatoday.com/story/sports/mlb/2015/12/14/baseball-commissioner-rob-manfred-not-reinstate-pete-rose-cincinnati-reds/77290922/>.

<sup>55</sup> *The Pete Rose Case*, *supra* note 53.

<sup>56</sup> PAULA M. ANDERSON ET AL., SPORTS BETTING: LAW AND POLICY 936 (T.M.C. Asser Press 2012).

<sup>57</sup> *Id.* at 938.

<sup>58</sup> *See, e.g.*, Constitution and By-laws of the National Basketball Association (May 29, 2012) (herein after "NBA Constitution"). The language in the NBA Constitution reflects the common abhorrence to sports wagers among professional sport leagues:

Any Player who, directly or indirectly, wagers money or anything of value on the outcome of any game played by a Team in the league operated by the Association shall, on being charged with such wagering, be given an opportunity to answer such charges after due notice, and the decision of the Commissioner shall be final, binding and conclusive and unappealable [sic]. The penalty for such offense shall be within the absolute and sole discretion of the Commissioner and may include a fine, suspension, expulsion and/or perpetual disqualification from further association with the Association or any of its Members.

It is self-evident why professional sports league affiliates who have a substantial influence on a contest's outcome are prohibited from betting on them. While lobbying for Congressional response to such concerns, former commissioners David Stern and Paul Tagliabue of the NBA and NFL respectively, testified that gambling poses a threat to the integrity of the game and sets a standard that may corrupt America's youth.<sup>59</sup> An entirely different issue arises as to whether players or, as referred to by the NBA Constitution, "persons" may participate in fantasy sports.<sup>60</sup> The lack of clarity as to whether professional sports affiliates can engage in fantasy sports contests as the equivalent to gambling is exemplified in the differing policies of each major professional sport imposes.

Major League Baseball has taken a stance through its Collective Bargaining Agreement with its players' union that disallows players' participation in fantasy sports that involve the transfer of money or other prizes.<sup>61</sup> The MLB is determined to create a barrier that protects the sport's integrity from anything that would entice game-fixing—unless, of course, it involves profiting through its DFS endorsement deals.<sup>62</sup> The National Basketball Association and the

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Article 35A(g)(i) prohibits any person other than players—defined as Members, Owners, Officers, Managers, Coaches, Referees, employees, or their agents or representatives—from “directly or indirectly wager[ing] money or anything of value on the outcome of any game played by a [t]eam in the league operated by the Association.” An example of this rule's implementation comes at the expense of ex-NBA 25-year veteran official, Tim Donaghy. See Robert G. Anderson & Daniel Ruetenik, *Ex-NBA Ref Tim Donaghy's Personal Foul 60 Minutes: Disgraced Ref Talks About Betting Scandal, The Mob, And How He Got Caught*, CBS NEWS (Dec. 3, 2009) <http://www.cbsnews.com/news/ex-nba-ref-tim-donaghys-personal-foul/2/>. Donaghy used NBA inside information to win between seventy and eighty percent of his wagers on NBA games that he officiated. *Id.* As a result, Donaghy was removed as an NBA official and served eleven months in federal prison for passing gambling tips across state lines. *Id.*

<sup>59</sup> See ANDERSON ET AL. *supra* note 56, at 938.

<sup>60</sup> See NBA Constitution *supra* note 58.

<sup>61</sup> Mason Levinson, *Daily Fantasy Sports Growth Pushes Leagues to Regulate Players*, BLOOMBERG BUSINESS (Apr. 2, 2015), <http://www.bloomberg.com/news/articles/2015-04-01/daily-fantasy-sports-growth-pushes-leagues-to-regulate-players>.

<sup>62</sup> MLB spokesman Pat Courtney offers reconciliation in that the league seeks to make fantasy distinct from “competition on the field and for on-field personnel to have no other outside influences on them with regard to the game.” Thus, according to MLB spokesman Greg Bouris, “[t]he [collective bargaining agreement] doesn't limit players' ability to sign sponsorship deals or other business transactions with fantasy sites.” See *id.*

National Hockey League likewise bar players from participating in fantasy contests that require entry fees and awards prizes.<sup>63</sup> Meanwhile, all three establishments endorse one of the two leading DFS platforms, which they refuse to characterize as illegal gambling.<sup>64</sup> While simultaneously prohibiting players from participating in DFS seem hypocritical, it reflects the uncertainty surrounding DFS. Only the National Football League allows player participation in fantasy leagues.<sup>65</sup> Fantasy Football has had its presence felt by NFL players, especially those who actually participate in fantasy.<sup>66</sup> However, while fantasy is certainly on the minds of some players, it only seems to affect a player's popularity and is not likely to influence their performance more than any other non-fantasy factors.<sup>67</sup> This is because of the NFL's policy limits a player to collecting no more than \$250 worth of prizes.<sup>68</sup> Nonetheless, the regulation of gambling on professional sports culminated in the passage of the Professional and Amateur Sports Protection Act of 1992 ("PASPA").<sup>69</sup>

b. PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT OF 1992

The Enactment of PASPA has faced various constitutional challenges both judicially and publically.<sup>70</sup> PASPA makes it unlawful for (i) a governmental entity or a person pursuant to the

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> According to NFL policy, fantasy games are not considered gambling, thus players may participate only when no wager is placed on the outcome of any football game. Furthermore, any NFL affiliate cannot accept more than \$250 in prizes or awards. See Roger Goodell, NFL COMPLIANCE PLAN 14 (July 2014).

<sup>66</sup> According to Greg Jennings of the Green Bay Packers, fans have expressed a heightened enthusiasm towards players because of their fantasy prowess. However, when players underperform, fans have expressed disdain, which has motivated players to perform better to spite obsessed fantasy fans. Jennings notes that fantasy also gets in the minds of players who own fantasy teams. It gets difficult when "[players] compet[e] against a guy" on their fantasy team, and therefore "want[s] that guy to be successful" at the same time. Jeff Bercovici, *Greg Jennings Reveals What NFL Players Really Think of Fantasy Football*, FORBES (Mar. 10, 2012), <http://www.forbes.com/sites/jeffbervicovici/2012/03/10/greg-jennings-reveals-what-nfl-players-really-think-of-fantasy-football/#6711c5e84fe2>.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*; see also Goodell, *supra* note 65.

<sup>69</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 (1992).

<sup>70</sup> *See Interactive Media Entm't & Gaming Ass'n v. Holder*, 2011 U.S. Dist. LEXIS 23383 (D.N.J. Mar. 7, 2011) (holding that Plaintiffs have no standing to challenge the constitutionality of PASPA because the New Jersey

law of a governmental entity to (ii) “sponsor, operate, advertise, promote, license, or authorize by law or compact” (iii) “a lottery, sweepstakes, or other betting, gambling, or wagering scheme” (iv) based, “directly or indirectly on one or more competitive games in which amateur or professional athletes participate,” or (v) on “one or more performances of such athletes in such games.”<sup>71</sup> Put simply, the government cannot pass a law that allows betting on professional sports.

PASPA’s enactment, however, included a caveat that grandfathered in certain states that were previously permitted to enact such sports betting laws.<sup>72</sup> New Jersey was the potential beneficiary of one particular provisional exception.<sup>73</sup> Section 3704 of PASPA provides that if a betting, gambling, or wagering scheme *was already in operation* via State Constitution in the ten year window prior to PASPA’s effective date, and the scheme be authorized within one year after the effective date of the legislation, then the prohibitory section shall not apply.<sup>74</sup> Consequently, five states had been previously taking bets and thus subject to the “grandfather clause”—Nevada, Oregon, Delaware, Montana, and New Jersey.<sup>75</sup> New Jersey, however, failed to subsequently authorize its sports wagering scheme until its latest Constitutional amendment, and thus failed to trigger the exception.

### c. UNLAWFUL INTERNET GAMING ENFORCEMENT ACT

The Unlawful Internet Gaming Enforcement Act of 2006 (“UIGEA”) arguably takes absolutely no stance on whether daily fantasy is legal. It defines unlawful internet gambling as (a)

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Constitution had not yet been amended to allow sports betting and thus had not met the (i) injury in fact, and (ii) redressability factors required by *Lujan v. Defenders of Wildlife*, 504 U.S. 555, (1992)); *NCAA v. Governor of N.J.*, 799 F.3d 259, (3d Cir. N.J. 2015) (holding that the New Jersey Sports Wagering Act violated PASPA and PASPA is not an unconstitutional violation of the anti-commandeering doctrine) (rehearing *en banc* granted in *NCAA v. Rebut*, 2015 U.S. App. LEXIS 17839 (3d Cir. N.J. Oct. 14, 2015)).

<sup>71</sup> 28 U.S.C. § 3702 (1992).

<sup>72</sup> 28 U.S.C. § 3704 (1992); *see also* ANDERSON ET AL., *supra* note 56, at 863–64.

<sup>73</sup> *See* ANDERSON ET AL., *supra* note 56, at 863–64.

<sup>74</sup> *Id.*

<sup>75</sup> Joshua Brustein, *New Jersey’s New Plan for Sports Gambling*, BLOOMBERG BUSINESS (June 23, 2014), <http://www.bloomberg.com/bw/articles/2014-06-23/new-jerseys-new-plan-for-sports-gambling>.

“placing, receiving, or otherwise knowingly transmitting” (b) a bet or wager (c) by means of the internet (even in part) (d) in which “the bet or wager is unlawful under State or Federal law” (e) “where the bet or wager is made.”<sup>76</sup> The UIGEA applies to both the person placing the bet (i.e., the consumer or everyday sports fan) and the recipient of the bet.<sup>77</sup> Moreover, the Act encompasses those facilitating the bets, such as the gambling hubs and ports of the nation—such as Las Vegas, Nevada and Atlantic City, New Jersey (i.e., the states in which these hubs reside).<sup>78</sup> In passing UIGEA, Congress recognized that “traditional law enforcement mechanisms are inadequate” for enforcing gambling prohibitions over the internet.<sup>79</sup> Moreover, UIEGA regulates activities that occur in interstate commerce; thus, intrastate activities are subject to individual state regulation.<sup>80</sup>

The UIGEA’s text enumerates the activities excluded from the purview of an unlawful wager.<sup>81</sup> A particular provision within UIEGA has given DFS its springboard for the substantial growth it has enjoyed.<sup>82</sup> The most prevalent portion of the act explicitly excludes fantasy sports from this prohibitory category, but neglects to mention daily fantasy.<sup>83</sup>

To qualify for exclusion as a fantasy sport contest, the UIGEA requires that (a) “prizes and awards be predetermined and made known to participants,” (b) awards are not to be based on the number of participants or amount of entry fees paid, (c) winning outcomes are “based on the relative skill and knowledge of participants determined by accumulated statistics of multiple

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<sup>76</sup> Unlawful Internet Gaming Enforcement Act, 31 U.S.C. § 5362(10)(A) (2015).

<sup>77</sup> *Id.*

<sup>78</sup> 31 U.S.C. § 5362 (10)(B).

<sup>79</sup> See ANDERSON ET AL., *supra* note 56, at 876.

<sup>80</sup> *Id.* at 877.

<sup>81</sup> See 31 U.S.C. § 5362(1)(E)(9) (2015).

<sup>82</sup> *Id.*

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

athletes,” and (d) “no winning outcome be based on the score, point spread, or performance by any single team or single athlete’s performance.”<sup>84</sup>

Both FanDuel and DraftKings exploit UIGEA’s missing “daily” language by astutely catering their DFS platforms to UIGEA’s fantasy exclusion. For instance, a participant that attempts to submit a fantasy line-up consisting of players all from the same real-life sports team will be denied entry into any contest.<sup>85</sup> Furthermore, each contest offers a link that provides its payout structure, predetermined and available to every participant.<sup>86</sup> However, DFS have managed to evade the UIGEA’s provision that prohibits awarding prizes based on entrants or entry fees.

