

**UPDATING YOUR FANTASY LINEUPS AND THE FEDERAL  
LAW:  
THE CASE FOR FEDERAL REGULATION OF DAILY FANTASY  
SPORTS**

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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 (NFL) 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-

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<sup>1</sup> Kevin Ota, *DraftKings Millionaire Maker Runner-up Nets \$1M, plus \$1M for his ESPN Fantasy Leagues*, ESPN FRONT ROW, <http://www.espnfrontrow.com/2015/09/draft-kings-millionaire-maker-runnerup-nets-1m-plus-1m-for-his-espn-fantasy-leagues/> (last visited Nov. 4, 2015).

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

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

outs, and “victory formation”<sup>4</sup> was inevitable.<sup>5</sup> Put simply, 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, the 49ers ran the ball, giving the second place contestant enough fantasy points to edge Beisel out of first place.<sup>8</sup>

What exactly are the chances that, rather than solidify victory by conventionally “kneeling the football,” in a scenario that begs a team to do so, instead, the 49ers seal their victory with a run play netting five redundant yards? Can an individual possibly have predicted this type of event to occur and chalk it up to 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.<sup>9</sup> DFS is the latest phenomenon that has invaded every

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<sup>4</sup> See *Victory Formation*, SPORTS LINGO: DEFINITION FOR COMMON SPORTS SLANG & JARGON, <http://www.sportslingo.com/sports-glossary/v/victory-formation/> (last visited Oct. 30, 2015). Victory formation is the offensive play where a football team’s quarterback kneels down with possession of the football in order to keep the game clock running. *Id.* 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. *Id.*

<sup>5</sup> See Ota, *supra* note 1.

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

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

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

<sup>9</sup> See Steven Perlberg, *Are DraftKings and FanDuel Bombarding Fans With Too Many Ads?*, WALL STREET J. (Sept. 16, 2015, 6:00 AM), <http://blogs.wsj.com/cmo/2015/09/16/are-draftkings-and-fanduel-bombarding-fans-with-too-many-ads/>. “Traditional” fantasy is in contrast to daily fantasy: the former competes concurrently with real sports leagues and is season-long. Chris Isidore, *Fantasy Sports: What is it, anyway?*, CNN MONEY (Oct. 6, 2015, 5:13 PM), <http://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/>. *Id.* On the other hand, like DFS, traditional fantasy assigns point values to each professional or collegiate athlete’s earned statistic. *Id.* These points are then compiled and compared against other participants’ rosters to gauge which participant has done best. *Id.*

consumer's living room with commercial advertisements in between their favorite sitcoms and the eleven 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>10</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>11</sup>

But how have fantasy sports become such a ubiquitous and inescapable pillar of American sports? The answer is that DFS makes two tantalizing concepts available to the consumer: money and sports—a combination that is taboo in America.<sup>12</sup> This answer invites 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 unchartered 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.<sup>13</sup> This theory presumes that the majority of DFS winners are sufficiently skilled, and when unskilled participants win, luck or chance is not a predominant factor.<sup>14</sup> On the other hand, assembling a fantasy roster that outperforms other participants' rosters is in large part a result of chance.<sup>15</sup> Nonetheless, DFS is entertaining, appealing, and above all else, extremely lucrative.<sup>16</sup> Popular demand, massive sponsorship, and the

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<sup>10</sup> See Perlberg, *supra* note 9. 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. *Id.* 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. *Id.*

<sup>11</sup> See Drew Casey, *DraftKings, FanDuel Make Millions, and Give Them Away, as Fantasy Revs Up*, CNBC (Sept. 20, 2015), <http://www.cnn.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 SPORTS REP. (Dec. 19, 2014), <http://www.legalsportsreport.com/170/revenue-projections-for-daily-fantasy-sports-sites/>.

<sup>12</sup> See discussion *infra* Part II.B.

<sup>13</sup> See Dustin Gouker, *Why The Gambling vs. Game Of Skill Debate In Fantasy Sports Won't Go Away*, LEGAL SPORTS REP. (Mar. 15, 2016, 8:14 AM), <http://www.legalsportsreport.com/9022/fantasy-sports-or-gambling/>.

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

<sup>15</sup> *Id.*

<sup>16</sup> See Casey, *supra* note 11.

deeply rooted tradition and compatibility of fantasy sports and real sports indicates that DFS is here to stay. DFS has arguably become, albeit in exceptionally rapid fashion, a meaningful part of American culture.

This comment seeks to introduce the various concerns and conflicts with state gaming laws amid 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, New Jersey and California have recently proposed regulations that should serve as a model for federal amendment. Part II discusses the history and background of fantasy sports to exemplify its underlying purpose and evolution. Parts III, IV, and V explain the tension brewing between federal and state laws using state case studies with an emphasis on New Jersey. These sections show that rather than deny consumers access to DFS, it can and should be monitored and maintained through regulation. Part VI discusses pending New Jersey and California legislation that can serve as models for a federal regulatory scheme. Part VII analyzes DFS using a “predominant purpose” test to show that, despite DFS’s associated dangers and harms given its resemblance to gambling, it is predominantly based on skill. Part VIII provides a resolution that establishes a broad enough standard to allow DFS to operate while maintaining state sovereignty in accordance with each state’s constituency. Finally, Part IX concludes this Comment.

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

The origin of fantasy sports, which is crucial to the pro-fantasy argument in contemporary legal debate, ironically came to its founders, Dan Okrent and Lee Eisenberg, two Manhattan-based journalists, in a dream.<sup>17</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>18</sup>

### A. *The Origin and Growth of Fantasy Sports: Rotisserie Baseball*

Late in 1979, the game’s founders prescribed a clear set of rules in the *Official Constitution of Rotisserie League Baseball*.<sup>19</sup> The concept of

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<sup>17</sup> *30 for 30: Silly Little Game* (ESPN television broadcast Apr. 20, 2010).

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

<sup>19</sup> The Rotisserie League Constitution parodied the United States Constitution

the game centered on the meticulous collection of baseball statistics in order to challenge one another's baseball knowledge.<sup>20</sup> Each participant assembled an imaginary baseball team consisting of athletes from either Major League Baseball's American or National Leagues.<sup>21</sup> The owners of the ten imaginary teams acquired their athletes through an "auction draft."<sup>22</sup> They arranged statistics categorically in order to determine who had the best team.<sup>23</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>24</sup>

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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 (1989) *available at* <http://www.c-r-l.org/rules/origcon.htm>.

<sup>20</sup> See 30 for 30: *Silly Little Game*, *supra* note 17.

<sup>21</sup> See *id.* Because the efforts in collecting statistics manually were tedious—i.e., the internet was not available to tally up individual statistics in a convenient format—the Rotisserie League required that teams be composed entirely of either AL or NL players for simplification. *Id.* See WAGGONER, *supra* note 19 (suggesting that NL and AL players should be kept separate because mixing the two leagues is “unrealistic and silly”). 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.” *Id.*

<sup>22</sup> See WAGGONER, *supra* note 19. The auction draft format was the means chosen to acquire twenty-three athletes through purchases not to exceed \$260. *Id.* The bid for an athlete subject to draft started at \$1. *Id.* Each team owner would have an opportunity to bid on the athlete through \$1 increment bids. *Id.* The owner with the highest bid earned the athlete at that price. *Id.*

<sup>23</sup> See 30 for 30: *Silly Little Game*, *supra* note 17. 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 athlete's individual statistics with a ledger sheet, a calculator, a pen and paper at his exposal. *Id.*

<sup>24</sup> See *id.* The winning owner's team name was inscribed on the “most valuable possession in baseball,” or the “Wiggy Cup” trophy. *Id.* 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. *Id.* The Rotisserie League's tradition consisted of the winning team being doused with chocolate milk in the presence of the other losing teams. *Id.* Of course, the auction draft fees collected by the league's treasurer was divided up based on final standings: first place received half

According to Okrent, each participant studied statistics for endless hours in order to prove who the most knowledgeable baseball fan was.<sup>25</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>26</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>27</sup>

Rotisserie Baseball generated massive interest due to the connections and affiliations that the Rotisserie founders had with various media outlets.<sup>28</sup> The founders attempted to exploit this growing interest by trademarking Rotisserie Baseball, selling merchandise, and producing marketing videos.<sup>29</sup> However, the game they had invented had outgrown its founders as its participants grew into the millions.<sup>30</sup> The birth of the internet provided the Rotisserie Baseball market with a platform that facilitated mass participation.<sup>31</sup> The season-long game was adapted and major sports conglomerates, such as ESPN and Yahoo! Sports, offered it without charge.<sup>32</sup> Furthermore, these companies expanded the fantasy concept to other

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of the pool; second place received twenty-five percent; third place received fifteen percent; and fourth place received ten percent. *See* WAGGONER, *supra* note 19.

<sup>25</sup> *See 30 for 30: Silly Little Game, supra* note 17.

<sup>26</sup> Lee Eisenberg, *Views of Sport; The Awful Truth About Rotisserie League Baseball*, N.Y. 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 athletes on a Rotisserie team against real life favorite teams). Trading athletes 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 17.

<sup>27</sup> *See 30 for 30: Silly Little Game, supra* note 17. Allen was purchased for a mere two dollars and subsequently outperformed his bargain price by pitching approximately thirty saves by the end of the season. *Id.*

<sup>28</sup> *See* Eisenberg, *supra* note 26. Eisenberg estimated that approximately half a million people play the game; notably, Governor Mario M. Cuomo, Bryant Gumbel, and Jim Kaat owned Rotisserie teams. *Id.*

<sup>29</sup> *See 30 for 30: Silly Little Game, supra* note 17.

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

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

<sup>32</sup> *See id.*

sports, such as football and basketball.<sup>33</sup> Cease and desist letters sent by the founders to program developers proved ineffective; instead, the developers simply changed the name to “Fantasy Sports” and made the rules adjustable to each individual league’s liking.<sup>34</sup> On average, the approximate thirty million fantasy users spend over ten hours a week researching what is now known as traditional fantasy sports.<sup>35</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 offers its participants an accelerated version of traditional fantasy sports with contests on a per day basis played primarily among large groups of strangers.<sup>36</sup> Furthermore, DFS removes the concept of a draft and replaces it with a fictional salary cap, similar to traditional Rotisserie Leagues, except every athlete in a sports league is available in every contest.<sup>37</sup> Each athlete is “priced” commensurate with that athlete’s ability.<sup>38</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>39</sup>

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>40</sup>—introduced its version of fantasy sports with a game called FanDuel.<sup>41</sup> HubDub

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<sup>33</sup> See *id.*

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

<sup>35</sup> See 30 for 30: *Silly Little Game*, *supra* note 17.

