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Comments



FLUSHED FROM THE POCKET: DAILY FANTASY SPORTS BUSINESSES SCRAMBLE AMIDST GROWING LEGAL CONCERNS

*Jonathan Bass**

I. INTRODUCTION

NATIONAL Football League (NFL) quarterbacks Tom Brady, Russell Wilson, and Cam Newton were not the only ones who had to contend with ferocious blitzes this past season. Television viewers were hard pressed to escape the stifling rush of ads from pay-to-play daily fantasy sports (DFS) websites. From January 1, 2015, through December 14, 2015, FanDuel and DraftKings, comprising ninety-five percent of the DFS market, spent more than \$300 million combined in television ads shown over 78,000 times.¹ In the weeks leading up to the NFL's September season kick-off, the two companies accounted for more advertising spending than the entire beer industry.² But in the fourth quarter of 2015, FanDuel and DraftKings were left scrambling in the face of allegations of insider trading and fraud, class action lawsuit filings, and investigations into the overall legality of the DFS business model.³

Once viewed as a mere “online distraction” for “sports nerds,” an estimated fifty-six million people played fantasy sports in North America in 2015.⁴ Industry analysts note that *daily* fantasy games, played by “only a

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1. Geoff Baker, *DraftKings and FanDuel spend millions on fantasy sports advertising, and it works*, SEATTLE TIMES (Nov. 11, 2015, 7:01 PM), <http://www.seattletimes.com/sports/seahawks/draftkings-and-fanduel-spend-millions-on-fantasy-sports-advertising-and-it-works/> [https://perma.cc/CEG2-RFFG]; Suzanne Vranica, *Year in Review: The Best and Worst Ads of 2015*, WALL ST. J. (Dec. 28, 2015, 4:10 PM), http://www.wsj.com/articles/year-in-review-the-best-and-worst-ads-of-2015-1451262576?mod=pls_whats_news_us_business_f [https://perma.cc/YSF8-2N8C].

2. Tom Kludt, *DraftKings and FanDuel ads seem to be everywhere on TV because they are*, CNN MONEY (Oct. 8, 2015, 5:23 PM), <http://money.cnn.com/2015/10/08/media/fanduel-draftkings-commercials/index.html> [https://perma.cc/8E4J-9T2J].

3. See *infra* Parts II.C and III.C.

4. 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/> [https://perma.cc/T4UF-N4Y8]. For comparison, in 1988 there were only 500,000 estimated fantasy sports players in North America, and eighteen million players by 2006—the year the Unlawful

small subset of traditional players,” generated around \$2.6 billion in entry fees in 2015—with the potential to grow 41% annually to \$14.4 billion by 2020.⁵ Given the significant past and expected future growth of the DFS industry, recent scrutiny by federal and state lawmakers is warranted. Part II of this comment provides a brief overview of the history of fantasy sports in the United States, an explanation of the differences between traditional fantasy sports and pay-to-play daily fantasy sports, and a context for understanding the recent concerns regarding the legality and lack of regulation pertaining to DFS. Part III argues that states will increasingly find that DFS constitutes illegal gambling; while some states will attempt to legalize and regulate DFS, those regulations are likely preempted by the Professional and Amateur Sports Protection Act (PASPA). Part IV refutes the pronouncements by DFS proponents that an exemption in the Unlawful Internet Gambling Enforcement Act (UIGEA) for fantasy sports contests legalized DFS and discusses several statutes that federal law enforcement could rely on to shut down DFS operators. Part V suggests that federal lawmakers should either criminalize or regulate DFS, as their efforts will be more efficient and provide better consumer protection than if regulation is left to the states.

II. A BRIEF FANTASY SPORTS PRIMER

America’s fascination with fantasy sports dates back to the end of World War II.⁶ In the late 1950s, Wilfred Winkenbach, who would later create the first fantasy football league, devised a fantasy golf game whereby participants selected teams comprised of real-life professional golfers.⁷ The participant with the lowest combined stroke total at the end of the tournament (based on the sum of the strokes taken by the actual real-life golfers on the player’s fantasy team) was declared the winner.⁸ Modern fantasy baseball and fantasy football both evolved from early 1960s games in which fantasy points were awarded based on real-life player statistics.⁹ The increased availability of sports statistics disseminated via the internet in the 1990s only furthered the growth of fantasy sports.¹⁰

In 2014, the National Basketball Association (NBA) “signed a four-

Internet Gambling Enforcement Act was signed into law. *Industry Demographics*, FANTASY SPORTS TRADE ASSOC., <http://fsta.org/research/industry-demographics/> [https://perma.cc/57NL-CU9B].