The amount of entrants and entry fees varies for each contest. There is an inevitable correlation between the payout to winning participants and the total amount of entry fees (which depends on the amount of participants or the cost of entry).<sup>87</sup> Yet because prizes are predetermined, it is difficult to violate this provision given its subjective nature (i.e., DraftKings can simply argue that a payout scheme was structured based on a predetermined algorithm as opposed to the final amount of contestants or entry fees; the predetermination of awards and prizes bolsters this argument). Entry fees and the number of contestants allows DraftKings and FanDuel to guarantee widely distributed prizes. As long as payout and entries are predetermined, the loose and contradictory language of the law lets DFS sites maneuver around this provision.

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

<sup>85</sup> The pool of players to choose from can be limited to those participating in as little as two sports contests (i.e., the players on four separate sports teams); however, even for these particular DFS contests, DFS servers sufficiently disallow participants to choose all players from one contest or one team. *See, e.g., DraftKings, Daily Fantasy Baseball League Rules*, <https://www.draftkings.com/help/mlb> (last visited Jan. 11, 2016).

<sup>86</sup> DraftKings, *Terms of Use*, <https://www.draftkings.com/help/terms> (last visited Jan. 11, 2016).

<sup>87</sup> Typically, contests with either higher entry fees or more contestants will payout more prizes to either a greater number of people or greater cash prizes to the highest placed participants. Nonetheless, unlike a state lottery which has a growing pot dependent on the amount of ticket purchased, a DFS contest is predetermined and will not change. *See DraftKings*, <https://www.draftkings.com/lobby#/featured> (last visited Jan. 11, 2016).



#### IV. ELEMENTS OF ILLEGAL GAMBLING: COMMON LAW

The three elements constituting illegal gambling are (1) consideration, (2) chance, and (3) prize.<sup>88</sup> Consideration must be present to categorize a game as illegal gambling.<sup>89</sup> Chance, in a majority of jurisdictions, must predominate the game in order to categorize an activity as illegal gambling.<sup>90</sup> There are three tests of chance that courts look to in determining whether the chance factor is satisfied: (1) the predominant purpose test, (2) the material element test, and (3) the gambling instinct test.<sup>91</sup> A majority of jurisdictions apply the predominant purpose test.<sup>92</sup>

##### a. MINORITY TESTS: THE MATERIAL ELEMENTS TEST & THE GAMBLING INSTINCT TESTS

Courts in at least seven jurisdictions, including New York and New Jersey, utilize the Material Element test.<sup>93</sup> In practice, this test is problematic because the lack of a uniform definition of “material” injects subjectivity into a judge’s ability to determine whether a particular game passes muster.<sup>94</sup> For instance, a material element could mean that chance is entirely incidental or insignificant (i.e., not material) to the game’s outcome, yet a court may still decide it is illegal gambling.<sup>95</sup> Moreover, from a practical perspective, there is an element of chance in every competition or contest imaginable. In effect, these tests allow courts to arbitrarily decide whether a game is unlawful, as the reasoning suggests in *United States v. Gotti*.<sup>96</sup> There, the defendant

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<sup>88</sup> See *Commonwealth v. Two Elec. Poker Game Machs.*, 502 Pa. 186 (1983) *Harris v. Econ. Opportunity Comm'n, Inc.*, 171 A.D.2d 223, 227 (App. Div. 1991).

<sup>89</sup> *Id.* at 228 (holding that the purchase of five \$2 raffle tickets was not a donation to a charitable cause but instead amounted to the “purchase of chances, for valuable consideration, to participate in a contest which constituted an illegal lottery.”).

<sup>90</sup> *Id.*

<sup>91</sup> Erica Okerberg, *What's in a Game? A Test Under Which We May Call a "VGT" a Gambling Game is Not So Sweet: Why Courts Should Not Apply the Material Element Test to VGTS*, 5 UNLV GAMING L.J. 27.

<sup>92</sup> See, e.g., *Two Elec.*, 502 Pa. at 186 (rejecting a standard making a game illegal if the outcome is based entirely on chance and instead adopting the predominant purpose test).

<sup>93</sup> See Okerberg *supra* note 91, at 28 n.3.

<sup>94</sup> See *id.* at 28–29.

<sup>95</sup> *Id.*

<sup>96</sup> *United States v. Gotti*, 459 F.3d 296, 342 (2d Cir. 2006); *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (Crim. Ct. 2009) (confusing the material element test with the predominant purpose test by requiring the game of “Mah Jong”

argued that poker games were games of skill. The court held that a “‘contest of chance’ encompasses games in which the skill of the contestants may play a role, as long as the outcome depends in a material degree on chance.”<sup>97</sup> The court provided no definition, analysis, or standard in holding that the games were illegal gambling, as the issue was a secondary matter in this case.<sup>98</sup>

Another minority test, the Gambling Instinct Test, is a subjective test assessing whether a game appeals to the gambling instinct of the participant.<sup>99</sup> However, the predominant purpose test is used by a majority of states and is the most workable of the three.<sup>100</sup>

#### b. MAJORITY TEST: PREDOMINANT PURPOSE TEST

If chance predominates skill by comprising at least fifty-one percent or more of a game’s outcome, then the predominance test is satisfied.<sup>101</sup> In *Commonwealth v. Two Elec. Poker Game Machs.*, the Pennsylvania Supreme Court applied the predominant purpose test to hold that the outcome of virtual poker was determined predominately by chance.<sup>102</sup> Showing a substantial element of chance will not suffice in establishing a predominance of chance over skill.<sup>103</sup> While

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contain a dominating element of chance that determines the result of the game, not merely an element of either chance or skill).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* The case involved the prosecution of the Gotti crime family on a sixty-eight count indictment, with focus primarily set on several counts of extortion. Hence, the circumstances of the case may have may have effected judgment against the defendants on the illegal gambling count.

<sup>99</sup> *See, e.g.* *State v. One Hundred & Fifty-Eight Gaming Devices*, 304 Md. 404, 436 (1985) (applying the gambling instinct test in holding that “coin-activated, free-play devices in [the defendant’s] possession, which involved an element of chance and which were equipped with odds mechanisms, or a meter for recording the number of free plays released, or other established indicia of a gambling device, are illegal slot machines because they appeal to the gambling instinct of individuals); *State v. Vance*, 2004 Tenn. Crim. App. LEXIS 317, at \*40 (Crim. App. Apr. 8, 2004) (holding the “operation of the Free Spin machines fell within the definition of ‘gambling’ because the machines were used to risk credits worth five cents apiece for a profit whose return was contingent on chance” appealing to the gambler’s instinct); *see also* Okerberg, *supra* note 91.

<sup>100</sup> *See Id.*

<sup>101</sup> *See* Okerberg *supra* note 91.

<sup>102</sup> *See* *Two Elec.*, 502 Pa. at 195.

<sup>103</sup> *Id.* at 194.

the mix of skill and chance comprise mostly all imaginable games, “chance ultimately determines the outcome because chance determines the cards dealt and the cards from which one can draw.”<sup>104</sup>

The court weighed the statistical arguments made in finding that skill was indeed present.<sup>105</sup> The defendant’s expert witness testified that outcomes differed when using “smart,” as opposed to “dumb,” strategies.<sup>106</sup> The former involved a player employing his knowledge of statistics, and the latter involved the player “standing pat” on the initial hand dealt by the machine.<sup>107</sup> When playing smart, a player won at a four and a half times greater rate. Nonetheless, the court held that even though skill—knowledge of probabilities—may improve a player’s winning odds, because there was a “random element” of which cards were ultimately dealt, chance determined the outcome.<sup>108</sup>

#### V. STATE LAW LANDSCAPE: DIFFERING STATE APPROACHES ON PROHIBITING SPORTS WAGERING AND ILLEGAL GAMBLING AND HOW DFS FIT INTO THE DISCUSSION

##### a. NEW YORK

Gambling laws in New York are not radically different from those in New Jersey. The New York Constitution prohibits legislative authorization of lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling except when a lottery is conducted by the State in which proceeds are reserved for State education.<sup>109</sup> The New York Constitution authorizes the legislature to codify preventative enactments to enforce this provision.<sup>110</sup> Paragraph 2 of the same section authorizes the majority of qualified electors to vote to validate games of

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<sup>104</sup> *Id.* at 196.

<sup>105</sup> *Id.* at 195.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See* Two Elec., 502 Pa. at 195–96.

<sup>109</sup> N.Y. CONST. art I, § 9, para. 1.

<sup>110</sup> *Id.*

chance—such as a lottery based on the random matching of symbols on cards or the awarding of prizes based on the random drawing of numbers—subject to government control.<sup>111</sup>

New York defines a game of chance as “any contest, game, gaming scheme or gaming devise in which the outcome depends in a *material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”<sup>112</sup> The same section notes three elements determining whether an activity is gambling: when an individual (1) stakes or risks something of value (2) on the outcome of a contest of chance or a future contingent event not under his control or influence, (3) upon an agreement or understanding that he will receive something of value in the event of a certain outcome.<sup>113</sup> Something of value is defined as “any money or property, [or] any token, object or article exchangeable for money.”<sup>114</sup> Furthermore, it can be credit or future promise of entry into a game without charge.<sup>115</sup>

i. ATTORNEY GENERAL SCHNEIDERMAN OPPOSES DFS

New York has recently taken a drastic stance in the legal debate over DFS. Attorney General Eric Schneiderman has sent a cease and desist letter to DFS providers to discontinue operation and refrain from accepting entry fees.<sup>116</sup> AG Schneiderman has since filed for a preliminary injunction in the New York Court of Appeals to enjoin FanDuel and DraftKings from continuing DFS activity in New York.<sup>117</sup> AG Schneiderman’s complaint suggests that the “the speed of DraftKings’ [and Fanduel’s] games, the size of their jackpots, and the degree to which

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<sup>111</sup> N.Y. CONST. art I, § 9, para. 2.

<sup>112</sup> N.Y. PENAL LAW § 225.00 (Consol. 2016) (*emphasis added*).

<sup>113</sup> *Id.*

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

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

<sup>116</sup> David Bario and Jake Pearson, *Fantasy Sports Companies Challenge AG Ban in Court*, NEW YORK LAW JOURNAL (Nov. 16, 2015), <http://www.newyorklawjournal.com/id=1202742379722/Fantasy-Sports-Companies-Challenge-AG-Ban-in-Court?slreturn=20160225172012>.

<sup>117</sup> *Id.*

the games are sold as winnable,” resembles illegal sports gambling and thus both companies should be enjoined from continuing operations.<sup>118</sup>

According to the AG, DFS fall squarely into the category of illegal gambling because it consists of a wager based on (a) a contingent future event that is beyond the participants control and (b) a contest dependent on chance.<sup>119</sup> The AG further takes issue with DFS’s large scale “easy to play and easy to win” style advertising and its tendency to promote the game as a lottery.<sup>120</sup> AG Schneiderman acknowledges the traditional/daily dichotomy in that the former was primarily engaged in for bragging rights or side wagers, while the latter offers massive jackpots.<sup>121</sup> AG Schneiderman concludes that DFS pose risks to New York residents who suffer from compulsive gambling.<sup>122</sup> He argues that DFS cause the precise harms that the New York gambling laws in place seek to eradicate.<sup>123</sup>

ii. AG SCHNEIDERMAN TRIUMPHANT AT TRIAL LEVEL; DFS SET TO APPEAL

AG Schneiderman has passed the first level of scrutiny at the trial level in December 2015.<sup>124</sup> Judge Manuel Mendez held that “the language of Penal Law §225.00 is broadly worded and as currently written sufficient for finding that DFS involves illegal gambling.”<sup>125</sup> Judge Mendez concluded that the UIGEA exception does not apply under the state law’s language and thus the defendants—FanDuel and DraftKings—are enjoined from doing business in the state of New York.<sup>126</sup> Furthermore, Judge Mendez rejected FanDuel and DraftKings’ due process claim

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<sup>118</sup> Complaint at 2, *Schneiderman v. DraftKings, Inc.*, No. 453054 (N.Y. Sup. Ct. filed Nov. 17, 2015).