<sup>36</sup> Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. 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>37</sup> See *id.* Upon payment of a contest entry fee, participants must assemble their fantasy teams by “buying” athletes within the confines of a set salary cap. See *id.*

<sup>38</sup> *Id.* For instance, an athlete with a higher likelihood of scoring more fantasy points will “cost” more than an athlete with a lower likelihood of scoring fantasy points. See *id.*

<sup>39</sup> Drew Harwell, *The Rise of Daily Fantasy Sports, Online Betting’s Newest Empire*, WASH. POST (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/>.

<sup>40</sup> *Company Profile: Hubdub Ltd.*, BLOOMBERG BUS., <http://www.bloomberg.com/profiles/companies/0088055Z:LN-hubdub-ltd> (last visited Jan. 9, 2017).

<sup>41</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/>.

received its first Series A funding led by Pentech Ventures and Scottish Co-Investment Fund.<sup>42</sup> From this capitalization, HubDub wisely chose to focus its attention on Nigel Eccles' FanDuel.<sup>43</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>44</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>45</sup> As a self-funding business driven primarily by entry fees, FanDuel raised roughly \$300 million in entry fees this past year alone.<sup>46</sup> By 2020, growth projections suggest that DFS could net a whopping \$2 billion in total annual revenue.<sup>47</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>48</sup> The most logical explanation for these 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>49</sup> FanDuel first reached deals with Major League Baseball (MLB) and the National Basketball Association (NBA), in which both organizations received a partial stake in the company by way of entry

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<sup>42</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>43</sup> See *id.*; see also Butcher, *supra* note 41.

<sup>44</sup> 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/>. For its eleven million dollar investment, Comcast Ventures received an equity interest in FanDuel and assigned its partner Andrew Cleland to FanDuel's board of directors. *Id.*

<sup>45</sup> Michael J. de la Merced, *FanDuel to Announce that it has Raised \$275 Million More*, N.Y. TIMES (July 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>46</sup> See Casey, *supra* note 11. FanDuel reserves only about ten percent of this intake for profit, while it gives the rest away in the form of contestant prizes. *Id.*

<sup>47</sup> See Grove, *supra* note 11.

<sup>48</sup> See *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *aff'g*, 926 F. Supp. 2d 551 (D.N.J. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *aff'd en banc*, 832 F.3d 389 (3d Cir. 2016).

<sup>49</sup> Chris Isidore, *How Fantasy Sports Changed the NFL*, CNN MONEY (Sept. 11, 2015), <http://money.cnn.com/2015/09/11/news/companies/fantasy-football/>. Local markets no longer consist of local teams only. *Id.* 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. *Id.* 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. *Id.*

fee earnings in exchange for sponsorship and advertisement rights.<sup>50</sup> The relationship the leagues have established with DFS appears hypocritical given the “integrity” argument they made against sports betting.<sup>51</sup> If the leagues’ argument is that sports betting may influence the “fixing” of professional sports games, then the fact that these leagues sponsor DFS contests is troubling. However, the leagues’ financial involvement insinuates that they support DFS despite their previous integrity arguments. Their financial support further suggests that DFS poses no threat, given its multitude of variables, of influencing contests the same way sports betting does.<sup>52</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>53</sup> While the duopoly of FanDuel and DraftKings faces little competition in the fantasy market, Yahoo! has recently launched its version of DFS and could instantly challenge FanDuel and DraftKings as the leading DFS provider, just as it did to Rotisserie Baseball.<sup>54</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, the MLB made Pete Rose permanently ineligible from playing in the league after he violated its Rule 21 (d).<sup>55</sup> By recently upholding Rose’s lifetime ban in April 2015, the MLB showed its commitment to the rule.<sup>56</sup> The rule prohibits those players, umpires, league officials, or employees with a duty to perform from betting on

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<sup>50</sup> See Kilgore, *supra* note 36.

<sup>51</sup> See discussion *infra* Part III.A.

<sup>52</sup> *Id.*

<sup>53</sup> Dustin Gouker, *DFS Partnership/Sponsorship Tracker*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-sponsorship-tracker/> (last visited Jan. 9, 2017).

<sup>54</sup> Chris Grove, *Yahoo Enters Daily Fantasy Sports Market: Impacts And Analysis*, LEGAL SPORTS REP. (July 8, 2015), <http://www.legalsportsreport.com/2152/yahoo-enters-daily-fantasy-sports-market/>.

<sup>55</sup> See *The Pete Rose Case; The 2 Rules in the Rose Case*, N.Y. 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>56</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-reinstatement-pete-rose-cincinnati-reds/77290922/>.

a MLB game.<sup>57</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>58</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>59</sup> Similar measures followed in the other major sports as well.<sup>60</sup>

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>61</sup> An entirely different issue arises as to whether athletes or, as referred to by the NBA Constitution, "persons" may

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<sup>57</sup> See *The Pete Rose Case*, *supra* note 55.

<sup>58</sup> Anita Moorman, *U.S. Professional Athletics*, in *SPORTS BETTING: LAW AND POLICY* 936 (Paul M. Anderson et al. eds., 2012).

<sup>59</sup> *Id.* at 938.

<sup>60</sup> 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.

See, e.g., *Constitution and By-laws of the National Basketball Association*, NAT'L BASKETBALL ASS'N (May 29, 2012), <http://prawfsblawg.blogs.com/files/221035054-nba-constitution-and-by-laws.pdf> [hereinafter *NBA Constitution*].

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.” *Id.* 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 subsequently served eleven months in federal prison for passing gambling tips across state lines. *Id.*

<sup>61</sup> See Moorman, *supra* note 58, at 938.

participate in fantasy sports.<sup>62</sup> The differing policies imposed by each major professional sports league exemplifies the lack of clarity as to whether professional sports affiliates can engage in fantasy sports contests.

The MLB has taken a stance through its Collective Bargaining Agreement with its players' union that precludes athletes from participating in fantasy sports when it involves the transfer of money or other prizes.<sup>63</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>64</sup> The NBA and the National Hockey League likewise bar their athletes from participating in fantasy contests that require entry fees and award prizes.<sup>65</sup> Meanwhile, all three establishments endorse one of the two leading DFS platforms, which they refuse to characterize as illegal gambling.<sup>66</sup> While simultaneously prohibiting athletes from participating in DFS seems hypocritical, it reflects the uncertainty surrounding DFS.

The only major professional sport that allows athlete participation in fantasy leagues is the NFL.<sup>67</sup> DFS has at least some effect on NFL athletes, especially those who participate in fantasy.<sup>68</sup> According to Greg Jennings, formerly of the NFL Green Bay Packers franchise, fans have expressed a heightened enthusiasm towards athletes because of their fantasy prowess.<sup>69</sup> However, when athletes underperform, fans

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<sup>62</sup> See *NBA Constitution*, *supra* note 60, at 46.

<sup>63</sup> Mason Levinson, *Daily Fantasy Sports Growth Pushes Leagues to Regulate Players*, BLOOMBERG BUS. (Apr. 2, 2015), <http://www.bloomberg.com/news/articles/2015-04-01/daily-fantasy-sports-growth-pushes-leagues-to-regulate-players>.

<sup>64</sup> See *id.* 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.” *Id.* 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.” *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *NFL Compliance Plan*, NAT’L FOOTBALL LEAGUE, 14 (July 2014), <http://thesportsesquires.com/wpcontent/uploads/2015/05/NFLCompliancePlan.pdf>. According to NFL policy, fantasy games are not considered gambling, thus athletes may participate only when no wager is placed on the outcome of any football game. *Id.* Furthermore, any NFL affiliate cannot accept more than \$250 in prizes or awards. *Id.*

<sup>68</sup> Jeff Bercovici, *Greg Jennings Reveals What NFL Players Really Think of Fantasy Football*, FORBES (Mar. 10, 2012), <http://www.forbes.com/sites/jeffbercovici/2012/03/10/greg-jennings-reveals-what-nfl-players-really-think-of-fantasy-football/#6711c5e84fe2>.

<sup>69</sup> See *id.*

have expressed disdain, which has motivated athletes to perform better to spite obsessed fantasy fans.<sup>70</sup> Jennings notes that fantasy also gets in the minds of athletes who own fantasy teams.<sup>71</sup> It gets difficult when “[athletes] compet[e] against a guy” on their fantasy team, and therefore “want[s] that guy to be successful” at the same time.<sup>72</sup> However, while fantasy is certainly on the minds of some athletes, it only seems to affect an athlete’s popularity and is not likely to influence their performance more than any other non-fantasy factors.<sup>73</sup> This is because the NFL’s policy limits an athlete to collecting no more than \$250 worth of prizes.<sup>74</sup> Ultimately, the regulation of gambling on professional sports culminated in the passage of the Professional and Amateur Sports Protection Act of 1992 (PASPA).<sup>75</sup>

#### B. *Professional and Amateur Sports Protection Act of 1992*

The enactment of PASPA faced various constitutional challenges both judicially and publicly.<sup>76</sup> PASPA makes it unlawful for a governmental entity or a person to:

sponsor, operate, advertise, or promote . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>77</sup>

Put simply, the government cannot pass a law that allows betting on

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<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See* Jeff Bercovici, *Greg Jennings Reveals What NFL Players Really Think of Fantasy Football*, FORBES (Mar. 10, 2012), <http://www.forbes.com/sites/jeffbercovici/2012/03/10/greg-jennings-reveals-what-nfl-players-really-think-of-fantasy-football/#6711c5e84fe2>; *see also* NAT’L FOOTBALL LEAGUE, *supra* note 67.

<sup>75</sup> Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 (1992).

<sup>76</sup> *See* Interactive Media Entm’t & Gaming Ass’n v. Holder, No. 09-1301, 2011 U.S. Dist. LEXIS 23383, at \*21–23 (D.N.J. Mar. 7, 2011) (holding that Plaintiffs did not meet the injury in fact and redressability requirements for standing PASPA because the New Jersey Constitution had not yet been amended to allow sports betting); *see also* Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013), *affg*, 926 F. Supp. 2d 551 (D.N.J. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *aff’d en banc*, 832 F.3d 389 (3d Cir. 2016) (holding that the New Jersey Sports Wagering Act violated PASPA and PASPA is not an unconstitutional violation of the anti-commandeering doctrine).