5. Darren Heitner, *The Hyper Growth Of Daily Fantasy Sports Is Going To Change Our Culture and Our Laws*, FORBES (Sept. 16, 2015, 4:01 PM), <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/> [https://perma.cc/6QGB-9EG5].

6. Ray Vichot, *History of Fantasy Sports and its Adoption by Sports Journalists*, NEWSGAMES (Jan. 2, 2009, 7:47 AM), <http://web.archive.org/web/20131217103525/http://news.games.gatech.edu/blog/2009/01/history-of-fantasy-sports-and-its-adoption-by-sports-journalists.html> [https://perma.cc/KYW2-ZLZ6].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

year deal with FanDuel and took a minor stake in the company.”¹¹ Major League Baseball (MLB), the National Hockey League (NHL), and Major League Soccer (MLS) all have investment stakes in DraftKings (which owns the exclusive right to market itself as MLB’s “Official Daily Fantasy Game”).¹² These strategic partnerships are a marked reversal from professional sports leagues’ failed attempts dating back to the late 1990s to suppress fantasy sports. A 1997 Second Circuit decision reversed a permanent injunction against Motorola and Sports Team Analysis and Tracking System (STATS) from selling a handheld pager called “SportsTrax” that displayed updated live scores and statistics from NBA games.¹³ In ruling against the NBA, the court distinguished between broadcasts of sporting events, which are copyrightable, and “purely factual information which any patron of an NBA game could acquire from the arena.”¹⁴ Ten years later, the Eighth Circuit affirmed a declaratory judgment against Major League Baseball Advanced Media, MLB’s interactive media and Internet company, permitting C.B.C. Distribution and Marketing, a vendor of fantasy baseball products, to use the names and information about MLB baseball players in its products without a license.¹⁵ The court noted that C.B.C.’s fantasy baseball game used information readily available in the public domain and remarked that “the public has an enduring fascination in the records set by former players . . . [and] the records and statistics remain of interest to the public because they provide context that allows fans to better appreciate or (deprecate) today’s performances.”¹⁶ Bowing to the popularity and economics of the fantasy sports industry, professional sports leagues now embrace the positive synergies associated with DFS by “leverag[ing] consumers’ cravings for fantasy content into higher ratings, more viewership and engag[ment of] fans during non prime-time games.”¹⁷ In a *New York Times* opinion article, NBA Commissioner Adam Silver advocated for the legalization and regulation of professional sports betting—despite more than two decades of previous opposition by the NBA and the league’s support for passage of the 1992 Professional and Amateur Sports Protection Act (PASPA).¹⁸

11. Harwell, *supra* note 4.

12. *DraftKings Becomes the Official Daily Fantasy Game of Major League Baseball*, YAHOO! FINANCE (Apr. 2, 2015), <http://finance.yahoo.com/news/draftkings-becomes-official-daily-fantasy-160400135.html> [<https://perma.cc/T3UH-RKAP>]; Harwell, *supra* note 4.

13. *Nat’l Basketball Ass’n v. Motorola, Inc.*, 105 F.3d 841, 843–44 (2d Cir. 1997).

14. *Id.* at 847.

15. *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 820 (8th Cir. 2007).

16. *Id.* at 823.

17. Heitner, *supra* note 5.

18. Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=1 [<https://perma.cc/FUP4-AFN7>]. Except in a few states protected through a grandfather provision, PASPA prohibits states from legalizing sports betting. *See infra* Part III.C.