<sup>119</sup> Brief for Plaintiff at 1, *Schneiderman v. DraftKings, Inc.*, No. 453054 (N.Y. Sup. Ct. filed Nov. 17, 2015).

<sup>120</sup> *Id.* at 9 (noting that in the first ten months of 2015, FanDuel has spent \$12 million in advertising alone).

<sup>121</sup> *Id.* at 11.

<sup>122</sup> *Id.*

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

<sup>124</sup> *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (Sup. Ct. Dec. 11, 2015).

<sup>125</sup> *Id.* at 17; *see supra* note 112 and accompanying text.

<sup>126</sup> *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 at 18.

because there had been an opportunity to be heard by AG Schneiderman and the presiding Court.<sup>127</sup> Judge Mendez also rejected DraftKings' equal protection argument because it failed to show other similarly situated DFS websites exempted from AG Schneiderman's investigation.<sup>128</sup> A New York Appellate court has since stayed Judge Mendez's approval of AG Schneiderman's motion to enjoin the DFS sites' activity.<sup>129</sup> The fate of DFS in New York will be reconsidered in May 2016 by the New York Appellate Division, First Department.<sup>130</sup>

b. NEW JERSEY: THE GRASS IS GREENER ON THE OTHER SIDE OF THE HUDSON

New Jersey's legislative history reflects its opposition to legalizing gambling and sports wagering outside of the gambler's Atlantic City safe-haven.<sup>131</sup> Nonetheless, New Jersey, in comparison to other states, is relatively pro-gambling considering its attempt to amend its constitution to allow gambling laws to pass.<sup>132</sup> In relevant part, the New Jersey Constitution prohibited its legislature from authorizing gambling of *any kind* unless the "kind, restrictions, and control" are voted on and approved by a majority of qualified voters at a general or special

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<sup>127</sup> *Id.* at 20.

<sup>128</sup> *Id.* at 21.

<sup>129</sup> Andrew Keshner, *Life of Fantasy Sports Sites In NY Is Extended Until May*, NEW YORK LAW JOURNAL (Jan. 12, 2016), <http://www.newyorklawjournal.com/id=1202746799270/Life-of-Fantasy-Sports-Sites-in-NY-Is-Extended-Until-May>.

<sup>130</sup> *Id.*

<sup>131</sup> *See, e.g.*, N.J. STAT. ANN. ANN. § 2A:40-1 (making all wagers, bets or stakes on any race or game based on "any lot, chance, casualty or unknown or contingent event" unlawful); N.J. STAT. ANN. ANN. § 2C:37-2 (making the promotion of gambling unlawful when (i) a person knowingly enters into an agreement to accept or receive money or property through the means of gambling activity; or (ii) materially aids gambling activity through the creation or establishment of the particular gambling games or contests).

<sup>132</sup> *See infra* notes 137–138 and accompanying text.

election.<sup>133</sup> Put differently, New Jersey residents would have to vote affirmatively to effectuate a legal gambling scheme anywhere outside of Atlantic City.<sup>134</sup>

Support for an amendment came primarily from Atlantic City investors and casinos, such as the Casino Association of New Jersey and Trump Entertainment Resorts Inc., among others.<sup>135</sup> Their general argument was that the legalization of sports wagers would provide a significant boost to Atlantic City's decrepit economy.<sup>136</sup> Public Question 1 of the November 8, 2011 New Jersey municipal election ballot was approved by a sixty-four percent majority of voters.<sup>137</sup> The amendment added two provisions—focusing on what previously outlawed sports wagering—that allowed the legislature to authorize (1) sports betting on the results of any professional, college, or amateur sport or athletic event, and (2) wagering at running and harness horse racetracks in this State.<sup>138</sup> The amendment's only notable opposition came from Harrah's Entertainment—who

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<sup>133</sup> Section D of the Paragraph 2 limits casinos' operation of gambling schemes to the Atlantic City, New Jersey locale. All gambling proceeds shall "be applied solely for the purpose of providing funding for reductions in property taxes, rental, telephone, gas, electric, and municipal utilities charges of eligible senior citizens and disabled residents of the State, and for additional or expanded health services or benefits or transportation services or benefits to eligible senior citizens and disabled residents, in accordance with such formulae as the Legislature shall by law provide." N.J. CONST., ART. IV, SEC. VII, PARA. 2.

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

<sup>135</sup> Baily Ludlam, *New Jersey Sports Betting Amendment, Public Question 1 (2011)*, BALLOTPEdia, [http://ballotpedia.org/New\\_Jersey\\_Sports\\_Betting\\_Amendment,\\_Public\\_Question\\_1\\_\(2011\)](http://ballotpedia.org/New_Jersey_Sports_Betting_Amendment,_Public_Question_1_(2011)) (last accessed Nov. 16, 2015).

<sup>136</sup> The legalization of sports betting can provide a potential boost of approximately \$2.7 billion, which is what sports wagering grossed in 2010 in Las Vegas. Atlantic City anticipated a revenue boost of around \$200 million in its first year of offering legalized sports betting. During the time of the amendment and subsequent complimentary legislation, 98 percent—which equated to tens of billions of dollars—of sports bets were wagered illegally in the U.S. or online through foreign gambling websites. See Chris Sieroty, *Sports Betting Possible in New Jersey*, LAS VEGAS REVIEW-JOURNAL (Sept. 17, 2011), <http://www.reviewjournal.com/sports/betting/sports-betting-possible-new-jersey>.

<sup>137</sup> The final tally was 648,769 for and 367,283 against the measure. See *New Jersey Municipal Election Results*, STAR LEDGER (Nov. 9, 2011), <http://www.nj.com/starledger/results-ballot/>.

<sup>138</sup> The language of the amendments imposes limitations on wagers on contests that involve a New Jersey College team or on collegiate contests that occur within the state. However, the amendment permits the usage of a wagering device, telephone, or the internet to place bets on all other sports contests. N.J. CONST., ART. IV, SEC. VII, PARA. 2. The ballot presented the amendment to voters using the following language:

Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature to authorize by law wagering at casinos or gambling houses in Atlantic City and at racetracks, in-person or

claimed it was premature considering the lingering federal ban—which evidently turned out to be true.<sup>139</sup> Also, the National Football League opposed the expansion of any sports betting outside of Nevada.<sup>140</sup>

New Jersey residents unequivocally supported a legal, regulated gambling scheme.<sup>141</sup> Naturally, the New Jersey Legislature exercised its newly acquired authority by passing the Sports Wagering Act.<sup>142</sup> New Jersey’s law made it legal, upon its Division of Law’s approval, to operate sports pools in casinos and racetracks.<sup>143</sup> The law required that an individual who has reached the age of 21 be physically present in a sports pool lounge—one with conforming physical dimensions, security measures, and equipment.<sup>144</sup> Section 5:12A-1 defines a sports pool using the broad language of the “business of accepting wagers on any sports event by any system or method of wagering.”<sup>145</sup> However, these amendments and ensuing legislation directly contradicted the prohibitions in PASPA.<sup>146</sup> Consequently, opposition came from the four major national sports leagues, but most troublesome for New Jersey and its recent measure, was the opposition it faced from the courts.

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through an account wagering system, on the results of professional, certain college, or amateur sport or athletic events, be approved?

Senate Concurrent Resolution No. 49 State of New Jersey, 214th Legislature, available at [http://www.njleg.state.nj.us/2010/Bills/SCR/49\\_I1.PDF](http://www.njleg.state.nj.us/2010/Bills/SCR/49_I1.PDF).

<sup>139</sup> See *Christie I*, 730 F.3d 208. See also discussion accompanying *infra* note 147.

<sup>140</sup> See BALLOTPEDIA, *supra* note 135.

<sup>141</sup> See STAR LEDGER, *supra* note 137,

<sup>142</sup> N.J. STAT. ANN. ANN. § 5:12A-2.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> N.J. STAT. ANN. ANN. § 5:12A-1, *et seq.*

<sup>146</sup> See Sieroty, *supra* note 136.



i. TENSION BETWEEN FEDERAL LAW AND STATE LAW: *NCAA v. GOVERNOR OF N.J. (CHRISTIE I)*

On September 17, 2013, the Third Circuit Court of Appeals affirmed the New Jersey District Court's granting of summary judgment to enjoin New Jersey's efforts to license gambling in *NCAA v. Governor of N.J. ("Christie I")*.<sup>147</sup> The NFL, NHL, MLB, NBA, and the NCAA, (collectively "the Leagues"), joined by the United States as an intervening party, argued that New Jersey's law permitting sports wagering on their contests violated PASPA.<sup>148</sup> New Jersey's substantive arguments challenged the constitutionality of PASPA raising an anti-commandeering claim, which states that the federal government may not commandeer state governments, as well as a state equal sovereignty claim.<sup>149</sup>

Judge Fuentes first held that the Leagues had standing because an injury in fact is established (a) in the cognizable harm of being associated with activity they and the public disapprove of, namely gambling, and (b) the increased "negative perceptions" of fans will result from the increased amount of gambling on sports and thus sustain damage to the Leagues' reputation.<sup>150</sup> Reaching the merits of the case, Judge Fuentes next held that PASPA is within reach of Congress' commerce clause powers because both gambling and national sporting contests substantially affect interstate commerce.<sup>151</sup> Next, Judge Fuentes held that PASPA does not violate the anti-commandeering doctrine because New Jersey can choose to repeal its anti-sport wagering laws.<sup>152</sup>

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<sup>147</sup> See *Christie I*, 730 F.3d 208.

<sup>148</sup> *Id.* at 214.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 219–22.

<sup>151</sup> *Id.* at 225.

<sup>152</sup> *Id.* at 232.

Finally, Judge Fuentes held that PASPA does not violate the equal sovereignty of the states.<sup>153</sup> First, because uniformity does not limit Congress' Commerce power to regulate commercial activity, which consequently may lead to different treatment among the states, there is no equal sovereignty violation.<sup>154</sup> Second, because laws remedying local evils are but one reason, and not the only reason, to treat states differently, no violation exists.<sup>155</sup> Third, just because PASPA treats one state more and not less favorably, there is not necessarily a violation.<sup>156</sup>

In a dissenting opinion, Judge Vinaskie agreed with the majority in all aspects except for in regards to the commandeering principle.<sup>157</sup> Judge Vinaskie would have held PASPA unconstitutional because it gives states a choice to either allow or prohibit unregulated betting on sporting events.<sup>158</sup> Thus, according to Judge Vinaskie, PASPA regulates state governments' regulation, which violates the anti-commandeering principle.<sup>159</sup> Given the slim two-to-one majority, a hearing *en banc* has since been granted in *NCAA v. Rebeck*.<sup>160</sup>

ii. FANTASY SPORTS ENTER THE ILLEGAL GAMBLING DEBATE: *HUMPHREY V. VIACOM, INC.*

In *Humphrey*, Defendants operated "pay-for-play" fantasy websites in which participants paid an entry fee to purchase a fantasy team and the associated services.<sup>161</sup> Essentially, participants paid to participate in a fantasy league that the defendant hosts provided.<sup>162</sup> Plaintiff alleged that

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<sup>153</sup> *Christie I*, 730 F.3d at 238.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 241.

<sup>158</sup> *Id.*

<sup>159</sup> *Christie I*, 730 F.3d at 238 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

<sup>160</sup> See *NCAA v. Rebeck*, 2015 U.S. App. LEXIS 17839 (3d Cir. Oct. 14, 2015) (granting a hearing *en banc*).

<sup>161</sup> The named defendants included Viacom Inc., the CBS Corporation, the CBS Television Network, Sportsline.com, Inc, The Hearst Corporation, The Walt Disney Company, ESPN, Inc., Vulcan, Inc., Vulcan Sports Media, and The Sporting News. Defendants offered support services such as "access to "real-time" statistical information, expert opinions, analysis, and message boards for communicating with other participants." *Humphrey v. Viacom, Inc.*, 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 19, 2007).