<sup>77</sup> 28 U.S.C. § 3702 (1992). This provision also precludes a government from licensing or authorizing a betting scheme. *Id.*

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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>78</sup> New Jersey was the potential beneficiary of one particular exception.<sup>79</sup> Section 3704 of PASPA provides that the prohibition shall not apply 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 if the scheme was authorized within one year after the effective date of the legislation.<sup>80</sup> Consequently, five states had previously allowed betting, and thus were subject to the "grandfather clause"—Nevada, Oregon, Delaware, Montana, and New Jersey.<sup>81</sup> New Jersey, however, failed to subsequently trigger the exception by waiting until its latest constitutional amendment to authorize its sports wagering scheme.<sup>82</sup>

### C. *Unlawful Internet Gaming Enforcement Act*

The Unlawful Internet Gaming Enforcement Act of 2006 (UIGEA) arguably takes no stance on whether daily fantasy is legal. It defines unlawful Internet gambling as placing, receiving, or knowingly transmitting a bet or wager through the Internet, in which "the bet or wager is unlawful under any applicable Federal or State law" where the bet or wager is made.<sup>83</sup> The UIGEA applies to both the person placing the bet and the recipient of the bet.<sup>84</sup> Moreover, the Act encompasses those facilitating the bets, such as the gambling hubs and ports of the nation.<sup>85</sup> In passing the UIGEA, Congress recognized that "traditional law enforcement mechanisms are inadequate" for enforcing gambling prohibitions over the Internet.<sup>86</sup> Moreover, the UIGEA regulates activities that occur in interstate commerce; thus, intrastate activities are subject to individual state regulation.<sup>87</sup>

The UIGEA's text enumerates the activities excluded from the

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<sup>78</sup> 28 U.S.C. § 3704 (1992); *see also* Moorman, *supra* note 58, at 863–64.

<sup>79</sup> *See* Moorman, *supra* note 58, at 863–64.

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

<sup>81</sup> Joshua Brustein, *New Jersey's New Plan for Sports Gambling*, BLOOMBERG BUS. (June 23, 2014, 5:44 PM), <http://www.bloomberg.com/bw/articles/2014-06-23/new-jerseys-new-plan-for-sports-gambling>.

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

<sup>83</sup> Unlawful Internet Gaming Enforcement Act, 31 U.S.C. § 5362(10)(A) (2015).

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

<sup>85</sup> 31 U.S.C. § 5362(10)(B).

<sup>86</sup> *See* Moorman, *supra* note 58, at 876.

<sup>87</sup> *Id.* at 877.

purview of an unlawful wager.<sup>88</sup> A particular provision within the UIGEA has given DFS its springboard for the substantial growth it has enjoyed.<sup>89</sup> The most prevalent portion of the Act explicitly excludes fantasy sports from this prohibitory category, but neglects to mention daily fantasy.<sup>90</sup>

To qualify for exclusion as a fantasy sport contest, the UIGEA requires that (1) prizes are made known to participants in advance; (2) awards are not based on the number of participants or amount of entry fees paid; (3) winning outcomes are based on a participant's relative skill and knowledge determined by the "accumulated statistical results" of multiple athletes;" (4) winning outcomes are not based on the score, point-spread, or performance of any single team; and (5) winning outcomes are not based on any individual athlete's single performance."<sup>91</sup>

Both FanDuel and DraftKings exploit the UIGEA's missing "daily" language by astutely catering their DFS platforms to the UIGEA's fantasy exclusion. For instance, both DFS websites deny participants entry into any contest if they attempt to submit any fantasy lineup composed of athletes all from the same real-life team.<sup>92</sup> Furthermore, each contest offers a link that provides its payout structure, predetermined and available to every participant.<sup>93</sup> However, DFS has 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>94</sup> Yet because prizes are

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<sup>88</sup> See 31 U.S.C. § 5362(1)(E)(ix) (2006).

<sup>89</sup> *Id.*

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

<sup>91</sup> *Id.*

<sup>92</sup> See, e.g., *Daily Fantasy Baseball League Rules*, DRAFTKINGS, <https://www.draftkings.com/help/mlb> (last visited Jan. 11, 2016). The pool of athletes to choose from can be limited to those participating in as little as two sports contests (i.e., the athletes on four separate sports teams); however, even for these particular DFS contests, DFS servers sufficiently disallow participants to choose all athletes from one contest or one team. *Id.*

<sup>93</sup> See *Terms of Use*, DRAFTKINGS, <https://www.draftkings.com/help/terms> (last visited Jan. 11, 2016).

<sup>94</sup> See DRAFTKINGS, <https://www.draftkings.com/lobby#/featured> (last visited Jan. 11, 2016). 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. *Id.* Nonetheless, a DFS contest is predetermined and will not change. *Id.*

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 allow 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.

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

The three elements constituting illegal gambling are (1) consideration, (2) chance, and (3) prize.<sup>95</sup> Consideration must be present to categorize a game as illegal gambling.<sup>96</sup> Chance, in a majority of jurisdictions, must predominate the game in order to categorize an activity as illegal gambling.<sup>97</sup> Courts look to three tests 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>98</sup> A majority of jurisdictions apply the predominant purpose test.<sup>99</sup>

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<sup>95</sup> See *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 977–78 (Pa. 1983); *Harris v. Econ. Opportunity Comm’n of Nassau Cnty., Inc.*, 575 N.Y.S.2d 672, 675 (N.Y. App. Div. 1991).

<sup>96</sup> *Harris*, 575 N.Y.S.2d at 676 (holding that the purchase of five \$2 raffle tickets was not a donation to a charitable cause but instead amounted to the “purchased chances, for valuable consideration, to participate in a contest which, pursuant to Penal Law § 225.00(10), constituted an illegal lottery”).

<sup>97</sup> See, e.g., *Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1227 (Kan. Ct. App. 2011) (holding that a card game was predominantly a game of chance because the distribution of cards determined its outcome); *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 631 (N.C. Ct. App. 2007) (holding that “chance predominates over skill in the game of poker, making that game a game of chance”); *Am. Amusements Co. v. Neb. Dep’t of Revenue*, 807 N.W.2d 492, 502–04 (Neb. 2011) (a video gaming device was predominantly a game of skill because the player has control of the outcome).

<sup>98</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, 28 (2014).

<sup>99</sup> *Id.* See also *Two Elec.*, 465 A.2d at 973 (rejecting a standard making a game illegal if the outcome is based entirely on chance and instead adopting the predominant purpose test).

A. *Minority Tests: The Material Element Test & The Gambling Instinct Test*

Courts in at least seven jurisdictions, including New York and New Jersey, utilize the material element test.<sup>100</sup> In practice, this test is problematic because the lack of a uniform definition of “material” injects subjectivity into a judge’s analysis of whether a particular game passes muster.<sup>101</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>102</sup> Moreover, from a practical perspective, there is an element of chance in every competition or contest imaginable. In effect, this test allows courts to arbitrarily decide whether a game is unlawful, as the reasoning suggests in *United States v. Gotti*.<sup>103</sup> There, the defendant argued that poker games are games of skill and 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>104</sup> The court provided no definition, analysis, or standard in holding that the games were illegal gambling, as the issue was a secondary matter.<sup>105</sup>

Another minority test, the gambling instinct test, is a subjective test that assesses whether a game appeals to the gambling instinct of the participant.<sup>106</sup> For instance, Tennessee defines gambling as

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<sup>100</sup> See Okerberg, *supra* note 98, at 28 n.3 (eight states are listed in this note, not seven).

<sup>101</sup> See *id.* at 28–29.

<sup>102</sup> *Id.*

<sup>103</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” contain a dominating element of chance that determines the result of the game, not merely an element of either chance or skill).

<sup>104</sup> See *Gotti*, 459 F.3d at 342.

<sup>105</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. *Id.* at 301. Hence, the circumstances of the case may have effected judgment against the defendants on the illegal gambling count.

<sup>106</sup> See, e.g., *State v. One Hundred & Fifty-Eight Gaming Devices*, 499 A.2d 940, 956–57 (Md. 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*, No. E2003-00110-CCA-R3-CD, 2004 Tenn. Crim. App. LEXIS 317, at \*40 (Tenn. 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

“risking anything of value for a profit whose return is to *any degree contingent on chance*, but does not include a lawful business transaction.”<sup>107</sup> This language is overbroad and it allows a judge to pick-and-choose what constitutes gambling simply by pointing to any element of chance that may have influenced a game’s outcome. Therefore, this comment uses the majority predominant purpose test, which is the most workable test of the three.<sup>108</sup>

*B. Majority Test: The Predominant Purpose Test*

If chance predominates skill by comprising at least fifty-one percent or more of a game’s outcome, then the predominant purpose test is satisfied.<sup>109</sup> In *Commonwealth v. Two Electric Poker Game Machines*, the Pennsylvania Supreme Court applied the predominant purpose test to hold that the outcome of virtual poker is determined predominately by chance.<sup>110</sup> Showing a substantial element of chance will not suffice in establishing a predominance of chance over skill.<sup>111</sup> While the mix of skill and chance comprises mostly all imaginable games, “chance ultimately determines the outcome because chance determines the cards dealt and the cards from which one can draw.”<sup>112</sup>

The court weighed the statistical arguments made in finding that skill was indeed present.<sup>113</sup> The defendant’s expert witness testified that outcomes differed when using “smart,” as opposed to “dumb,” strategies.<sup>114</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>115</sup> When playing “smart,” a player won at a four and a half times greater rate.<sup>116</sup> Nonetheless, the court held that even though skill may improve a player’s odds at winning, because there was a “random element” to how the cards were dealt, chance ultimately determined the outcome.<sup>117</sup>

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gambler’s instinct); *see also* Okerberg, *supra* note 98.

<sup>107</sup> *Vance*, 2004 Tenn. Crim. App. LEXIS 317, at \*31 (emphasis added).

<sup>108</sup> *See* Okerberg, *supra* note 98,

<sup>109</sup> *See id.*

<sup>110</sup> *See* *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 978 (Pa. 1983).

<sup>111</sup> *Id.* at 977.

<sup>112</sup> *Id.* at 978.

<sup>113</sup> *Id.* at 977.

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

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

<sup>116</sup> *Two Elec.*, 465 A.2d at 978.

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

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

A. *New York*

Gambling laws in New York are not radically different from those in New Jersey.<sup>118</sup> 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>119</sup> The New York Constitution authorizes the legislature to codify preventative enactments to enforce this provision.<sup>120</sup> Paragraph 2 of the same section authorizes the majority of qualified electors to vote to validate games of 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>121</sup>

New York defines a game of chance as “any contest, game, gaming scheme or gaming device 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>122</sup> The same section notes three elements that determine whether an activity is gambling: when an individual stakes or risks something of value on the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.<sup>123</sup> New York defines something of value as “any money or property, [or] any token, object or article exchangeable for money.”<sup>124</sup> Furthermore, it can be credit or future promise of entry into a game without charge.<sup>125</sup>

1. Attorney General Schneiderman Opposes DFS

New York recently took a drastic stance in the legal debate over DFS. Attorney General Eric Schneiderman (“AG Schneiderman”) recently sent a cease and desist letter to DFS providers to discontinue

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<sup>118</sup> See, e.g., N.Y. CONST. art. I, § 9, para. 1; N.Y. PENAL LAW § 225.00 (McKinney 2016).