A. TRADITIONAL FANTASY SPORTS PLAY

Traditional fantasy sports participants “own” and “manage” teams that engage in fictional competitive leagues.¹⁹ Leagues can be comprised of groups of friends or strangers.²⁰ The specific mechanisms of league play vary with the league, even within the same sport. However, all traditional fantasy games share the same underlying goal—compete to win the most points awarded based on the actual performance of real-life athletes on the player’s fantasy roster.²¹ Specific league rules govern the number of real-life players allowed on a fantasy player’s roster, as well as the distribution by position.²² Fantasy points are awarded based on a real-life player’s performance in a match or game.²³ Participants thus endeavor to “collect the most productive players across a variety of positions.”²⁴

One of the hallmarks of traditional fantasy sports, and a major differentiator between it and DFS, is season-long league play. A fantasy season usually begins with a draft in which participants initially fill their fantasy team’s roster.²⁵ The three most common formats for conducting drafts include: the “snake” format in which participants alternate between picking first and last in each round; the “auction” method in which all league participants start with the same initial budget and bid for players; and the “salary-cap” method in which all participants start with the same initial budget, but rather than bidding against other participants, each participant purchases fantasy players who each have set fantasy salaries.²⁶ The salary-cap method allows for multiple owners to draft the same player.²⁷ In “dynasty leagues,” participants select players with the intention of possibly keeping them on their rosters for multiple years.²⁸

Another common characteristic of traditional fantasy sports not found in DFS is exclusive ownership of players. Since no two participants can

19. Jim McCormick, *So you want to play fantasy football?*, ESPN (July 9, 2010), <http://espn.go.com/fantasy/football/fil/story?page=nfldk2k10howtoplay> [https://perma.cc/5Z2E-QYGG].

20. Matt Hunt, *How Fantasy Football Works*, HOWSTUFFWORKS.COM (Dec. 12, 2005), <http://entertainment.howstuffworks.com/fantasy-football.htm> [https://perma.cc/F2FP-7A XD].

21. *Id.*

22. *Id.* In Wilfred Winkenbach’s first fantasy football league in 1963, fantasy team rosters were comprised of twenty players (four offensive ends, four halfbacks, two fullbacks, two quarterbacks, two kick/punt returners, two field goal kickers, two defensive backs/linebackers and two defensive linemen). *Id.*

23. *Id.* In Winkenbach’s original league, payoffs for scoring included: \$.50 for a rushing touchdown by any player; \$.25 for any player receiving a pass for a touchdown; \$.25 for any player throwing a touchdown pass; \$.25 for each field goal; \$2.50 for a kickoff or punt return for a touchdown; and \$5.00 for a touchdown by a defensive lineman. *Id.*

24. McCormick, *supra* note 19.

25. *Id.*

26. *Id.*; Mem. from J. Brin Gibson, Bureau Chief of Gaming & Gov’t Affairs & Ketan D. Bhirud, Head of Complex Litig., Nev. Att’y Gen., to A.G. Burnett, Chairman Nev. Gaming Control Bd. & Nev. Gaming Control Bd. Members Terry Johnson & Shawn Reid 3 (Oct. 16, 2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10487> [https://perma.cc/B2ZG-BMJH] [hereinafter Nev. Att’y Gen. Memo].

27. Nev. Att’y Gen. Memo, *supra* note 26.

28. McCormick, *supra* note 19.

own the same player at the same time, much of the strategy and skill behind traditional fantasy sports is the team owner acting as part scout, part general manager, and part coach to draft, trade for, and play the combination of players they believe will garner the most points throughout the season.²⁹ Long before the draft and commencement of league play, dedicated participants devote time to “gaug[ing] where value lies amongst the collective of . . . players.”³⁰ This includes “collecting information on injuries, position battles, [and] free agency.”³¹ Come draft day, participants use their accumulated knowledge to decide which players to draft—mindful that a backup player can impact a team’s success should a star player succumb to injury.³² Once a season begins, owners strategize weekly over which players to start and which to bench before the weekly deadline to finalize rosters.³³ In the end, diligent research and a sound strategy can greatly increase a participant’s chance for success, but the unpredictable nature of sports still plays a significant role in determining the final standings at the end of a long season.³⁴

B. DAILY FANTASY SPORTS PLAY

Unlike traditional fantasy sports, which track player performance over the majority of a season, daily fantasy sports track player performance only through the course of a single game.³⁵ Additionally, most DFS sites use the salary-cap draft method—thus permitting competing team owners to own the same real-life players as other owners.³⁶ As in traditional fantasy sports, DFS sites require that participants lock in their lineups at a set point before each individual game commences.³⁷

There are many different types of DFS contests. In head-to-head match-ups, one DFS player bets that his line-up will perform better than one selected by another DFS player, and the winner receives the entire payout pool.³⁸ In tournament play, owners compete against two or more

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. In 2015, participants who drafted Andrew Luck based on his 2014 finish as the top-rated fantasy quarterback were not so lucky as Luck struggled with injuries and played in only seven games. *See Quarterback Stats: 2014*, FFTODAY (Jan. 11, 2016), <http://www.fftoday.com/stats/playerstats.php?Season=2014&GameWeek=&PosID=10&LeagueID=1> [<https://perma.cc/7TLT-UGZK>]; *Andrew Luck Player Page*, ROTOWORLD (Jan. 11, 2016), <http://www.rotoworld.com/player/nfl/6439/andrew-luck> [<https://perma.cc/Y8PH-85BQ>].