<sup>162</sup> See *id.*

the entry fees amounted to wagers or bets and thus under *qui tam* gambling recovery statutes he is eligible to recover the entry fees.<sup>163</sup>

Presiding United States District Judge Dennis M. Cavanaugh first dismissed Plaintiff's *qui tam* recovery claim because he lacked the necessary elements by not pleading (a) the identity of the loser(s), (b) the amount of each loser's loss, (c) when the loss occurred, and (d) the nature of the "wager" or "bet" made with either of the Defendants.<sup>164</sup> Furthermore, Plaintiff failed to allege, as required by the New Jersey *qui tam* statute, that (a) Plaintiff successfully and (b) each "loser" unsuccessfully brought suit within six months of losing the bet.<sup>165</sup> Second, Judge Cavanaugh held that the entry fees do not amount to bets or wagers because (a) the entry fees are unconditional, and (b) the prizes are guaranteed to be awarded and thus are absent of the risk necessary to constitute a wager.<sup>166</sup> The court held that reasonable entry fees are not bets or wagers where the contest's sponsor guarantees a prize (i.e., when the sponsor is not competing for the prize).<sup>167</sup>

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<sup>163</sup> *Id.* at 6.

<sup>164</sup> *Id.* at 16.

<sup>165</sup> *Id.* at 17.

<sup>166</sup> *Id.* at 20.

<sup>167</sup> While Judge Cavanaugh did not find it necessary to reach the merits on whether the kind of fantasy sport offered here was a game of chance or skill, he did offer insight into the skill required when competing with participants within or outside of one's own league:

The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench. The team with the best performance—based upon the statistics of the players chosen by the participant—is declared the winner at the season's end.

Humphrey v. Viacom, Inc., 2007 U.S. Dist. LEXIS 44679, at \*21 (citing *Las Vegas Hacienda v. Gibson*, 359 P.2d 85 (Nev. 1961)).

- c. NEW JERSEY AND CALIFORNIA OFFER THE DFS SOLUTION: NEW JERSEY’S INTERNET GAMING SCHEME, THE WHELAN BILL AND AB 1437
  - i. INTERNET GAMING MADE LEGAL IN NEW JERSEY PROVIDING THE MODEL STRUCTURE FOR DFS

New Jersey further sought, in the interest of Atlantic City’s revitalization, to legalize internet gambling within the state’s borders through its February 26, 2013 Casino Control Act amendment (“CCA Amendment”).<sup>168</sup> Licensed casinos may offer, via express authority granted in the CCA Amendment, internet gaming to consumers in New Jersey.<sup>169</sup> The CCA Amendment promises “a robust casino gaming industry that is capable of competing regionally, nationally, and internationally at the highest levels of quality” that simultaneously “retain[s] strict State regulatory oversight to ensure the integrity of all casino gaming operations conducted in [New Jersey].”<sup>170</sup> An additional reason for the implementation of legal internet gaming is attributed to the prior rampant participation in illegal gambling of unregulated, off-shore operators.<sup>171</sup>

According to David Deitch, a former New York Assistant District Attorney and U.S. District Attorney for the District of Columbia, safeguards are integrated into the CCA Amendment that serves to maintain the integrity of internet gaming.<sup>172</sup> For instance, a gaming provider—whether it be a casino or an affiliate—must complete the full casino licensing application as well as obtain a permit from the New Jersey Division of Law.<sup>173</sup> This rigorous process is certain to attract those already established internet-gaming companies (companies such as DraftKings and FanDuel), who would be capable of pursuing such a venture.<sup>174</sup> According to Deitch, what makes

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<sup>168</sup> David B. Deitch, *New Jersey: Taking the Lead in Offering Internet Gaming to the World*, European Gaming Lawyer, available at [http://www.ifrahlaw.com/wp-content/uploads/2013/04/EGL\\_Spring2013.pdf](http://www.ifrahlaw.com/wp-content/uploads/2013/04/EGL_Spring2013.pdf).

<sup>169</sup> *Id.*

<sup>170</sup> N.J. STAT. ANN. § 5:12-95.17(e) (West 2015).

<sup>171</sup> N.J. STAT. ANN. § 5:12-95.17(f) (West 2015).

<sup>172</sup> *See* Deitch, *supra* note 168.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

the gaming structure appealing is Section 29 of the CCA Amendment, which allows those not physically present within New Jersey to wager over the internet.<sup>175</sup> A degree of control is maintained by restricting all internet gaming hardware, software, and other equipment to casino facilities in Atlantic City.<sup>176</sup> These measures are implemented to maintain “secur[ity] [and] inaccessib[ility] to the public” and will keep equipment “under the complete control of a casino licensee or its internet gaming affiliate.”<sup>177</sup>

By allowing foreign participants outside of U.S. borders to place online wagers or participate in gaming, the CCA Amendment installs two restrictions: first, gambling must be permitted in the foreign country where the participant resides; and second, New Jersey must enter into a reciprocal agreement with the foreign nation to facilitate online gaming.<sup>178</sup> While the first restriction is arguably not much of a hurdle, Deicht concedes that the second restriction may be subject to more scrutiny.<sup>179</sup> Ultimately, however, after considering the myriad of controlling federal law, Deicht concludes that allowing foreign participants to engage in New Jersey based online gambling would not be contrary to Federal law.<sup>180</sup>

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<sup>175</sup> The language included in Assembly Bill 2578 was specifically phrased:

Wagers may be accepted thereunder from persons who are not physically present in this State if the Division of Gaming Enforcement in the Department of Law and Public Safety determines that such wagering is not inconsistent with federal law or the law of the jurisdiction, including any foreign nation, in which any such person is located, or such wagering is conducted pursuant to a reciprocal agreement to which this State is a party that is not inconsistent with federal law.

2012 Bill Text NJ A.B. 2578.

<sup>176</sup> N.J. STAT. ANN. § 5:12-95.17(j) (West 2015).

<sup>177</sup> *Id.*

<sup>178</sup> *See* Deicht, *supra* note 168.

<sup>179</sup> *Id.*

<sup>180</sup> Deicht concludes the Federal Wire Act of 1961 (“FWA”) would probably not serve to barricade foreign wagers because only sport wagers are within the purview of this Act. *Id.* The FWA prohibits the knowing use of wire communication to transmit money or credit in relation to bets or wagers. 18 U.S.C.S. § 1084. Furthermore, because Federal laws rely on State law to determine what unlawful betting, wagering, or internet gambling means, the UIGEA and the Internet Gambling Business Act—which prohibits a person engaged in the business of betting or wagering from accepting money transfers for unlawful internet gambling—are unlikely to pose as an impediment on internet gaming. *See* Deicht, *supra* note 168

One of the most attractive aspects of the scheme compels the New Jersey Division of Gaming Enforcement (“NJDE”) to produce a report on the impact of internet gambling on problem gamblers.<sup>181</sup> An independent report conducted by Lia Nower of the Rutgers Center for Gambling Studies concluded that internet gambling provides an additional medium for individuals with high risk gambling problems.<sup>182</sup> In the span of one year, internet gaming accounts rose from 126,231 in 2013 to 531,626 by December of 2014.<sup>183</sup> Likewise, the internet gaming revenue rose substantially each month, generating a total of \$131.2 million since its inception.<sup>184</sup> New Jersey benefited from this growth, collecting fifteen percent of total revenue in taxes, while two percent was apportioned to the Casino Reinvestment Development Authority.<sup>185</sup> The Research Report concluded that New Jersey’s legalized internet gambling scheme is clearly directed at facilitating informed and responsible gambling choices among its consumers.<sup>186</sup> The measures ensure that a high-risk gambler will not engage in reckless gambling.<sup>187</sup>

Finally, the CCA Amendment makes tampering with odds or payouts, or with the equipment affecting odds or payouts, a crime in the third degree.<sup>188</sup> Those operators in violation

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<sup>181</sup> N.J. STAT. ANN. § 5:12-95.18 (West 2015).

<sup>182</sup> Lia Nower, *Internet Gaming in New Jersey Calendar Year 2014 Report to the Division of Gaming Enforcement*, RUTGERS UNIVERSITY (February 2015), available at <http://www.nj.gov/oag/ge/2015news/ResponsibleGamingFinalReport%202015.pdf>.

<sup>183</sup> *Id.* at 10.

<sup>184</sup> The month of December 2014 saw a substantial growth from previous months, accumulating \$10.7 million in revenue. *Id.* at 11.

<sup>185</sup> *Id.* The Casino Reinvestment Development Authority is an agency that reinvests casino revenue for the well-being of New Jersey residents. Its initiative is to “provide capital investment funds for economic development and community projects that respond to the changing economic and social needs of Atlantic City and the State of New Jersey . . . by encourage[ing] business development and permanent job creation . . .” Casino Reinvestment Development Authority, About Us, available at <http://www.njcrda.com/about-us/> (last accessed Nov. 16, 2015).

<sup>186</sup> See Nower, *supra* note 182, at 12. New Jersey has succeeded in curbing the gambler’s appetite to reckless gambling by implementing preventative measures to limit excess wagering. According to the report, (a) providing the elapsed time a participant has spent gambling; (b) supplying gambling helpline and informational resources, (c) providing account and game history; (d) giving participants options to set limits on losses, deposits, time played; (e) requiring a three day “cool off” period; and (f) providing an opportunity for one to exclude themselves from all internet gaming sites through the Division. *Id.* at 9.

<sup>187</sup> See *Id.*

<sup>188</sup> See N.J. STAT. ANN. § 5:12-95.27–28 (West 2015).

are subject to not more than a \$50,000 fine, and for unnatural persons, not more than a \$200,000 fine.<sup>189</sup>

Moreover, those violating these provisions are required to forfeit their permit and license.<sup>190</sup> The scheme used in New Jersey to regulate internet gambling is a suitable solution for the quasi-gambling nature of DFS. Implementing a regulatory scheme at the Federal level modeled after New Jersey's internet gaming legislation will allow consumers to safely play DFS while simultaneously inhibiting the growth of gambling addiction and raising United States revenue through taxation. This is a scheme that will decrease the profits that DFS providers currently reap, but it sufficiently balances the government's interest in protecting consumers while allowing the activity enjoyed by consumers to flourish.

#### ii. THE WHELAN BILL

Given New Jersey's online gambling landscape, the state is poised to lead the way in DFS regulation and legalization and serve as the model for federal law. State Senator Jim Whelan proposed a bill ("Whelan Bill") that has received mixed responses from DraftKings.<sup>191</sup> On November 3, 2015, DraftKings promulgated to seemingly all of its New Jersey-based customers an email aimed at the heart of those "who love to play fantasy sports."<sup>192</sup> DraftKings pleaded for

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> 2016 Bill Text NJ S.B. 1927 (herein after "Whelan Bill").