<sup>119</sup> N.Y. CONST. art. I, § 9, para. 1.

<sup>120</sup> *Id.*

<sup>121</sup> N.Y. CONST. art. I, § 9, para. 2.

<sup>122</sup> N.Y. PENAL LAW § 225.00 (McKinney 2016) (emphasis added).

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

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

operation and refrain from accepting entry fees.<sup>126</sup> AG Schneiderman then 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>127</sup> Recently, New York Governor Andrew Cuomo stymied AG Schneiderman's efforts by signing a bill legalizing DFS in the state.<sup>128</sup> Nonetheless, the arguments raised in the brief supporting AG Schneiderman's complaint are important to consider, as they are the typical arguments made in opposition of DFS. AG Schneiderman's complaint suggested that the "the speed of DraftKings' [and FanDuel's] games, the size of their jackpots, and the degree to which the games are sold as winnable," resembles illegal sports gambling and thus both companies should be enjoined from continuing operations.<sup>129</sup>

According to AG Schneiderman, DFS falls 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>130</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>131</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>132</sup> AG Schneiderman concludes that DFS poses risks to New York residents who suffer from compulsive gambling.<sup>133</sup> He argues that DFS causes the precise harms that the New York gambling laws in place seek to eradicate.<sup>134</sup>

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<sup>126</sup> David Bario & Jake Pearson, *Fantasy Sports Companies Challenge AG Ban in Court*, N.Y. L.J. (Nov. 16, 2015), <http://www.newyorklawjournal.com/id=1202742379722/Fantasy-Sports-Companies-Challenge-AG-Ban-in-Court?slreturn=20160923100848>.

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

<sup>128</sup> See Y. Peter Kang, *NY Gov. Signs Bill Legalizing Daily Fantasy Sports*, LAW360 (Oct. 21, 2016, 6:56 PM) <http://www.law360.com/articles/824806/ny-gov-signs-bill-legalizing-daily-fantasy-sports>.

<sup>129</sup> Complaint at 2, *Schneiderman v. DraftKings, Inc.*, No. 453054 (N.Y. Sup. Ct. filed Nov. 17, 2015).

<sup>130</sup> Brief for Plaintiff at 1, *Schneiderman v. DraftKings, Inc.*, No. 453054 (N.Y. Sup. Ct. 2015).

<sup>131</sup> *Id.* at 9 (noting that in the first ten months of 2015, FanDuel has spent \$21 million in advertising alone).

<sup>132</sup> *Id.* at 11.

<sup>133</sup> *Id.*

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

## 2. AG Schneiderman Triumphant at Trial Level; DFS Set to Appeal prior to New York's legalizing DFS

AG Schneiderman passed the first level of scrutiny at the trial level in December 2015.<sup>135</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>136</sup> Judge Mendez concluded that the UIGEA exception does not apply under the state law’s language and thus defendants FanDuel and DraftKings are enjoined from doing business in the State of New York.<sup>137</sup> Furthermore, Judge Mendez rejected FanDuel and DraftKings’ due process claim because they failed to seize their opportunity to be heard by AG Schneiderman and the presiding court.<sup>138</sup> Judge Mendez also rejected DraftKings’s equal protection argument because it failed to show other similarly situated DFS websites were exempted from AG Schneiderman’s investigation.<sup>139</sup> A New York Appellate court stayed Judge Mendez’s approval of AG Schneiderman’s motion to enjoin the DFS sites’ activity.<sup>140</sup> The fate of DFS in New York and the question of its survival became moot as of August 3, 2016.<sup>141</sup> New York Governor Andrew Cuomo took a landmark step by declaring DFS a game of skill by signing a bill that passed a New York Senate vote forty-five to seventeen.<sup>142</sup> The new law “takes certain steps to ensure participants are subject to games that are fair, prohibits minors from participating, and protects customers’ deposited funds.”<sup>143</sup>

### B. New Jersey: *The Grass is Greener on the Other Side of the Hudson*

New Jersey’s laws reflect the legislature’s opposition to legalizing gambling and sports wagering outside of Atlantic City.<sup>144</sup> Nonetheless,

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<sup>135</sup> People v. Fanduel, Inc., No. 453056/15, slip op. 323332(U) (N.Y. Sup. Ct. Dec. 11, 2015).

<sup>136</sup> *Id.* at 17.

<sup>137</sup> *Fanduel, Inc.*, No. 453056/15, slip op. 323332(U) at 7.

<sup>138</sup> *Id.* at 8.

<sup>139</sup> *Id.*

<sup>140</sup> Andrew Keshner, *Life of Fantasy Sports Sites In NY Is Extended Until May*, N.Y. L.J. (Jan. 12, 2016), <http://www.newyorklawjournal.com/id=1202746799270/Life-of-Fantasy-Sports-Sites-in-NY-Is-Extended-Until-May>.

<sup>141</sup> See Kang, *supra* note 128.

<sup>142</sup> *Id.*

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

<sup>144</sup> See, e.g., N.J. STAT. ANN. § 2A:40-1 (West 2016) (“All wagers, bets, or stakes made to depend on any race or game, or upon any gaming by lot or chance, or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful.”); N.J. STAT. ANN. § 2C:37-2 (West 2016) (making the promotion of gambling unlawful when (i) a person knowingly enters into an agreement to accept or receive money or property through

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>145</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 election.<sup>146</sup> Put differently, New Jersey residents would have to vote affirmatively to permit implementation of a legal gambling scheme anywhere outside of Atlantic City.<sup>147</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>148</sup> They argued that legalizing gambling would provide a significant boost to Atlantic City’s stagnant economy.<sup>149</sup> Voters approved Public Question 1 of the November 8, 2011 New Jersey municipal election ballot by a margin of sixty-four percent.<sup>150</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>151</sup>

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the means of gambling activity; or (ii) materially aids gambling activity through the creation or establishment of the particular gambling games or contests).

<sup>145</sup> See *infra* notes 150–151 and accompanying text.

<sup>146</sup> N.J. CONST. art. IV, § 7, para. 2. Section D of Paragraph 2 limits casinos’ operation of gambling schemes to the Atlantic City, New Jersey locale. N.J. CONST. art. IV, § 7, para. 2. 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, § 7, para. 2.

<sup>147</sup> *Id.*

<sup>148</sup> Chris Sieroty, *Sports Betting Possible in New Jersey*, LAS VEGAS REV.-J. (Sept. 17, 2011), <http://www.reviewjournal.com/sports/betting/sports-betting-possible-new-jersey>.

<sup>149</sup> *Id.* 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. *Id.* Atlantic City anticipated a revenue boost of around \$200 million in its first year of offering legalized sports betting. *Id.* During the time of the amendment and subsequent complimentary legislation, ninety-eight 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. *Id.*

<sup>150</sup> See *New Jersey Municipal Election Results*, STAR LEDGER (Nov. 9, 2011), <http://www.nj.com/starledger/results-ballot/>. The final tally was 648,769 for and 367,283 against the measure. *Id.*

<sup>151</sup> N.J. CONST. art. IV, § 7, para. 2. The language of the amendment imposes

New Jersey residents unequivocally supported a legal, regulated gambling scheme.<sup>152</sup> Naturally, the New Jersey Legislature exercised its newly acquired authority by passing the Sports Wagering Act.<sup>153</sup> New Jersey's law made it legal, upon the Division of Law's approval, to operate sports pools in casinos and racetracks.<sup>154</sup> The law required that an individual who is at least twenty-one years old be physically present in a sports pool lounge—one with conforming physical dimensions, security measures, and equipment.<sup>155</sup> Section 5:12A-1 broadly defines a sports pool as a “business of accepting wagers on any sports event by any system or method of wagering.”<sup>156</sup> However, these amendments and ensuing legislation directly conflicted with the prohibitions in PASPA.<sup>157</sup> Consequently, the opposition from the four major national sports leagues put New Jersey and its recent measure on an inevitable path towards litigation.

1. 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.*<sup>158</sup> The NFL, NHL, MLB, NBA, and the NCAA, (collectively “the Leagues”), joined by the United States as an

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limitations on wagers on contests that involve a New Jersey college team or on collegiate contests that occur within the state. N.J. CONST. art. IV, § 7, para. 2. N.J. CONST. art. IV, § 7, para. 2. 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, § 7, 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 through an account wagering system, on the results of professional, certain college, or amateur sport or athletic events, be approved?

S. Con. R. 49, Leg., 214th Sess. (N.J. 2010), [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>152</sup> See STAR LEDGER, *supra* note 150.

<sup>153</sup> N.J. STAT. ANN. § 5:12A-2 (repealed 2014).

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

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

<sup>156</sup> § 5:12A-1 (repealed 2014).

<sup>157</sup> See Sieroty, *supra* note 148.

<sup>158</sup> See Nat'l Collegiate Athletic Ass'n v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013), *aff'g*, 926 F. Supp. 2d 551 (D.N.J. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *aff'd en banc*, 832 F.3d 389 (3d Cir. 2016).

intervening party, argued that New Jersey's law permitting sports wagering on their contests violated PASPA.<sup>159</sup> New Jersey's substantive arguments challenged the constitutionality of PASPA by raising an anti-commandeering claim, as well as a state equal sovereignty claim.<sup>160</sup>

Judge Fuentes first held that the Leagues had standing because they suffered an injury in fact.<sup>161</sup> This was established when (a) the Leagues became involuntarily associated with "gambling activity," which both the Leagues and the public disapproved of; and (b) the Leagues' reputation would be damaged due to the fans' increased "negative perceptions" resulting from increased sports gambling.<sup>162</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>163</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>164</sup>

Finally, Judge Fuentes held that PASPA does not violate equal sovereignty of the states.<sup>165</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>166</sup> Second, because laws remedying local evils are one reason, but not the only reason to treat states differently, no violation existed.<sup>167</sup> Third, just because PASPA treats one state more, but not less favorably, there was not necessarily a violation.<sup>168</sup>

In a dissenting opinion, Judge Vinaskie disagreed with the majority with respect to the commandeering issue.<sup>169</sup> Judge Vinaskie reasoned that PASPA is unconstitutional because it gives states a choice to either allow or prohibit unregulated betting on sporting events.<sup>170</sup> Thus, according to Judge Vinaskie, PASPA regulates state governments' regulation, which violates the anti-commandeering

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<sup>159</sup> *Id.* at 214.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 219–22.

<sup>163</sup> *Id.* at 225.

<sup>164</sup> *See Governor of N.J.*, 730 F.3d at 232.

<sup>165</sup> *Id.* at 238.

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

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 241.