<sup>192</sup> NJ.com, DraftKings urges N.J. users to contact legislators in email sent to customers, [http://www.nj.com/giants/index.ssf/2015/11/draftkings\\_urges\\_nj\\_users\\_to\\_contact\\_legislators\\_i.html](http://www.nj.com/giants/index.ssf/2015/11/draftkings_urges_nj_users_to_contact_legislators_i.html) (last accessed Nov. 6, 2015). This particular email was sent following the circulation of a petition initiated by DraftKings and nationally by the Fantasy Sports Trade Association. The petition simply requests that DFS users endorse a statement claiming that fantasy sports adds excitement to sports, creates communal interactions, and tests competitors' sports knowledge against others. Bostlnno, Here's DraftKings' 1st Attempt to Mobilize Its Users [Full Text]: The company emailed its users in NJ asking them to sign a petition, <http://bostlnno.streetwise.co/2015/11/04/nj-daily-fantasy-ban-draftkings-petition-to-new-jersey-residents/> (last accessed Nov. 11, 2015). The FSTA uses similar language in its petition on its website:

As your constituent and one of the millions of fantasy sports players here in New Jersey, I urge you to protect my right to enjoy fantasy sports. Playing fantasy sports is not about the money. It's about the challenge, the skill, the fun, and connecting with friends, family, and coworkers. I urge you to

its New Jersey DFS users to contact their legislators to oppose “any measure that would restrict [the] ability to play fantasy sports in New Jersey.”<sup>193</sup> The email’s gravamen seeks to protect the game of daily fantasy sports by maintaining its accessibility.<sup>194</sup>

Ironically enough, the proposed bill does not call for the declaration of DFS as illegal gambling.<sup>195</sup> Perhaps the reason, at that point in time, that DraftKings apparently opposed the Whelan Bill was due to the potential financial repercussions that it is sure to impose on DFS operators. Being somewhat apropos, the Whelan Bill’s deliberation comes amid New Jersey’s Third Circuit Appeal *en banc* in *NCAA v. Governor of New Jersey*, discussed *supra*, reviewing the Constitutionality of the legalization of gambling as proposed by a state constitutional amendment.<sup>196</sup>

The Whelan Bill would make DFS safe for consumers while maintaining the integrity of the subjected sports. Particularly, Whelan insists that his tentative bill does not seek to ban fantasy sports but that it “make[s] sure fantasy sports competition is fair, impartial, and transparent to everyone.”<sup>197</sup> Indeed the bill would declare “[a] daily fantasy sports game [as] a game of skill and shall not be considered to be a game of chance.”<sup>198</sup> So why are petitions circulating in hopes of

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oppose any measure that would restrict the ability to play fantasy sports in New Jersey, and to support keeping fantasy sports accessible for everyone in our state. Stand with your constituents, like me, who support #FantasyforAll. Thank you.

FSTA Fantasy Sports Trade Association, *Protect Fantasy Sports in NJ!*

[http://salsa4.salsalabs.com/o/51362/p/dia/action3/common/public/?action\\_KEY=16357&utm\\_source=DailyEmail&utm\\_medium=Email&utm\\_content=http%3a%2f%2fsalsa4.salsalabs.com%2fo%2f51362%2fp%2fdia%2faction3%2fcommon%2fpublic%2f%3faction\\_KEY%3d16357&utm\\_campaign=](http://salsa4.salsalabs.com/o/51362/p/dia/action3/common/public/?action_KEY=16357&utm_source=DailyEmail&utm_medium=Email&utm_content=http%3a%2f%2fsalsa4.salsalabs.com%2fo%2f51362%2fp%2fdia%2faction3%2fcommon%2fpublic%2f%3faction_KEY%3d16357&utm_campaign=)

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* Of course DraftKings did not fail to reinforce its belief in the legality of daily fantasy sports, noting the social appeal of DFS in “connecting with friends, family, and co-workers,” and that the basis of its contests are “about the challenge [and] the skill.”

<sup>195</sup> The bill is merely a draft and has not been filed with the legislature. Cite bill in my email *See id.*

<sup>196</sup> *National Collegiate Athletic Ass’n v. Governor of New Jersey*, 730 F.3d 208 (2013). A hearing *en banc* has been granted by *NCAA v. Rebeck*, *see supra* note 160.

<sup>197</sup> Letter from Jim Whelan, New Jersey Senator, to Director Rebeck and Chairman Levinson (Oct. 30, 2015) (available at <http://files.ctctcdn.com/38874f71101/a6770444-dc15-40b4-ba7b-393dc11deef9.pdf>).

<sup>198</sup> *See Whelan Bill*, *supra* note 191, at section 1(c).



garnering New Jersey DFS participants' support? The primary reason is that the Whelan Bill overhauls the current scheme, adopting one that is purely intrastate as opposed to interstate; a move that could send DFS providers packing.<sup>199</sup>

Unlike the UIGEA, the Whelan Bill defines fantasy sports more broadly to specifically include DFS within its regulatory reach.<sup>200</sup> The language is specifically catered for fantasy sports and defines the term as any fantasy contest between participants “determined by statistics generated based on performance by actual individuals participating in actual professional or collegiate athletic events.”<sup>201</sup> Consistent with the UIGEA, the outcome of the contest must be based off of the relative skill of the participants.<sup>202</sup> The Whelan Bill would retain the prohibition on “sports betting” by disallowing the placement of wagers on the score or spread of an individual contests or the performance of an individual player.<sup>203</sup> DFS, like traditional fantasy sports, would pass muster because wagers hardly resemble bets based solely on the outcome of real-life games. The accumulation of statistics from individual performances determine DFS outcomes, regardless of what team the individual plays for.

Furthermore, the definition of “fantasy sports providers” provides the rhetoric that has DFS providers concerned.<sup>204</sup> It prohibits authorized DFS operators from accepting entries from those not physically present in the state.<sup>205</sup> According to the Whelan Bill, a DFS provider must be issued a permit through the approval of the NJDGE.<sup>206</sup> The fees associated with licensing a DFS provider

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<sup>199</sup> Dustin Gouker, *New Jersey Bill Would Treat Daily Fantasy Sports Pretty Much Like Regulated Online Gambling, Except For Actually Calling It Gambling*, LEGAL SPORTS REPORT (Nov. 2, 2015), <http://www.legalsportsreport.com/5762/nj-dfs-bill/>.

<sup>200</sup> See Whelan Bill, *supra* note 191.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> Article 2 of the Casino Control Act, establishes the NJDGE. N.J. STAT. ANN. § 5:12-55 (West 2015). The division is established in Atlantic City, New Jersey with satellite operation in Trenton, New Jersey, and is under the

would cover the Division’s cost of overseeing the conduct of DFS operators.<sup>207</sup> The Whelan Bill proposes similar conditions to those established by the UIGEA, including: “(a) the outcome of the contest must be determined by statistics of individual athletes, (b) prizes must be predetermined, (c) the outcome must not be based solely on the performance of an individual athlete, the score, a point spread, or any individual team performance and, (d) a patron must be 21 years of age to participate.”<sup>208</sup> Additional provisions include the permission of a mobile wagering account allowing patrons to submit entry fees to a casino licensee’s facilities so as long as contests are conducted in New Jersey alone.<sup>209</sup>

iii. CALIFORNIA FORESHADOWS THE LEGAL LANDSCAPE FOR DFS BY ADOPTING NEW JERSEY’S APPROACH: PASSES BILL AB 1437

California has taken the step to implement the framework for DFS regulation by passing committee chairman Adam Gray’s bill (“AB 1437”) in January 2016.<sup>210</sup> AB 1437 faced very little opposition passing seventeen to one by the Assembly Governmental Organization Committee.<sup>211</sup> Gray noted that millions play in what is currently an unprotected consumer market.<sup>212</sup> Some concerns mounted by committee members involved the assurance of whether there exists enough funding to adequately monitor online operators and to keep minors from participating.<sup>213</sup>

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direction of appointed Assistant Attorney General and Director David L. Rebuck. See The State of New Jersey Department of Law & Public Safety Office of the Attorney General, Director of the Division of Gaming Enforcement, <http://www.nj.gov/oag/ge/director.htm>. The primary goal of the NJDGE is to “protect the public interest by maintaining a legitimate and viable industry, free from the influences of organized crime, and assuring the honesty, good character and integrity of casino owners, operators, employees and vendors.” <http://www.nj.gov/oag/ge/mission&duties.htm>. Article 5 authorizes the NJDGE to generally grant certificates of operation and casino gaming licenses; audit casinos’ financial records and accounting; create and enforce regulations; license, regulate, and investigate gaming over the internet; and among other similar duties, establish a patron exclusion list. N.J. STAT. ANN. § 5:12-76 (West 2015).

<sup>207</sup> See Whelan Bill, *supra* note 191.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> Cheryl Miller, *Fantasy Sports Sites Meet Weak Opposition in Calif.*, THE RECORDER (Jan. 6, 2016).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

Nonetheless, the bill received overwhelming support in moving forward as it continues to be crafted.<sup>214</sup>

AB 1437 adds chapter 4.7, entitled the Internet Fantasy Sports Games Consumer Protection Act, to Division 8 of the Business and Professions Code and amends the California Penal Code.<sup>215</sup> The bill acknowledges the central issue surrounding DFS nationwide in Article 1, Section 19752(c):

Neither federal nor California laws provide any consumer protections for California players. California players assume all risks, any negative social or financial impacts are borne by the citizens of California, and the revenues generated from these games are being realized by unlicensed operators and do not provide any benefits to the citizens of California.<sup>216</sup>

The bill proposes a sensible remedy to the potential harms of DFS by establishing a licensing scheme to control DFS operators.<sup>217</sup> It is a concise and progressive adaptation of gaming law that inadvertently conjoins the principles of New Jersey's CCA amendment and the Whelan Bill. AB 1437 seeks to ensure that gameplay is offered consistent with the law, the state is capable of collecting its share of taxes, and that the consumer is protected in gameplay and collections of prizes.<sup>218</sup> Before DFS is offered to California consumers, Article 3 of AB 1437 requires an operator to apply for and receive a license from the California Department of Justice.<sup>219</sup> Section 19772 echoes the UIGEA fantasy carve-out provisions; however, no requirement of skill is included.<sup>220</sup>

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<sup>214</sup> *Id.*

<sup>215</sup> 2015 Bill Text CA A.B. 1437.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> AB 1437 requires the California DOJ to determine whether an applicant meets the good character and integrity provision, and is capable of paying 19782 one-time license fee. This fee has yet to be determined. *Id.*

<sup>220</sup> This section (1) prohibits an imaginary team being based on the current membership of an amateur or professional sports team, (2) requires prizes be disclosed prior to the contest, (3) prohibits prizes from being

Furthermore, a licensed operator is responsible for providing adequate data security measures and determining participant eligibility.<sup>221</sup> Section 19774(f) establishes a system that authorizes the state to levy fees on provision violators.<sup>222</sup> Section 19780 creates the Fantasy Sports Fund in the State Treasury.<sup>223</sup> Annual regulatory fees to be paid by operators will be deposited in the Fantasy Sports Fund.<sup>224</sup> The annual fee is to be determined by the California DOJ based on “the reasonable costs of license oversight, consumer protection, state regulation, problem gambling programs, and . . . enforcement efforts related to illegal Internet gambling activities.”<sup>225</sup>

The passing of AB 1437 may ultimately prove to be a landmark step towards extinguishing the chaos that has ensued from the inception of DFS. All of the desirable facets of the New Jersey online gambling scheme are implemented in this bill. It provides California with an additional taxation resource while simultaneously allowing consumers to participate in a safer version of the fantasy game that its citizens have grown fond of.

#### VI. ANALYSIS: ARE DFS A GAME OF CHANCE OR A GAME OF SKILL?

This analysis will show that daily fantasy sports are no less skill-based than traditional fantasy sports—which have long been accepted as a non-gambling activity—and perhaps more skill-based. This analysis discusses the reasons DFS are skill-based in juxtaposition with traditional fantasy sports.<sup>226</sup> Under current federal law, DFS are operating legally pursuant to

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contingent on the number of participants or entry fees, and (4) winning may not be based on point spreads or the performance of any individual player. *Id.*

<sup>221</sup> The verification responsibilities include verifying credit card identity, verifying that the participant is at least twenty-one years of age, and verifying a participant’s location in California. *Id.*

<sup>222</sup> Fees range between \$1,000 for a first-time violator to \$10,000 for an operators fifth violation. *Id.*

<sup>223</sup> 2015 Bill Text CA A.B. 1437.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> A Survey consisting of 1,420 participants reflects the relevance of traditional sports. Sixty-one percent of those who play DFS are also in at least one season-long fantasy sports league. The survey was marketed through social media websites and was conducted from June 18 through July 9, 2015. See Adam Krejcik, *Daily Fantasy Sports Player Survey – 2015*, EILERS RESEARCH (July 14, 2015), <https://courier.bluematrix.com/Courier/EmailDocViewer.action?info=vNnixFYyhd4FCmyi2AiiGw5bKPLv9kYZ%2BZwoDtUOHirWYkn0AQzNKxEiRrGphv6zdodk2GDWPv%2FX%0AC%2BhzuqMIBWLeF97PSR8CVyMr2Di1P>

UIGEA’s fantasy sports carve-out.<sup>227</sup> First, all prizes are made known to participants in advance.<sup>228</sup> Second, winning outcomes are determined predominately by the relative knowledge of skill by the accumulation of statistical results of real professional players.<sup>229</sup> Third, DFS operators provide barriers that restrict individuals from betting on (1) the score or outcome of a single professional sports contest and (2) the performance of a single athlete.<sup>230</sup>

But does the UIEGA fantasy carve-out absolve DFS operators from the penalties that illegal gambling is subject to? Considering the UIEGA was enacted in 2006, before DFS were created, it arguably does not apply to DFS.<sup>231</sup> In fact, Jim Leach, a Republican congressman who co-authored UIGEA, has stated that the carve-out was considered more of a footnote, and that “[i]t was never much discussed during consideration of UIGEA because [fantasy sports] was considered like horse racing, already part of the American betting scene.”<sup>232</sup> Of course, it is the language of the law that governs, not the intent of a co-author; and DFS comply with the black-letter language of the federal law as written.<sup>233</sup>

Given that the minority tests are unworkable, as they inject subjectivity into the equation, for the purpose of this analysis, the predominant purpose majority test will be the lens through which DFS are viewed.<sup>234</sup> There are various reasons why skill predominates over chance: first, an unprecedented amount of time and research is required to succeed in fantasy sports; second, a

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(*hereinafter* “Eilers Research”).

<sup>227</sup> See *supra* notes 81–83 and accompanying text.

<sup>228</sup> See DraftKings, <https://www.draftkings.com>.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Dustin Gouker, *UIGEA Author: “No One Ever Conceived” That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REPORT (May 8, 2015), <http://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/>.

<sup>232</sup> See Kilgore, *supra* note 33.

<sup>233</sup> See Gouker, *supra* note 231.

<sup>234</sup> See Okerberg, *supra* note 94.

participant's actions have a significant effect on his outcome; third, certain variables of chance are virtually eliminated in a daily format, such as injuries and player rest; and fourth, there are varying skill-levels that can increase over time. Nonetheless, when money is involved, there must be a buffer in place to protect the integrity of the real games, and thus regulations are necessary. In sum, DFS should not be considered illegal gambling because its outcome is not predominantly determined by chance. Instead, a federal regulatory scheme is appropriate given the lines dividing illegal gambling and legal contests continue to blur.

a. DFS ARE PREDOMINANTLY A GAME OF SKILL BECAUSE TIME AND RESEARCH IS NECESSARY TO EARN PROFITABLE WINNINGS

First, DFS are predominantly skill-based because participants must be studious of the particular sport that their fantasy contest entry is in. Substantial amounts of time must be set aside for preparation and research in both traditional and daily fantasy. The connotation “daily” often causes opponents of DFS to overlook the required research. In a survey conducted by Eilers Research, consisting of 1,420 individuals reporting, those who allegedly play DFS admitted that between ten and twenty hours a week were reserved for fantasy research.<sup>235</sup> A whopping 84.3 percent of DFS players reported to have spent over five hours of research a week.<sup>236</sup> Those surveyed who do not play DFS, reported that the reason for excluding themselves was because they were “too intimidate[ed]” or that the game was too “time consuming.”<sup>237</sup>

Of those investing money into DFS contests, a thirty-five percent majority reported that they had broken even or made a return on their investment (“ROI”) of twenty percent.<sup>238</sup> Given

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<sup>235</sup> The survey notes that an overwhelming majority of research is performed through Rotogrinders’ website—a fantasy sports news source. *See* Eilers Research, *supra* note 226 at 21.

<sup>236</sup> A total of 1,219 responded to this particular survey question. *See id.*

<sup>237</sup> Of those who reported they do not participate in DFS, thirteen percent provided that their reason was due to not knowing about DFS, while ten percent attributed their abstinence to concern over the legality of DFS. *Id.* at 13.

<sup>238</sup> *Id.* at 23.

that eighty-five percent of those who perform extensive research of over five hours a week previously noted, at least some correlation exists between performing research and making ROI.<sup>239</sup> Of course, studying alone does not necessarily place one in the top percentile—one must possess the skill required to succeed—but it indeed plays a substantial role in success.

Regardless of whether a contest is season-long or daily, when choosing lineups it is important to consider a player's entire body of work for that season. The ultimate goal is to insert a player into one's lineup during the athlete's optimal performance during the season. To accomplish this, a fantasy participant must study the player's trends leading up to that day's particular real-life game. In traditional fantasy sports, fantasy owners are often handcuffed into ignoring prior trends (i.e. less research is necessary) because of the extremely limited alternatives—owners are typically limited to his/her "bench players."<sup>240</sup> Whereas in DFS, every player in the league is available at the participant's exposal.<sup>241</sup>

The time and research required to succeed in DFS certainly distinguishes it from sports betting and gambling. There are many variables that go into successfully choosing which team will likely win a sports contest. Sports gambling however is not dependent on studying these variables because success is not contingent on dissecting each player's attributes, but rather, the broad totality of a team's performance. Contrarily, without understanding certain variables, such as player trends, matchups, weather, and injuries, a DFS participant will be far less successful. To succeed in DFS, a participant must consider an individual athlete's performance. Unlike point spread wagers, an individual athlete's performance often depends on several variables. For

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<sup>239</sup> *Id.*

<sup>240</sup> Free agents are also available on waiver wires but are likewise a limited alternative. *See* discussion *infra* section VI.b.

<sup>241</sup> This, of course, depends on which games are included in a particular contest. Nonetheless, any player who plays the vacant position may be used to fill a participant's roster spot. *See* DraftKings.com (last visited Jan. 15, 2016).

instance, in fantasy football, a wide receiver must depend on whomever his quarterback is to perform well enough to successfully throw the ball to the wide receiver.

Furthermore, the opposing defense plays a factor requiring consideration. For example, if the opposing defense has a poor run defense, then the offense will throw the ball less making the wide receiver less valuable. Of course, the opposing defensive line is a variable as well as the opposing team's defensive backs (this is the individual matchup factor that has a profound effect on fantasy scoring). Finally, the intangibles, such as weather and home field advantage, are relevant in fantasy scoring as well. If the game is played in rain or snow, it is far less likely that a team will throw the ball and thus it might be more sensible to choose either the running back for the team or avoid the contest altogether. The multitude of variables, and the amount of research required to comprehend and apply them appropriately, eliminates chance as a predominant factor.

b. DFS ARE PREDOMINANTLY A GAME OF SKILL BECAUSE PLAYER ACTIONS HAVE A SIGNIFICANT EFFECT ON THE OUTCOMES OF CONTESTS

The court in *Commonwealth v. Two Elec. Poker Game Machs.* noted that there is a certain level of skill associated with poker.<sup>242</sup> However, because a poker player has no control over which cards are dealt, chance played a predominant role.<sup>243</sup> In DFS however, a participant has a considerable amount of control in choosing which players to start. While the participant has no control over how their chosen athlete performs, DFS is distinguishable from poker because a participant can make a knowledgeable decision on who to start based on past performances. In DFS, it is more than luck that determines how the course of the contest plays out.

Human action plays a significant role in determining a participant's success in DFS contests. If chance were a predominant factor in determining DFS outcomes, then computer

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<sup>242</sup> See *Two Elec.*, 502 Pa. at 195.

<sup>243</sup> *Id.*



generated lineups chosen at random would produce comparable results to human generated lineups.<sup>244</sup> However, in a study conducted by MIT Professor Anette (Peko) Hosoi, simulations showed just the opposite.<sup>245</sup> The simulation compared the fantasy points of actual FanDuel user lineups with computer generated lineups that were subject to two conditions: (1) that at least eighty-five percent of the salary cap be used and (2) and that the salary be apportioned according to each position's relative value (e.g., higher salary be apportioned to the higher valued running back position than the kicker position).<sup>246</sup> The results revealed that the human users outscored the computer generated lineups eighty-six percent of the time for NFL contests and ninety-five percent of the time for NBA contests.<sup>247</sup>

The issue with this simulation is that, if some computer generated lineups used only eighty-five percent of its salary cap, artificially inflated numbers are produced because those lineups are at a statistical disadvantage considering players are priced according to their skill level. Two bits of information would be helpful in buttressing Professor Hosoi's simulation: (i) the average salary cap percentage used across all DFS users and (ii) the average salary cap percentage exhausted by the top twenty percent of players—who collect an average of 86.7 percent of gross winnings throughout the different DFS contests offered.<sup>248</sup>

c. DFS ARE PREDOMINANTLY A GAME OF SKILL BECAUSE CHANCE VARIABLES ARE NEARLY ELIMINATED IN THE DAILY FORMAT

Daily Fantasy is arguably more of a skill-based game than traditional fantasy sports because injuries and seeding factors play a smaller role. While chance is not completely eliminated

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<sup>244</sup> Affidavit of Anette (Peko) Hosoi Supporting Defendant (hereinafter "Peko Affidavit") at 5, *Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct. filed Nov. 23, 2015).

<sup>245</sup> *Id.* at 1.

<sup>246</sup> *Id.* at 7.

<sup>247</sup> *Id.* at 8.

<sup>248</sup> This data is gathered from New York participants between 2014 and November 2015. *See id.* at Ex. 3.

it is indeed diminished in the DFS format. For instance, injuries play a significant role in season-long fantasy sports. Injuries to players that are integral to one's team is based heavily on an element of chance. Some factors may raise or lower the chances of injury, such as the amount of playing time or genetics; nonetheless, every athlete is vulnerable to an injury. Where skill becomes relevant, as argued by opponents of DFS, is in the ability to drop, trade, and acquire free agent players—a staple in season-long fantasy sports but absent in DFS. This notion is given too much weight.

In traditional fantasy sports, which typically consist of twelve-team leagues, the players available as “free agents” are either one of two types of players: (1) low-caliber players (i.e., player who do not score high fantasy points because of their low skill or playing time) or (2) the reserve or backup player to the original injured player. The second scenario is based purely on chance because given the added player's status as a backup player, he comes equipped with only a small body of in-game performance to base one's reasonable judgment on. Therefore one must rely on luck as to whether that added free agent performs well.

Essentially, a season-long fantasy participant with the winningest team may suffer an injury to their best player halfway through a season (or be victim to the nightmare scenario of an injury immediately preceding playoffs) and thereafter struggle to salvage their team. On the contrary, DFS, through daily contests, substantially diminishes the injury dilemma associated with fantasy sports. When provided with accurate and timely sports news updates, a fantasy owner can adjust appropriately before submitting a lineup, thereby eradicating the injury issue almost entirely.

An additional factor to consider is the real-life success of the sports team a fantasy player belongs to. Often times, a coach may decide to rest a player when more important playoff games

are approaching.<sup>249</sup> This is done to secure the highest performance of the athlete in elimination games rather than risk injury or fatigue by playing the athlete in what has become a meaningless regular season game. Moreover, this strategy is employed typically at the end of a sport's regular season, which usually coincides with fantasy playoffs.<sup>250</sup>

It is almost impossible to predict at the beginning of a season which teams will be in the position to rest prime players come season's end. In this sense, season-long fantasy participants are essentially gambling on which teams will finish the season with a playoff berth and avoiding players from those teams. If a season-long fantasy participant by chance owns a player who is rested in the final few weeks of a season, that individual is stuck without a quality replacement. On the contrary, the DFS format eradicates this issue because a participant may choose different players each contest. Therefore, chances of injury or rest become less relevant.

d. DFS ARE PREDOMINANTLY BASED ON SKILL BECAUSE OUTCOMES ARE PREDICTABLE OVER SHORT PERIODS OF TIME AND SKILL LEVELS IMPROVE OVER LONGER PERIODS OF TIME.