<sup>170</sup> *See Governor of N.J.*, 730 F.3d at 241.

doctrine.<sup>171</sup> The slim two-to-one majority was upheld *en banc* in *National Collegiate Athletic Association v. Governor of the State of New Jersey*, with Judge Marjorie Rendell writing for the majority.<sup>172</sup>

## 2. 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>173</sup> Essentially, individuals paid to participate in a fantasy league that the defendant hosts provided.<sup>174</sup> Plaintiff alleged that the entry fees amounted to wagers or bets and thus, under *qui tam* gambling recovery statutes, he was eligible to recover the entry fees.<sup>175</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>176</sup> Furthermore, Plaintiff failed to allege, as required by the New Jersey *qui tam* statute, that Plaintiff successfully, and each “loser” unsuccessfully, brought suit within six months of losing the bet.<sup>177</sup> Second, Judge Cavanaugh held that the entry fees did not amount to bets or wagers because they were unconditional and there was no risk that the prizes would constitute a wager because they were guaranteed.<sup>178</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>179</sup>

<sup>171</sup> *Id.* at 238 (citing *New York v. United States*, 505 U.S. 144, 166 (1992)).

<sup>172</sup> *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016).

<sup>173</sup> *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 U.S. Dist. LEXIS 44679, at \*5 (D.N.J. June 20, 2007). 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. *Id.* Defendants offered support services such as “access to ‘real-time’ statistical information, expert opinions, analysis, and message boards for communicating with other participants.” *Id.*

<sup>174</sup> *See id.*

<sup>175</sup> *Id.* at 6.

<sup>176</sup> *Id.* at 16.

<sup>177</sup> *Id.* at 17.

<sup>178</sup> *Id.* at 20.

<sup>179</sup> *Humphrey*, 2007 U.S. Dist. LEXIS 44679, at \*4. 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

VI. NEW JERSEY AND CALIFORNIA OFFER THE DFS SOLUTION: NEW JERSEY'S INTERNET GAMING SCHEME, THE WHELAN BILL AND AB 1437

A. *Internet Gaming Made Legal in New Jersey Providing the Model Structure for DFS*

New Jersey further sought to legalize Internet gambling within the state's borders through its February 26, 2013 Casino Control Act Amendment ("CCA Amendment").<sup>180</sup> Licensed casinos may offer, via express authority granted in the CCA Amendment, Internet gaming to consumers in New Jersey.<sup>181</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>182</sup> Rampant participation in illegal gambling of unregulated, off-shore operators further supports legal internet gaming.<sup>183</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 serve to maintain the integrity of internet gaming.<sup>184</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>185</sup> This rigorous process is certain to attract those already established internet-gaming companies, such as DraftKings and FanDuel, who are capable of pursuing such a venture.<sup>186</sup> According to Deitch, what makes the gaming structure appealing is Section 29 of the CCA Amendment, which allows those not physically

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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.

*Id.*

<sup>180</sup> David B. Deitch, *New Jersey: Taking the Lead in Offering Internet Gaming to the World*, EUR. GAMING LAW. 18 (Spring 2013), [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>181</sup> *Id.*

<sup>182</sup> N.J. STAT. ANN. § 5:12-95.17(e) (West 2015).

<sup>183</sup> § 5:12-95.17(f).

<sup>184</sup> See Deitch, *supra* note 180.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

present within New Jersey to wager over the internet.<sup>187</sup> A degree of control is maintained by restricting all internet gaming hardware, software, and other equipment to casino facilities in Atlantic City.<sup>188</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>189</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>190</sup> While the first restriction is arguably not much of a hurdle, Deitch concedes that the second restriction may be subject to more scrutiny.<sup>191</sup> Ultimately, however, after considering the myriad of controlling federal laws, Deitch concludes that allowing foreign participants to engage in New Jersey-based online gambling would not be contrary to federal law.<sup>192</sup>

One of the most attractive aspects of the scheme compelled the New Jersey Division of Gaming Enforcement (NJDE) to produce a report on the impact of internet gambling on problem gamblers.<sup>193</sup> An independent report conducted by Lia Nower of the Rutgers Center for Gambling Studies concluded that internet gambling provides an

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<sup>187</sup> A.B. 2578, 215th Leg., Reg. Sess. (N.J. 2012). 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.

A.B. 2578, 215th Leg., Reg. Sess. (N.J. 2012).

<sup>188</sup> N.J. STAT. ANN. § 5:12-95.17(j) (West 2015).

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

<sup>190</sup> *See* Deitch, *supra* note 180.

<sup>191</sup> *Id.*

<sup>192</sup> *See* Deitch, *supra* note 180. Deitch 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. *See* 18 U.S.C. § 1084 (2012). 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 prohibit 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 to internet gaming. *See* Deitch, *supra* note 180.

<sup>193</sup> N.J. STAT. ANN. § 5:12-95.18 (West 2015).

additional medium for individuals with high-risk gambling problems.<sup>194</sup> In the span of one year, internet gaming accounts rose from 126,231 in 2013 to 531,626 by December of 2014.<sup>195</sup> Likewise, the internet gaming revenue rose substantially each month, generating a total of \$131.2 million since its inception.<sup>196</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>197</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>198</sup> These measures ensure that a high-risk gambler will not engage in reckless gambling.<sup>199</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>200</sup> Violators are subject to no more than a \$50,000 fine, and for unnatural persons, no more than a \$200,000 fine.<sup>201</sup>

Moreover, those violating these provisions are required to forfeit their permit and license.<sup>202</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 play DFS safely while simultaneously raising the United

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<sup>194</sup> Lia Nower, *Internet Gaming in New Jersey Calendar Year 2014 Report to the Division of Gaming Enforcement*, RUTGERS U. CTR. FOR GAMBLING STUD. (Feb. 2015), <http://www.nj.gov/oag/ge/2015news/ResponsibleGamingFinalReport%202015.pdf>.

<sup>195</sup> *See id.* at 10.

<sup>196</sup> *See id.* at 11. The month of December 2014 saw a substantial growth from previous months, accumulating \$10.7 million in revenue. *Id.*

<sup>197</sup> *Id.* The Casino Reinvestment Development Authority is an agency that reinvests casino revenue for the well-being of New Jersey residents. *Id.* 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 . . ." *See About Us*, CASINO REINVESTMENT DEV. AUTHORITY, <http://www.njcrda.com/about-us/> (last visited Nov. 16, 2015).

<sup>198</sup> *See Nower, supra* note 194, at 12. New Jersey has addressed the reckless gambling issue by implementing certain preventative measures, such as: (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>199</sup> *See id.*

<sup>200</sup> *See* N.J. STAT. ANN. §§ 5:12-95.27–5:12-95.28 (West 2015).

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

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

States' revenue through taxation and inhibiting the growth of gambling addiction. 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.

### 1. 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. 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>203</sup> DraftKings pleaded for 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>204</sup> The email's gravamen seeks to protect DFS by maintaining its accessibility.<sup>205</sup>

Since then, on March 7, 2016, State Senator Jim Whelan proposed S-1927 (“Whelan Bill”), a bill that does not call for the declaration of

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<sup>203</sup> Charles Curtis, *DraftKings urges N.J. users to contact legislators in email sent to customers*, NJ.COM (Nov. 4, 2015, 3:06 PM), [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). DraftKings sent this email to its New Jersey users after circulating a petition that asked them to endorse a statement claiming that fantasy sports add excitement to sports, create communal interactions, and test competitors' sports knowledge against others. *Id.*; see also Hayden Bird, *Here's DraftKings' 1st Attempt to Mobilize Its Users [Full Text]: The company emailed its users in NJ asking them to sign a petition*, BOSTLNNO (Nov. 4, 2015, 1:33 PM), <http://bostinno.streetwise.co/2015/11/04/nj-daily-fantasy-ban-draftkings-petition-to-new-jersey-residents/>. The FSTA uses similar language in its nationally circulated petition:

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 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.

*Protect Fantasy Sports in NJ!*, FANTASY SPORTS TRADE ASS'N, [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%2fpublish%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%2fpublish%2f%3faction_KEY%3d16357&utm_campaign=) (last visited Jan. 11, 2017).

<sup>204</sup> See Curtis, *supra* note 203.

<sup>205</sup> *Id.* Of course, DraftKings did not fail to reinforce its belief in the legality of DFS, noting its social appeal in “connecting with friends, family, and co-workers,” and that the basis of its contests are “about the challenge [and] the skill.” *Id.*

DFS as illegal gambling.<sup>206</sup> Being somewhat apropos, the Whelan Bill's deliberation came amid New Jersey's Third Circuit Appeal *en banc* in *NCAA v. Governor of New Jersey*, reviewing the constitutionality of the legalization of gambling as proposed by a State Constitutional amendment.<sup>207</sup>

Since its inception, the Whelan Bill passed the New Jersey Senate Budget and Appropriations Committee, and now awaits a vote before the State's full Senate.<sup>208</sup> The Whelan Bill would make DFS safe for consumers while maintaining the integrity of the subject sports.<sup>209</sup> 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>210</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>211</sup> The Whelan Bill overhauls the current scheme, adopting one that is purely intrastate as opposed to interstate.<sup>212</sup>

Unlike the UIGEA, the Whelan Bill broadly defines fantasy sports to include DFS within its regulatory reach.<sup>213</sup> The language specifically caters to fantasy sports, defining 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>214</sup> Consistent with the UIGEA, The Whelan Bill requires the outcome of any contest to be based on the "relative skill of the participants."<sup>215</sup> The Whelan Bill would retain the prohibition on "sports betting" by disallowing the placement of wagers

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<sup>206</sup> S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016). The bill has passed first committee. See S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016).

<sup>207</sup> See *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *aff'g*, 926 F. Supp. 2d 551 (D.N.J. 2013), *cert. denied*, 134 S. Ct. 2866 (2014), *aff'd en banc*, 832 F.3d 389 (3d Cir. 2016); see also discussion *supra* Section V.B.0.

<sup>208</sup> See Jonathan Zaun, *New Jersey's DFS Bill Full Steam Ahead to Full Senate Vote*, GAMBLEONLINE.CO (June 22, 2016), <http://www.gambleonline.co/new-jerseys-dfs-bill-full-steam-ahead-to-full-senate-vote/>.

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

<sup>210</sup> Letter from Jim Whelan, N.J. Senator, to Dir. David Rebeck and Chairman Matthew Levinson, Division of Gaming Enforcement (Oct. 30, 2015), <http://files.ctctcdn.com/38874f71101/a6770444-dc15-40b4-ba7b-393dc11deef9.pdf>.

<sup>211</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 REP. (Nov. 2, 2015), <http://www.legalsportsreport.com/5762/nj-dfs-bill/>; see S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016).

<sup>212</sup> See *id.*

<sup>213</sup> See S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016).