An additional consideration that supports the notion that DFS are predominately based on skill relates to the acknowledgment that a participant's skill-level is consistent over short periods of time and can improve over longer periods of time.<sup>251</sup> DFS even segregates its contests based on skill level. DFS operators offer beginner contests exclusively to those new to the game who have entered into less than fifty beginner contests.<sup>252</sup> Beginners can choose to bypass these contests entirely; but nonetheless, it is an opportunity for new participants to build the requisite skill to participate in more competitive contests. These segregated contests suggest that beginners

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<sup>249</sup> See, e.g., Christopher Montague, *The Week 17 Dilemma – Which Teams Will Rest Their Starters?*, FANTASY SMACK TALK, <http://www.fantasysmacktalk.com/the-week-17-dilemma-which-teams-will-rest-their-starters/>.

<sup>250</sup> See *id.*

<sup>251</sup> See Peko Affidavit, *supra* note 244, at 9.

<sup>252</sup> DraftKings, Frequently Asked Questions, <https://www.draftkings.com/help/faq> (last visited Jan. 15, 2016).

inherently have lower skill due to their lack of experience. Almost any skill, with practice and experience, can be developed and grow.

While this argument may be diluted by the fact that DFS itself implements segregated contests, any bias is a misconception. DFS providers have an interest in drawing in new players to their game. Thus, DFS must maintain contests that are fair and competitive. Beginners that join and have no success are more likely to quit. However, as logic will dictate, beginners that are successful, or that at least remain competitive, will enjoy the game and continue playing. As their skill-level increases, beginners become more adept to the game and are more capable of competing in advanced contests.

Nonetheless, professor Hosoi has demonstrated in her study that skill levels remain persistent as the amount of contests entries grow.<sup>253</sup> Hence, certain players have a propensity to win while others have a propensity to lose.<sup>254</sup> Professor Hosoi accomplished this by measuring win percentages for the first and second halves of a sports season and then assigning a skill valuation.<sup>255</sup> She then observed that as the amount of contests grew larger, skill factor played a more prominent role, allowing predictable outcomes of participants.<sup>256</sup>

Professor Hosoi further observed that over longer periods of time, skill develops and participants become more skilled.<sup>257</sup> By grouping participants in four quartiles—one being the least experienced and four being the most experienced (having submitted at least 3,042 entries)—and tracking their performances, professor Hosoi observed that the most experienced participants

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<sup>253</sup> See Peko Affidavit, *supra* note 244, at 9.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 10–11.

<sup>256</sup> For instance, an individual having entered 150 contests in a given period had a skill level in the higher end of the spectrum of between 0.9 and 1.0. See *id.* at 12.

<sup>257</sup> *Id.* at 18.

were significantly more successful.<sup>258</sup> Those with the most experience had a sixty-six percent win fraction, opposed to quartile one, which had only a forty-three percent win fraction.<sup>259</sup> From this, Professor Hosoi was able to conclude that skill can develop with experience.<sup>260</sup>

## VII. SOLUTION

In October, 2015, a scandal erupted that had policy makers questioning the legitimacy of the DFS industry.<sup>261</sup> Reports surfaced regarding leaked insider-information that may have led to DraftKings employee Ethan Haskell's \$350,000 payout on FanDuel.<sup>262</sup> DFS immediately became scrutinized as an unsafe pitfall for consumers. Concerns over data control and consumer protections became the forefront in the DFS debate.<sup>263</sup> DFS operators responded with an immediate change in policy that prohibits all DFS employees from participating in contests where money is involved.<sup>264</sup> Furthermore, the Fantasy Sports Trade Association established the Fantasy Sports Control Agency—a self-governing body charged with overseeing “a strict, transparent and effective system of self-regulation . . . .”<sup>265</sup>

Nonetheless, the game's suspect qualities were exposed in mainstream media outlets, certainly with a loss of participants imminent. Oddly enough, this was not what ensued. Rather, data suggests that DFS reached record high entry fees the weekend following the scandal.<sup>266</sup> While DFS operators were flooded with criticism, the industry was enjoying the pinnacle of its success

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<sup>258</sup> *Id.*

<sup>259</sup> *See* Peko Affidavit, *supra* note 244, at 18.

<sup>260</sup> *Id.*

<sup>261</sup> Travis Waldron, *New Self-Regulatory Body Will Oversee Daily Fantasy Sports Companies*, THE HUFFINGTON POST (Oct. 27, 2015), [http://www.huffingtonpost.com/entry/fantasy-sports-regulation\\_us\\_562fd988e4b0c66bae59e6cf](http://www.huffingtonpost.com/entry/fantasy-sports-regulation_us_562fd988e4b0c66bae59e6cf).

<sup>262</sup> *See id.*

<sup>263</sup> *Id.*

<sup>264</sup> DraftKings, *Frequently Asked Questions*, <https://www.draftkings.com/help/faq> (last visited Jan. 15, 2016).

<sup>265</sup> *See* Waldron, *supra* note 261.

<sup>266</sup> Daniel Roberts, *Fantasy Sports Scandal Helped DraftKings and FanDuel*, FORTUNE (Oct. 13, 2015), <http://fortune.com/2015/10/13/scandal-helped-draftkings-fanduel/>.

up to that point.<sup>267</sup> Perhaps then, DFS represents something more to its faithful consumers than a mere sports wager or even a touted skill; perhaps, an escape from reality.

- a. THE UNLAWFUL INTERNET GAMING ENFORCEMENT ACT SHOULD BE AMENDED TO CONSIDER DAILY FANTASY AND ADOPT A UNIFORM PREDOMINANCE STANDARD TO DETERMINE IF A GAME IS SKILL OR CHANCE-BASED.

Currently, confusion shrouds the DFS industry as to its legality. Because of this uncertainty, regulation efforts are impeded. States, such as New York, have temporarily outlawed DFS operation within their borders, pending government clarification. Hence, to solve the various nationwide issues, the federal government should adopt New Jersey's approach towards internet gaming and apply it to DFS providers, much like California has done in its AB 1437 bill.

Without at least some type of interpretation at the federal level, states will continue to take drastically different stances on each side of the DFS argument. Participants—DFS consumers—are left uncertain and vulnerable to legal action and financial harm. A major concern that lies with the consumer is the uncertainty associated with the exchange of money. Currently, DFS does not operate in several states for legal purposes.<sup>268</sup> Whether a consumer can retrieve his rightful winnings when inside a prohibited state's borders is not entirely clear. Thus, the law should recognize DFS as distinct from gambling. This will provide participants with certainty in their earned winnings. Congress should amend UIGEA to allow for interstate daily fantasy play and regulate it as interstate commerce. The first step is to include language that simply incorporates DFS into the current fantasy carve-out. The language used should be similar to the Whelan Bill and AB 1437, such as:

“Fantasy Sports” means any contest determined by statistics generated based on performance by actual individuals participating

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<sup>267</sup> *Id.*

<sup>268</sup> Washington, Louisiana, Iowa, and Arizona have laws in place that disfavor DFS operation and thus are not present in those states. Montana is the only state with a flat-out ban on DFS. Daniel Roberts, *Are DraftKings and FanDuel Legal?*, FORTUNE, Sep. 24, 2015, available at <http://fortune.com/2015/09/24/draftkings-fanduel-legal/>.

in actual professional or collegiate athletic events, regardless of the frequency in which contests are renewed and offered to consumers.

This simple solution will eradicate the current uncertainty associated with the applicability of UIGEA to DFS. By addressing the frequency of the rate at which a fantasy game can be played, the definition eliminates the foregoing confusion over the legality of DFS. As a result, states and DFS participants will no longer fear violating the law and losing entry fees as a consequence. A federal endorsement can provide a safeguard for those participants in outlawed states. Federal law can facilitate contests between states by establishing the legality of DFS and thus eradicate any public concerns related to uncertainty. This definition simply clarifies the difference between traditional and daily by acknowledging that contests can be conducted on a daily basis and that daily lineups likewise operate as a game of skill.

Furthermore, a uniform Predominant Purpose standard must be adopted for courts to determine whether a game is skill or chance-based. Currently, some jurisdictions employ minority tests that allow an injection of subjectivity into a court's reasoning. The Material Element and the Gambling Instinct tests must be abandoned entirely. This transition will not be difficult given that jurisdictions applying these minority tests have already, in some instances, confused them with the Predominant Purpose Test.<sup>269</sup> The amendment can simply add the predominance language in clause (c) of the UIGEA fantasy carve-out, which would read:

(c) Winning outcomes are based predominantly on the relative skill and knowledge of participants, with chance being attributable to an outcome by less than fifty percent, determined by accumulated statistics of multiple athletes.

This solves the subjectivity issue which currently dominates several jurisdictions. A uniform standard will provide certainty for operators, DFS and other gaming providers alike. Gaming

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<sup>269</sup> See , *supra* note 96 and accompanying text.

operators will have a workable formula, using statistical analysis, in determining exactly what the odds of a game is and whether that game is predominately determined by skill. Prediction in this area of gambling law will clear the dockets of meritless cases, allow operators to provide lawful games to consumers, and create harmony for intrastate providers, such as DFS operators.

b. THE FEDERAL TRADE COMMISSION SHOULD BE RESPONSIBLE FOR A DFS LICENSING AND REGULATORY SCHEME.

Given the pervasive nature of DFS online, Congress should regulate the industry as interstate commerce. To facilitate a fluid regulatory scheme, Congress should assign the responsibility of enforcing the industry to a federal agency, in an effort to keep DFS pure and to prolong the enjoyment for sports fans. Limits should be imposed through a body of federal regulations. Like the CCA Amendments discussed previously, DFS participants would benefit tremendously from regulations. While regulations may indeed provide less financial incentive for operators to manage DFS, it would ensure security and fairness to its users.

Because participants have the opportunity to win cash prizes, there is an addiction concern that accompanies DFS. Much like individuals are drawn to the thrill of winning money at casinos, addiction to DFS may pose an even larger concern considering lesser-skilled participants are statistically at a disadvantage against higher-skilled participants. Thus, a solution is to limit the amount of entry fees that one participant can forfeit in a single week. This would lower the “gambling appeal” for those with addictive personalities. The notion here is create a less hostile playing environment and more of a friendly, “side wagers” environment, as New York Attorney General Schneiderman advocates.<sup>270</sup> A \$500 per week limit will lower the probability of those becoming addicted to DFS.

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<sup>270</sup> It is notable that a majority of the winnings and losses reported in the Eilers Research survey were both under one hundred dollars. See Krejcik, *supra* note 226.



Furthermore, high-stake entry fees in fantasy should be reserved for those gambling sanctuaries articulated in PASPA. The higher the stakes, the more DFS resembles gambling. DFS users should be restricted to one entry per contest to eradicate the “probability” strategies employed by the “bulk” participants.<sup>271</sup> This will further differentiate DFS from gambling because it eliminates the contemplation of raising one’s probabilities by having an abundance of entries. On the contrary, implementing probability strategies reflects a certain knowledge that tends to add another element of skill to the game. However, the means of increasing probability (i.e., buying more entries to increase one’s odds) takes no skill because, as it relates to the game, spending money in order to increase one’s odds does not gauge one’s performance. Eliminating or setting a modest limit on the number of entries will focus participants on compiling a team based on individual matchups—a more accurate reflection of one’s skill or knowledge of a sport. Moreover, disclosure and availability of an entry fee history to participants should be required by law. This will also help lower addiction issues. A system of “cool-off” periods should be included, on top of the natural cool-off periods that accompany seasonal sports. This also will help curb the appeal to DFS and lead to less abuse.

The federal government should delegate regulatory duties to a federal agency responsible for overlooking DFS operation in each state. The most appropriate agency is the Federal Trade Commission (FTC), as it already oversees consumer protection.<sup>272</sup> The primary benefit of having federal oversight is to maintain uniformity. States can still freely govern and control intrastate gambling, albeit in a uniform way with the FTC supervising operation. Like New Jersey’s Division of Gaming enforcement, the FTC can establish an office with proper expertise in regulatory gaming; for example, an Office of Fantasy Sports Regulation (“OFSR”). The OFSR

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<sup>271</sup> See *supra* note 273 and accompanying text.