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

<sup>215</sup> *Id.*

on the score or spread of an individual contest or the performance of an individual athlete.<sup>216</sup>

Furthermore, the definition of “fantasy sports providers” includes the rhetoric that had concerned DFS providers.<sup>217</sup> The Whelan Bill prohibits authorized DFS operators from accepting entries from those not physically present in the state.<sup>218</sup> According to the Whelan Bill, a DFS provider must obtain a permit through the approval of the NJDGE.<sup>219</sup> The fees associated with licensing a DFS provider would cover the Division’s cost of overseeing the conduct of DFS operators.<sup>220</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>221</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>222</sup> In essence, the Whelan Bill nestles DFS, along with traditional fantasy sports, into the UIGEA carve-out because its contests are not bets based solely on the outcome of real-life games, but rather, on the accumulation of multiple athletes’ statistical performances, regardless

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

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

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

<sup>219</sup> N.J. STAT. ANN. § 5:12-55 (West 2015). Article 2 of the Casino Control Act establishes the NJDGE in Atlantic City, New Jersey with a satellite operation in Trenton, New Jersey, and is under the direction of appointed Assistant Attorney General and Director David L. Rebeck. *See id.*; *see also Director of the Division of Gaming Enforcement*, THE ST. OF N.J. DEP’T OF L. & PUB. SAFETY OFF. OF THE ATT’Y GEN., <http://www.nj.gov/oag/ge/director.htm> (last visited Oct. 7, 2016). 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.” *About the Division of Gaming Enforcement*, THE ST. OF N.J. DEP’T OF L. & PUB. SAFETY OFF. OF THE ATT’Y GEN., <http://www.nj.gov/oag/ge/mission&duties.htm> (last visited Oct. 7, 2016). 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. *See* N.J. STAT. ANN. § 5:12-76 (West 2015).

<sup>220</sup> S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016).

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

of the team on which the athlete plays.<sup>223</sup> California, on the other hand, is ambivalent in regard to declaring DFS legal and implementing a regulatory scheme.

## 2. California's Failed Attempt at Adopting New Jersey's Approach: AB 1437 Rejected

California recently attempted to implement a framework for DFS regulation by drafting committee Chairman Adam Gray's bill ("AB 1437") in January 2016.<sup>224</sup> AB 1437 faced very little opposition, passing sixty-two to one by California's Assembly Governmental Organization Committee.<sup>225</sup> Gray noted that millions play in what is currently an unprotected consumer market.<sup>226</sup> Some concerns mounted by committee members involved the assurance of whether there exists enough funding to monitor online operators adequately and to keep minors from participating.<sup>227</sup> AB 1437 received overwhelming support in the House.<sup>228</sup> Ultimately, AB 1437 did not pass in California, as it sat dormant in Senate since its last amendment in June.<sup>229</sup>

Nonetheless, the bill deserves consideration as a DFS federal scheme develops. AB 1437 proposed to add chapter 4.7, entitled the Internet Fantasy Sports Games Consumer Protection Act, to Division 8 of the Business and Professions Code, and amend the California Penal Code.<sup>230</sup> It acknowledged 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

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<sup>223</sup> See discussion *supra* Part II.

<sup>224</sup> See Cheryl Miller, *Fantasy Sports Sites Meet Weak Opposition in Calif.*, THE RECORDER, Jan. 6, 2016; see also Dustin Gouker, *62-1: California Assembly Overwhelmingly Passes Daily Fantasy Sports Bill*, LEGAL SPORTS REP. (Jan. 27, 2016), <http://www.legalsportsreport.com/7659/california-passes-dfs-bill/>.

<sup>225</sup> See Gouker, *supra* note 224.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> See Dustin Gouker, *DFS State Watch: Monitoring Daily Fantasy Sports Action In State Government*, LEGAL SPORTS REP. (Sept. 8, 2016), <http://www.legalsportsreport.com/dfs-state-watch/>; see also Dustin Gouker, *California Daily Fantasy Sports Bill Lies Dormant With Little Time Left*, LEGAL SPORTS REP. (Aug. 19, 2016), <http://www.legalsportsreport.com/11112/california-dfs-update/>.

<sup>230</sup> A.B. 1437, 2015–16 Gen. Assemb., Reg. Sess. (Cal. 2016).

do not provide any benefits to the citizens of California.<sup>231</sup>

AB 1437 proposed a sensible remedy to DFS's potential harms by establishing a licensing scheme to control DFS operators.<sup>232</sup> It embodied 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 sought to ensure that gameplay was consistent with the law, the State was capable of collecting its share of taxes, and that the consumer was protected in gameplay and collections of prizes.<sup>233</sup> Before DFS is offered to California consumers, Article 3 of AB 1437 required an operator to apply for and receive a license from the California Department of Justice.<sup>234</sup> Section 19772 mirrors the UIGEA fantasy carve-out provisions; however, no requirement of skill is included.<sup>235</sup>

Furthermore, AB 1437 required that a licensed operator be responsible for providing adequate data security measures and determining participant eligibility.<sup>236</sup> Section 19774(f) established a system that authorized the State to levy fees on provision violators.<sup>237</sup> Section 19780 created the Fantasy Sports Fund in the State Treasury.<sup>238</sup> AB 1437 required operators to deposit annual regulatory fees to the Fantasy Sports Fund.<sup>239</sup> The California DOJ would have determined the annual fee 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>240</sup>

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<sup>231</sup> *Id.* at Art. 1, § 19752(c).

<sup>232</sup> *Id.* at Art. 1, § 19754.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at Art. 3, § 19772. 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—the fee has yet to be determined. *Id.*

<sup>235</sup> *Id.* This section (1) prohibits an imaginary team from 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 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 athlete. *Id.*

<sup>236</sup> A.B. 1437, 2015–16 Gen. Assemb., Reg. Sess. Art. 3, § 19774(b) (Cal. 2016). The verification responsibilities include verifying credit card identity, that the participant is at least twenty-one years of age, and that the participant's location is in California. *Id.*

<sup>237</sup> *Id.* at Art. 3, § 19774(f). Fees range between \$1,000 for a first-time violator and \$10,000 for an operator's fifth violation. *Id.*

<sup>238</sup> *Id.* at Art. 3, § 19780(a).

<sup>239</sup> *Id.* at Art. 3, § 19780(b).

<sup>240</sup> *Id.*

The passing of AB 1437 would have been the landmark step DFS needed to extinguish some of the surrounding concerns with the game. California's bill implemented all of the desirable aspects of the New Jersey online gambling scheme. AB 1437 provided the State with an additional taxation resource, while simultaneously allowing consumers to participate in a safer version of the fantasy game that its citizens adore. The rejected bill, most of all, provided legal clarity.

VII. ANALYSIS: ARE DAILY FANTASY SPORTS A GAME OF CHANCE OR A GAME OF SKILL?

This analysis will show that DFS is no less skill-based than traditional fantasy sports, which have long been accepted as a non-gambling activity.<sup>241</sup> Under current federal law, DFS is operating legally pursuant to the UIGEA's fantasy sports carve-out.<sup>242</sup> First, all prizes are made known to participants in advance.<sup>243</sup> Second, winning outcomes are determined predominately by the relative knowledge of skill by the accumulation of statistical results of real professional athletes.<sup>244</sup> Third, DFS operators provide barriers that restrict individuals from betting on either (1) the score or outcome of a single professional sports contest, or (2) the performance of a single athlete.<sup>245</sup>

But does the UIGEA fantasy carve-out absolve DFS operators from the penalties that illegal gamblers face? Considering the UIGEA was enacted in 2006, before DFS were created, it arguably does not apply to DFS.<sup>246</sup> In fact, Jim Leach, a Republican congressman who co-authored the 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

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<sup>241</sup> See Adam Krejcik, *Daily Fantasy Sports Player Survey – 2015*, EILERS RES. (July 14, 2015),

<https://courier.bluematrix.com/Courier/EmailDocViewer.action?info=vNnixFYhd4FCmyi2AiiGw5bKPLv9kYz%2BZwoDtUOHirWYkn0AQzNKxEiRrGphv6zodk2GDWPv%2FX%0AC%2BhzuqMIBWLef97PSR8CVyMr2Di1PopPVRmAbIdrG1Y9nnc0GOWivhqCSj7Nl6M9WmRadJjk4Vfu%0AazRheD6Qqr6vQsok1GU%3D%0A> [hereinafter EILERS RESEARCH]. The survey consisted of 1,420 participants. *Id.* Sixty-one percent of those who play DFS were also in at least one season-long fantasy sports league. *Id.* The survey was marketed through social media websites and was conducted from June 18 through July 9, 2015. *Id.*

<sup>242</sup> See 31 U.S.C. § 5362(1)(E)(9) (2012).

<sup>243</sup> See DRAFTKINGS, <https://www.draftkings.com> (last visited Jan. 11, 2017).

<sup>244</sup> See *id.*

<sup>245</sup> See *id.*

<sup>246</sup> Dustin Gouker, *UIGEA Author: "No One Ever Conceived" That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REP. (May 8, 2015), <http://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/>.

horse racing, already part of the American betting scene.”<sup>247</sup> Of course, the language of the law governs, not the intent of a co-author, and DFS complies with the law as written.<sup>248</sup>

This analysis utilizes the predominant purpose test because the minority tests are prone to subjective analysis.<sup>249</sup> DFS contests are predominately skill-based because first, an unprecedented amount of time and research is required to succeed in fantasy sports. Second, a participant’s actions have a significant effect on his outcome. Third, daily formats virtually eliminate certain variables of chance, such as injuries and athlete rest. Last, 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 necessary to clarify the lines dividing illegal gambling and legal DFS contests.

*A. DFS is Predominantly a Game of Skill Because Time and Research is Necessary to Earn Profitable Winnings*

First, DFS is predominantly skill-based because successful participants generally study the particular sport that corresponds to the participant’s fantasy contest. 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 they reserved between ten and twenty hours a week for fantasy research.<sup>250</sup> 84.3% of DFS participants reported having spent over five hours of research a week.<sup>251</sup> Of the individuals surveyed who do not participate in DFS, the cited reasons were that they were “too intimidate[ed]” or that the game was too “time consuming.”<sup>252</sup>

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<sup>247</sup> See Kilgore, *supra* note 36.

<sup>248</sup> See Gouker, *supra* note 246.

<sup>249</sup> See Okerberg, *supra* note 98.

<sup>250</sup> See EILERS RESEARCH, *supra* note 241, at 21. The survey notes that an overwhelming majority of research is performed through Rotogrinders’ website—a fantasy sports news source. *Id.*

<sup>251</sup> See *id.* A total of 1,219 people responded to this particular survey question. *Id.*

<sup>252</sup> *Id.* at 13. Of the individuals who reported that 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 their concern over the legality of DFS. *Id.*

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>253</sup> Since there is overlap between those earning ROI and those studying for over five hours a week, it is logical to conclude that at least some winnings can be attributed to studying.<sup>254</sup> This also suggests that while studying may play a role in DFS success, one must also possess the skill required to succeed.

Regardless of whether a contest is season-long or daily, when choosing lineups it is important to consider the athlete's entire body of work for that season. The ultimate goal is to insert an athlete into one's lineup during the athlete's optimal performance during the season. To accomplish this, a fantasy participant must study the athlete'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 or her "bench players."<sup>255</sup> Whereas in DFS, every athlete in his or her respective professional league is available to the participant.<sup>256</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 athlete's attributes, but rather, the broad totality of a team's performance. Contrarily, without understanding certain variables, such as athlete trends, matchups, weather, and injuries, a DFS participant will be far less successful. A DFS participant has a higher likelihood of succeeding if he or she considers an individual athlete's performance. Unlike point-spread wagers, an individual athlete's performance often depends on several variables. For instance, in fantasy football, a receiver must depend on whomever his quarterback is to throw the ball successfully to the receiver.

Furthermore, opposing defenses factor into a fantasy team's success. For example, in fantasy football, if an opposing defense has a poor run defense, the offense may throw the ball less making their receivers less valuable. Of course, the opposing defensive line is a

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<sup>253</sup> *Id.* at 23.

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

<sup>255</sup> Free agents are also available on waiver wires but are likewise a limited alternative. See discussion *infra* Part VII.B.

<sup>256</sup> See DRAFTKINGS, <https://www.draftkings.com> (last visited Jan. 15, 2016). This depends on which games are included in a particular contest. *Id.*

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, other externalities, 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 is Predominantly a Game of Skill Because Participants' Actions have a Significant effect on the Outcomes of Contests*

Because fantasy participants have a degree of control over their fantasy teams, which in turn has a significant effect on the contest's outcome, DFS is predominantly a game of skill. The court in *Commonwealth v. Two Electric Poker Game Machines*, noted that there is a certain level of skill associated with poker.<sup>257</sup> However, because a poker player has no control over which cards are dealt, chance played a predominant role.<sup>258</sup> In DFS, by contrast, a participant has a considerable amount of control in choosing which athletes 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. DFS requires more than luck. In poker, cards are randomly dealt and gameplay is based solely on odds.

A DFS participant's actions play a significant role in determining his or her success. If chance were a predominant factor in determining DFS outcomes, then computer-generated lineups chosen at random would produce comparable results to human generated lineups.<sup>259</sup> However, in a study conducted by MIT Professor Anette (Peko) Hosoi, simulations showed just the opposite.<sup>260</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

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<sup>257</sup> See *Commonwealth v. Two Elec. Poker Game Machs.*, 465 A.2d 973, 977-78 (Pa. 1983).

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

<sup>259</sup> Affidavit of Anette (Peko) Hosoi Supporting Defendant at 5, *Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct. filed Nov. 23, 2015) [hereinafter *Peko Affidavit*].

<sup>260</sup> *Id.* at 1.

back position than the kicker position).<sup>261</sup> The results revealed that the human user lineups 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>262</sup>

The simulation is not without certain flaws that may have led to artificially inflated numbers. For example, if some computer-generated lineups used only 85% of its salary cap, then those lineups were at a statistical disadvantage considering DFS prices athletes 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 participants—who collect an average of 86.7% of gross winnings throughout the different DFS contests offered.<sup>263</sup> Nonetheless, the simulation provides at least some insight about the involvement of skill in DFS.

C. *DFS is Predominantly a Game of Skill Because Chance Variables Are Nearly Eliminated in the Daily Format*

DFS is arguably more of a skill-based game than traditional fantasy sports because real-life injuries and playoff seeding factors play a smaller role. While chance is not completely eliminated, it is indeed diminished in the DFS format. For instance, injuries play a significant role in season-long fantasy sports. An injury occurring to a fantasy team's integral athlete is based heavily on 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 athletes—a staple in season-long fantasy sports but absent in DFS. This notion is given too much weight.

In traditional fantasy leagues—typically comprised of either ten, twelve, or fourteen participants' teams, each with around fifteen athletes—the athletes available as “free agents” are either one of two types. First, the free agent may be a low-caliber athlete, or an athlete that does not score high fantasy points because of their low skill or playing time. Second, the free agent may be the original injured athlete's reserve or backup. The latter scenario is based mostly on chance because, given the added athlete's status as a backup, a fantasy

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<sup>261</sup> *Id.* at 7.

<sup>262</sup> *Id.* at 8.

<sup>263</sup> *See id.* at Ex. 3. This data was gathered from New York participants between 2014 and November 2015. *Id.*

participant must base his or her reasonable judgment on the backup athlete's small amount of in-game performance time. Therefore, one must rely mostly on luck as to whether that added free agent will perform well.

Essentially, a season-long fantasy participant with the winningest team may suffer an injury to their most skilled athlete halfway through a season or immediately preceding playoffs. That participant will struggle to salvage their team. On the contrary, DFS 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. There is undoubtedly the similar possibility that an injury occurs in a DFS contest midway through a game. Nonetheless, rather than being plagued all season, a DFS participant can pick a new roster the following week. Unfortunately, the chance of injury is unavoidable in both styles of fantasy sports.

An additional consideration is the actual success of the sports team to which an athlete belongs. Oftentimes, an athlete's coach may decide to rest him or her as meaningful playoff games approach.<sup>264</sup> This secures the highest performance of the athlete in elimination games. However, it is virtually unpredictable in traditional fantasy leagues because participants draft their teams at the onset. Furthermore, coaches typically employ this strategy at the end of a sport's regular season, which usually coincides with fantasy playoffs.<sup>265</sup>

It is almost impossible to predict, at the beginning of a season, which teams are playoff-bound and will thus be in the position to rest prime athletes come season's end. In a sense, season-long fantasy participants are essentially "gambling" by avoiding athletes from the teams that they believe will finish the season with a playoff berth. If a season-long fantasy participant owns an athlete 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 athletes each contest. Therefore, the probability of injury or rest becomes less significant.

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<sup>264</sup> See, e.g., Christopher Montague, *The Week 17 Dilemma – Which Teams Will Rest Their Starters?*, FANTASY SMACK TALK (Dec. 24, 2013), <http://www.fantasysmacktalk.com/the-week-17-dilemma-which-teams-will-rest-their-starters/>.

<sup>265</sup> See *id.*

D. *DFS is Predominantly Based on Skill Because Outcomes are Predictable over Short Periods of Time and Skill Levels Improve over Longer Periods of Time.*

DFS is predominately based on skill because a participant's skill-level is consistent over short time periods and can improve over longer time periods.<sup>266</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>267</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 inherently have lower skill due to their lack of experience. An individual can develop almost any skill with practice and experience.

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 participants 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's study demonstrates that skill levels remain persistent as the amount of contest entries grow.<sup>268</sup> Hence, certain participants have a propensity to win while others have a propensity to lose.<sup>269</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>270</sup> She then observed that as the amount of contests grew larger, skill played a more prominent role, allowing predictable outcomes of participants.<sup>271</sup>

Professor Hosoi further observed that over longer time periods, participants become more skilled.<sup>272</sup> By grouping participants in four quartiles—one being the least experienced and four being the

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<sup>266</sup> See Peko Affidavit, *supra* note 259, at 9.

<sup>267</sup> *Frequently Asked Questions*, DRAFTKINGS, <https://www.draftkings.com/help/faq> (last visited Jan. 15, 2016).

<sup>268</sup> See Peko Affidavit, *supra* note 259, at 9.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 10–11.

<sup>271</sup> See *id.* at 12. 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. *Id.*

<sup>272</sup> *Id.* at 18.

most experienced (having submitted at least 3,042 entries)—and tracking their performances, Professor Hosoi observed that the most experienced participants were significantly more successful.<sup>273</sup> Those with the most experience had a sixty-six percent win fraction, opposed to the least experienced quartile, which had only a forty-three percent win fraction.<sup>274</sup> From this, Professor Hosoi concluded that skill develops with experience.<sup>275</sup>

### VIII. SOLUTION

In October, 2015, a scandal erupted that had policy makers questioning the legitimacy of the DFS industry.<sup>276</sup> Reports surfaced regarding leaked insider-information that may have led to DraftKings employee Ethan Haskell's \$350,000 prize on FanDuel.<sup>277</sup> DFS was immediately scrutinized as an unsafe pitfall for consumers. Data control and consumer protection emerged as the leading concern in the DFS debate.<sup>278</sup> DFS operators responded with an immediate change in policy that prohibits all DFS employees from participating in contests where money is involved.<sup>279</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>280</sup>

Nonetheless, the Haskell scandal exposed the game's suspect qualities in mainstream media outlets. Despite this scandal, DFS

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<sup>273</sup> *Id.*

<sup>274</sup> *See* Peko Affidavit, *supra* note 259, at 18.

<sup>275</sup> *Id.*

<sup>276</sup> Travis Waldron, *New Self-Regulatory Body Will Oversee Daily Fantasy Sports Companies*, 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>277</sup> *See id.* DFS users accused Haskell of accessing insider information, ahead of the deadline to modify his lineup, that revealed what percentage of entrants selected various athletes for FanDuel contests. *See* Tim Dahlberg, *Insider Trading Scandal Rocks Multimillion Dollar Fantasy Sports Industry*, HUFFINGTON POST (Oct. 6, 2015), [http://www.huffingtonpost.com/entry/draftkings-fanduel-fantasy-sports\\_us\\_56131058e4b022a4ce5f3e8c](http://www.huffingtonpost.com/entry/draftkings-fanduel-fantasy-sports_us_56131058e4b022a4ce5f3e8c). A private investigation determined that Haskell only accessed this information forty minutes after the modification deadline. *See* Travis Waldron, *DraftKings Investigation Answers Just One of the Questions Facing Daily Fantasy Sports Sites*, HUFFINGTON POST (Oct. 19, 2015), [http://www.huffingtonpost.com/entry/draftkings-investigation-questions-dailyfantasy\\_us\\_56256af6e4b0bce34701ef7](http://www.huffingtonpost.com/entry/draftkings-investigation-questions-dailyfantasy_us_56256af6e4b0bce34701ef7).

<sup>278</sup> *See* Waldron, *supra* note 276.

<sup>279</sup> *Frequently Asked Questions*, DRAFTKINGS, <https://www.draftkings.com/help/faq> (last visited Jan. 15, 2016).