<sup>272</sup> See Federal Trade Commission, *What We Do*, <https://www.ftc.gov/about-ftc/what-we-do>.

can enforce the laws enacted to regulate the industry as an authoritative body and supervise state licensing schemes. Furthermore, OFSR can effectively facilitate the enjoyment for consumers' participation in DFS while placing a safeguard on the integrity of sports. This would undoubtedly preserve a sense of fairness and would maintain the competitiveness of professional sports. The OFSR can also be in charge of prosecuting satellite DFS operators in violation of regulations. For example, following the Internet gaming regulations in New Jersey, the agency can employ investigation teams to verify that equipment and operations are in compliance with regulations. The OFSR should also supervise state-help programs and hotlines for those who become obsessive over playing DFS by ensuring proper protocol. Regulations should require that DFS provide a states help number hotline to all DFS users.

Finally, the federal government can require a separate taxation on the industry for operating a quasi-gambling regime that is based on a game of skill. The federal government can tax DFS Operators in a similar fashion as to the way New Jersey taxes its internet gaming and California its DFS operators. While a 15% rate is high considering (1) the activity is not textbook gambling and (2) DFS companies will already be taxed accordingly as their statuses as business entities, perhaps a lower rate would be justified because of DFS's similarities to gambling. However, just as alcohol is taxed at a higher rate, higher taxation may be justified as a sin tax. The revenue acquired from taxation should nonetheless be fixed at a rate necessary to financially support the nationwide operation of DFS. Furthermore, due to its involvement in facilitating the industry, the government will be justified in designating part the revenue raised to the national treasury to be redistributed according to state needs.

c. DE-GAMBELIZING DAILY FANTASY SPORTS: ELIMINATING “HIGH-STAKE” AND “HIGHER-PROBABILITY” SCENARIOS.

Substantive issues remain that need to be resolved to further distinguish DFS with illegal gambling. What resembles gambling probably the most is the “high-stake” contests which allow entry fees of over \$1,000. Regulation must address this by placing a limit on the total amount of entry fees allowed. This would almost certainly cut into profits tremendously—fantasy sharks would be less willing to participate with a lower chance of winning meaningful profit. With less total entries, DFS operators have a smaller prize pool to take their percentage from. Whether it would be financially worth it to continue operation is a speculative question that has yet to be answered.

Furthermore, DFS sites currently permit participants to play in bulk, submitting hundreds of team entries in a single contest.<sup>273</sup> Fantasy sharks enter a multitude of contests creating a plethora of various lineups to maximize their odds and reap substantial profits.<sup>274</sup> In order to make contests fair for all and limit the contests to true skill, limits must be placed on the amount of entries an individual participant may submit in a single contest.

a. THE THREAT TO THE INTEGRITY OF AMATEUR AND PROFESSIONAL SPORTS MUST BE ADDRESSED THROUGH REGULATION.

Perhaps one of the largest issues is the threat DFS poses to the integrity of sports. This is the primary reason regulation is necessary. While skill predominates DFS, the influence it could potentially have on sports is far from fantasy; it is a real threat. For this reason alone, DFS should be given an intermediate classification as a game of skill with inherent addictive tendencies. Regulation should ensue to ensure veracity in sports and simultaneously abhor outlawing DFS. DFS may affect the integrity of sports because, as it stands, virtually every team and league has

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<sup>273</sup> See Harwell, *supra* note 282.

<sup>274</sup> *Id.*

some type of equity arrangement, sponsorship, or just a flat out stake in the company.<sup>275</sup> The NBA for instance, has an equity stake and a seat reserved on FanDuel's board of directors.<sup>276</sup> Typically, most teams have arranged team-controlled media buys that are designated for either FanDuel or DraftKings marketing purposes.<sup>277</sup>

“Fantasy Sports Lounges” are also being erected within the stadiums of professional sport teams, allowing fans to engage in contests while at live sporting events.<sup>278</sup> These lounges closely resemble sportsbooks and, in some instances, have been referred to as such.<sup>279</sup> While DFS does not amount to gambling, it certainly is being exploited as if it were. Thus, the solution is to erect a financial barrier between DFS and the professional sports leagues. In no way should any league profit directly from endorsement deals or have a say in the direction of DFS businesses.

It is far more blatant and suspect for sports leagues to sponsor wagers on the results of real sports contest. However for DFS, “throwing” or “fixing” professional sports games is more difficult because there is a wider range of variables. But this is precisely the reason to eliminate business relationships between the leagues and DFS. DFS providers collect data on the percentage of participants who start individual players. If a contest gets big enough, and enough participants

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<sup>275</sup> See *supra* note 48 and accompanying text.

<sup>276</sup> Terry Lefton, Sign Sponsorship Deal With FanDuel, St. Louis Business Journal, <http://www.bizjournals.com/stlouis/blog/2015/03/rams-sign-sponsorship-deal-with-fanduel.html>.

<sup>277</sup> For instance, the NFL franchise St. Louis Rams, as a part of sponsorship terms, will allow FanDuel branding throughout its stadium so as long as it is not visible on television. When the team achieves a first down, the stadium's LED scoreboard will portray it to fans in attendance as a “FanDuel First Down.” *Id.*

<sup>278</sup> A smaller scale DFS provider, Draft Ops, that is in a sponsorship agreement with the Barclay's arena in Brooklyn, New York preserves rights to a “Draft Ops Fantasy Lounge.” The lounge “will be located on the arena's main concourse and will serve as an interactive daily fantasy experience. Throughout the space, fans will be able to explore the Draft Ops platform, browse fantasy stats and out-of-town scores . . . on high definition televisions and touch screen displays.” BarclaysCenter.com, *Fantasy Sports Company Draft Ops Forms Fully Integrated Alliance with the New York Islanders in Brooklyn and Barclays Center*, <http://www.barclayscenter.com/news/detail/fantasy-sports-company-draft-ops-forms-fully-integrated-alliance-with-the-new-york-islanders-in-brooklyn-and-barclays-center>.

<sup>279</sup> See Dustin Gouker, *What's In a Name? Why 'Fantasy Sports Books' Could Prove Troublesome For The DFS Industry*, LEGAL SPORTS REPORT (Jun. 30, 2015) [http://www.osga.com/online\\_gaming\\_articles.php?What-s-In-a-Name-Why-Fantasy-Sports-Books-Could-Prove-Troublesome-For-The-DFS-Industry-15739#.VxAaWKQrLIU](http://www.osga.com/online_gaming_articles.php?What-s-In-a-Name-Why-Fantasy-Sports-Books-Could-Prove-Troublesome-For-The-DFS-Industry-15739#.VxAaWKQrLIU)

“start” a specific player, influence may be exerted on the player, effecting his/her natural performance. Furthermore, reaching one individual player is easier than influencing an entire professional sports roster. And so too is keeping the influence over one individual a secret. This possibility must be eliminated altogether. Professional sport leagues must draw an ethical barrier in the same way the leagues have abhorred sports betting. Congress should include in its act a provision that prohibits this conduct.

b. SOLUTIONS TO SEVERAL OF ATTORNEY GENERAL SCHNEIDERMAN’S CONCERNS

States, such as New York, that intend to prohibit individuals from participating in DFS contests are wrong to conclude that participants are engaged in illegal activity. This note offers a response to several points in AG Schneiderman’s illegal gambling arguments.

First, AG Schneiderman presumes that DFS’s lottery-style advertisements support his illegal gambling argument.<sup>280</sup> He notes that advertisements promote the simplicity of the game and the idea that anyone can participate and win.<sup>281</sup> Because of this, he concludes that DFS resembles gambling and should be declared illegal. However, advertising is distinct from the contests. The content of DFS’s advertising has no bearing on whether it is a form of illegal gambling. AG Schneiderman is correct in declaring that DFS advertisements are deceiving. However, his position that the commercials lure the unskilled into a game of skill only concedes the opposing argument. Most consumers who are deceived into playing DFS will likely join, choose a team without knowledge of player trends, previous player performances, and player

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<sup>280</sup> The AG later contradicts the notion that DFS represents itself as a lottery by concluding that DFS Operators misrepresent to the public, in violation of Executive Law § 63(12), its characterization as a game of skill. *See* Brief for Plaintiff, *supra* note 119. It seems more appropriate to perceive DFS’s deceptive advertising the other way around; that is, that a consumer without sports knowledge is deceived into believing the game is based on chance, and thus has a chance to win, when indeed those with the requisite skill essentially eliminate, to an almost absolute certainty, any chance for these individuals to win.

<sup>281</sup> *See* Brief for Plaintiff, *supra* notes 119–120 and accompanying text.

matchups, and consequently lose money to those “fantasy sharks” who are well-abreast to the ebb and flow of fantasy statistics.<sup>282</sup> Deceitful advertising is only an issue because DFS is based on skill. One would not be deceived by the same commercial advertising a chance-based state lottery. There is a simple solution to this: require DFS to be forthright about the requisite skill involved in the game. Advertisements should depict the nature of the game by touting its competitiveness, praising the most skilled players in the nation, and celebrating the individual efforts taken by participants to improve their skill levels.

Second, the New York Attorney General looks to distinguish playing daily and traditional fantasy sports based on camaraderie and the former’s lack of a social component. This however, does not carry weight. Certainly, friends and family can engage socially in discussions over which players would be better off being put into a daily fantasy starting lineup. Furthermore, there is a sense of local competitiveness in the quest to identify “sleeper picks” based on matchups.<sup>283</sup> When a sleeper pick is correctly identified and entered into a line-up, this prompts that participant to flaunt his superior knowledge of the game.

The biggest flaw with AG Schneiderman’s argument is that camaraderie and face-to-face relationships are quickly becoming less relevant in the modern social arena.<sup>284</sup> Facebook and Instagram have established precedence in allowing individuals to socialize online without having ever physically met prior to online interaction.<sup>285</sup> DFS is simply another gateway to meet other

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<sup>282</sup> Drew Harwell, *All the Reasons You (Probably) Won’t Win Money Playing Daily Fantasy Sports*, THE WASHINGTON POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/>.

<sup>283</sup> In terms of DFS sleeper picks, ideally a participant will want to find a discreet player that is poised for a good game and with a low usage percentage by other participants. The idea is to create a unique line up distinguishable from the majority of contest participants to increase the likelihood of scoring higher than the majority. *See supra* note 24 and accompanying text.

<sup>284</sup> *See* Alexia Tsotsis, *Study: You’ve Never Met 7% Of Your Facebook “Friends”*, TECH CRUNCH (Jun. 16, 2011), <http://techcrunch.com/2011/06/16/study-youve-never-met-7-of-your-facebook-friends/>.

<sup>285</sup> In fact, roughly seven percent of the average Facebook user’s friends are complete strangers that have never met face-to-face. The study shows that the average user has roughly 229 “friends” on Facebook. Of those friends,

individuals with similar interests and engage them socially through fantasy competition. It is a step away from face-to-face encounters, but it is something that must be embraced in this technological era dominated by virtual social interaction.

### VIII. Conclusion

In sum, while there are quasi-gambling aspects to DFS contests, in no way can DFS be characterized as illegal gambling. DFS contests are games that are predominantly based on skill. However, some of the dangers associated with such an addictive game calls for federal regulation. The suggestions offered in this note provide a uniform, workable solution to those issues. A debate that has now frequently come under the nation's scrutiny, of course, has no simple solution. But a regulatory scheme appears to be the most appropriate way for DFS to survive. Even for the founders of DFS, regulation is beginning to emerge as the logical course of action. In response to what has apparently become a frequently asked question of whether DraftKings supports DFS regulation, Eccles answered: “[w]e are open to discussion.”<sup>286</sup>

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twenty-two percent were comprised of people they knew from high school, twelve were extended family, ten were coworkers, nine percent were college friends, eight percent was immediate family, seven percent were people from extracurricular groups, and two were neighbors.” Seven percent, or roughly thirteen people, were complete strangers. Three percent, or roughly seven people, had met only once before they became Facebook friends. *Id.*

<sup>286</sup> DraftKings.com, Frequently Asked Questions, <https://www.draftkings.com/help/faq> (last accessed Apr. 16, 2016).