<sup>280</sup> *See* Waldron, *supra* note 276.

reached record high entry fees the following weekend.<sup>281</sup> While DFS operators were overwhelmed with criticism, the industry was enjoying the pinnacle of its success up to that point.<sup>282</sup> This shows that DFS is deeply embedded in mainstream sports culture and means more to consumers than a sports wager or a touted skill. Perhaps, DFS is an escape from reality.

A. *The Unlawful Internet Gaming Enforcement Act Should be Amended to Consider Daily Fantasy and adopt a uniform Predominant Purpose 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 toyed with the idea of outlawing DFS operations within their borders.<sup>283</sup> 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's attempt at passing AB 1437.

Without 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>284</sup> Whether a consumer can retrieve his winnings when inside a prohibited state's borders is not entirely clear.<sup>285</sup> 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:

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<sup>281</sup> Daniel Roberts, *Fantasy Sports Scandal Helped DraftKings and FanDuel*, FORTUNE (Oct. 13, 2015), <http://fortune.com/2015/10/13/scandal-helped-draftkings-fanduel/>.

<sup>282</sup> *Id.*

<sup>283</sup> See discussion *supra* Part V.A.1.

<sup>284</sup> Daniel Roberts, *Are DraftKings and FanDuel Legal?*, FORTUNE (Sep. 24, 2015), <http://fortune.com/2015/09/24/draftkings-fanduel-legal/>. Washington, Louisiana, Iowa, and Arizona have laws in place that disfavor DFS operation and thus are not present in those states. *Id.* Montana is the only state with a flat-out ban on DFS. *Id.*

<sup>285</sup> For example, it is not entirely clear whether a DFS user in New Jersey can lawfully collect his winnings while within New York's borders.

“Fantasy Sports” means any contest determined by statistics generated based on performance by actual individuals participating 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 fantasy sports 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.<sup>286</sup> Courts should abandon the material element and the gambling instinct tests entirely. This transition will not be difficult given that jurisdictions applying these minority tests have already confused them with the predominant purpose test.<sup>287</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 that currently dominates several jurisdictions. A uniform standard will provide certainty for DFS operators and other gaming providers alike. Gaming operators will have a workable formula, using statistical analysis, in determining exactly what the odds of a game are and whether that game is predominately determined by skill. Prediction in this area of gambling law will minimize meritless cases, allow consumers to lawfully access DFS, and create harmony for intrastate providers, such as DFS operators.

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<sup>286</sup> See *supra* notes 103, 106 and accompanying text.

<sup>287</sup> See *People v. Li Ai Hua*, 885 N.Y.S.2d 380, 383 (Crim. Ct. 2009).

B. *De-Gambelizing Daily Fantasy Sports: Eliminating “High-Stake” and “Higher-Probability” Scenarios*

Substantive issues remain that need to be resolved to further distinguish DFS from illegal gambling. What resembles gambling probably the most are the “high-stake” contests that allow entry fees of over \$1,000. DFS sites also currently permit participants to play in bulk by allowing hundreds of submissions per participant in a single contest.<sup>288</sup> Fantasy sharks enter a multitude of contests creating a plethora of various lineups to maximize their odds and reap substantial profits.<sup>289</sup> While mastering statistical probability may in fact be a skill that translates into DFS success, its dependence on probability resembles gambling far too much. Thus, regulation must address this by placing a limit on the total quantity and cost of entry fees. This would almost certainly cut into profits tremendously—fantasy sharks would be less willing to participate when there is a lower chance of winning meaningful profits. 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. Nevertheless, in order to make contests fair for all and limit the contests to true utilization of skill by knowledge, limitations must be placed on the amount of entries an individual participant may submit in a single contest.

Because participants have the opportunity to win cash prizes, much like in casinos, addiction concerns accompany DFS. Lesser-skilled participants are at a statistical disadvantage to higher-skilled participants. Thus, a solution is to limit the amount of entry fees that one participant can forfeit in a single time frame. This would lower the “gambling appeal” for those with addictive personalities. The notion here is to create a less hostile playing environment and more of a friendly, “side wagers” environment, as New York Attorney General Schneiderman advocates.<sup>290</sup> For instance, a \$500 per week limit will lower the probability that individuals will become addicted to DFS.

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

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<sup>288</sup> Drew Harwell, *All the Reasons You (Probably) Won’t Win Money Playing Daily Fantasy Sports*, WASH. 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>289</sup> *Id.*

<sup>290</sup> See EILERS RESEARCH, *supra* note 241. It is notable that a majority of the winnings and losses reported in the Eilers Research survey were both under one hundred dollars. *Id.*

should be restricted to a low amount of entries per contest to eradicate the “probability” strategies employed by the “bulk” participants.<sup>291</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.

*C. 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. Limitations 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.

Congress 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>292</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

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<sup>291</sup> See Harwell, *supra* note 288 and accompanying text.

<sup>292</sup> See *What We Do*, FED. TRADE COMMISSION, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Jan. 11, 2017).

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regulatory gaming; for example, an Office of Fantasy Sports Regulation (OFSR). The OFSR can enforce the laws enacted to regulate the industry as an authoritative body and supervise state licensing schemes. Furthermore, the 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 obsessed with playing DFS. Regulations should require that DFS provide a states help number hotline to all DFS users.

Finally, the federal government should 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, similar to how New Jersey taxes its Internet gaming and California taxes its DFS operators. While a fifteen percent rate is high, considering the activity is not textbook gambling and DFS companies will already be taxed accordingly as their statuses as business entities, a lower rate is justified. However, just as alcohol is taxed at a higher rate,<sup>293</sup> 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 of the revenue raised to the national treasury to be redistributed according to state needs.

*D. 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, the federal government should classify DFS as a game of skill with inherent addictive tendencies. Regulation should abhor outlawing DFS and simultaneously ensure veracity in sports. DFS may affect the

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<sup>293</sup> James Sadowsky, *The Economics of Sin Taxes*, ACTON INST. (Mar. 1994), <http://www.acton.org/pub/religion-liberty/volume-4-number-2/economics-sin-taxes>.

integrity of sports because, as it stands, virtually every team and league has some type of equity arrangement, sponsorship, or just a flat out stake in the company.<sup>294</sup> The NBA for instance, has an equity stake and a seat reserved on FanDuel's board of directors.<sup>295</sup> Typically, most teams have arranged team-controlled media buys that are designated for either FanDuel or DraftKings marketing purposes.<sup>296</sup>

Professional sports teams are erecting "Fantasy Sports Lounges" within their stadiums allowing fans to engage in contests while at live sporting events.<sup>297</sup> These lounges closely resemble sportsbooks, or locations that accept sports bets, and have even been referred to as such.<sup>298</sup> While DFS does not amount to gambling, many are certainly exploiting it as if it were.<sup>299</sup> 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 athletes. If a contest gets big enough, and enough

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<sup>294</sup> See Kilgore, *supra* note 36 and accompanying text.

<sup>295</sup> Terry Lefton, *Sign Sponsorship Deal With FanDuel*, ST. LOUIS BUS. J., <http://www.bizjournals.com/stlouis/blog/2015/03/rams-sign-sponsorship-deal-with-fanduel.html>.

<sup>296</sup> *Id.* For instance, the former NFL franchise St. Louis Rams, as a part of sponsorship terms, allowed FanDuel branding throughout its stadium so as long as it is not visible on television. *Id.* 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>297</sup> See *Fantasy Sports Company Draft Ops Forms Fully Integrated Alliance with the New York Islanders in Brooklyn and Barclays Center*, BARCLAYS CTR. (July 14, 2015), <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>. 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." *Id.* 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." *Id.*

<sup>298</sup> See Dustin Gouker, *What's In a Name? Why Fantasy Sports Books' Could Prove Troublesome For The DFS Industry*, LEGAL SPORTS REP. (June 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).

<sup>299</sup> *Id.*

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participants “start” a specific athlete, influence may be exerted on the athlete, affecting his or her natural performance. Furthermore, reaching one individual athlete 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.

*E. Solutions to Several of Attorney General Schneiderman’s Concerns*

States, such as New York, pondering prohibiting individuals from participating in DFS contests are wrong to conclude that participants are engaged in illegal activity. This comment 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>300</sup> He notes that advertisements promote the simplicity of the game and the idea that anyone can participate and win.<sup>301</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 athlete trends, previous performances, and matchups, and consequently lose money to those “fantasy sharks” who are abreast of the ebb and flow of fantasy statistics.<sup>302</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

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<sup>300</sup> See Brief for Plaintiff, *supra* note 130. 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. *Id.* 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>301</sup> See Brief for Plaintiff, *supra* notes 130–131 and accompanying text.

<sup>302</sup> See Harwell, *supra* note 288.

the game. Advertisements should depict the nature of the game by touting its competitiveness, praising the most skilled participants 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. However, this does not carry weight. Certainly, friends and family can engage socially in discussions over which athletes would be better off being put into a DFS lineup. Furthermore, there is a sense of local competitiveness in the quest to identify "sleeper picks" based on matchups.<sup>303</sup> When a sleeper pick is correctly identified and entered into a lineup, 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>304</sup> Facebook and Instagram have established precedence in allowing individuals to socialize online without having ever physically met prior to online interaction.<sup>305</sup> DFS is simply another gateway to meet other 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.

## IX. CONCLUSION

In sum, while there are quasi-gambling aspects to DFS contests, DFS is simply not illegal gambling. DFS contests are games that are predominantly based on skill. However, some of the dangers

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<sup>303</sup> See *30 for 30: Silly Little Game*, *supra* note 17 and accompanying text. In terms of DFS sleeper picks, ideally a participant will want to find a discreet athlete that is poised for a good game and that has a low usage percentage by other participants. *Id.* The idea is to create a unique lineup distinguishable from the majority of contest participants to increase the likelihood of scoring higher than the majority.

<sup>304</sup> See Alexia Tsotsis, *Study: You've Never Met 7% Of Your Facebook "Friends"*, TECH CRUNCH (June 16, 2011), <http://techcrunch.com/2011/06/16/study-youve-never-met-7-of-your-facebook-friends/>.

<sup>305</sup> *Id.* In fact, roughly seven percent of the average Facebook user's friends are complete strangers that have never met face-to-face. *Id.* The study shows that the average user has roughly 229 "friends" on Facebook. *Id.* Of those friends, twenty-two percent were comprised of people they knew from high school, twelve [percent] were extended family, ten [percent] were coworkers, nine percent were college friends, eight percent were immediate family, seven percent were people from extracurricular groups, and two [percent] were neighbors." *Id.* 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.*

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associated with such an addictive game calls for federal regulation. The suggestions offered in this comment provide a uniform, workable solution to those issues. The debate over the legality of DFS 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>306</sup>

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<sup>306</sup> *Frequently Asked Questions*, DRAFTKINGS, <https://www.draftkings.com/help/faq> (last visited Jan. 11, 2017).