35. Nev. Att’y Gen. Memo, *supra* note 26, at 2.

36. *Id.* at 3. Both DraftKings and FanDuel use the salary-cap method. Jason Spry, *DraftKings vs Fanduel Fantasy Football*, DAILY FANTASY SPORTS 101 (Aug. 8, 2014), <http://www.dailyfantasysports101.com/draftkings-vs-fanduel-fantasy-football/> [<https://perma.cc/CF8M-W2QQ>]. The possibility for multiple ownership of fantasy players quantitatively impacts the predictive modeling used by some repeat DFS contest winners, and thus is significant to the skill versus chance debate. *See infra* Part III.A.2.

37. Nev. Att’y Gen. Memo, *supra* note 26, at 2–3.

38. *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521, at *13 (N.Y. Sup. Ct. Dec. 11, 2015); Nev. Att’y Gen. Memo, *supra* note 26, at 3.

owners.³⁹ At the end of the tournament, players who achieve a certain predetermined ranking are awarded a share of the payout pool.⁴⁰ The most popular DFS contests feature a guaranteed prize pool that fixes the size of the prize pool regardless of how many people enter the contest.⁴¹ Participants pay “entrance fees” ranging from as low as \$0.25 to as high as \$10,600 per contest.⁴² DFS site operators generate revenue by collecting or “raking” a portion of these fees as “commission” on every competition.⁴³

C. CONTEXT FOR UNDERSTANDING THE RECENT MOUNTING CONCERNS REGARDING THE FAIRNESS OF DAILY FANTASY SPORTS

Fresh off the heels of a successful NFL season kick-off advertising campaign, on October 5, 2015, the DFS industry was roiled by allegations of insider trading. That day, DraftKings announced that an employee, described as a mid-level content manager, won \$350,000 at rival FanDuel the same week the employee had also inadvertently released data before

39. Nev. Att’y Gen. Memo, *supra* note 26, at 3.

40. *Id.* at 3–4.

[T]he most common [tournaments] are (1) 50/50; (2) double-up; (3) triple-up/quadruple-up/quintuple-up/etc.; and (4) top-X In a traditional 50/50 simulated game, an owner’s goal is to end up in the top half of total scores. Owners who finish in the top half will equally split the payout pool. As a result, half the owners will lose their entry fee and half the owners will win. The winning owners, however, will not actually “double” their entry fee because the site operator will take a “rake” from every owner who participates By contrast, in a double-up simulated game, the site operator might allow 110 owners into the simulated game, while only paying the owners with the top 50 scores [thus permitting a true doubling of money] Triple-up, quadruple-up, and quintuple-up simulated games are similar to double-up simulated games, except that instead of the opportunity to double their money, the owners have the opportunity to triple, quadruple, or quintuple their money. For example, in a triple-up league, the top third splits the payout pool In a top-X simulated game, which can consist of up to thousands of owners, the owners finishing with a total score in the top-X (top 1, top 2, top 3, etc.) will split the payout pool (either evenly or with progressively more based on how high they finish).

Id.

41. Dustin Gouker, *Daily Fantasy Sports Basics – What is a Guaranteed Prize Pool (GPP)?*, DAILY FANTASY SPORTS CODES (Apr. 28, 2015, 21:32), <http://dailyfantasysports.codes/basics/daily-fantasy-basics-what-is-a-guaranteed-prize-pool-gpp/> [https://perma.cc/U5YM-364C].

42. *Fanduel*, 2015 N.Y. Misc. LEXIS 4521, at *12–13.

43. *Id.* at *13–14. The New York Attorney General (NYAG) contends that FanDuel and DraftKings keep between 6% and more than 14% of the entry fees as commissions, which the NYAG equates to the “rake” or “vig” charge collected on wagers by sports bookies. *Id.* DFS proponents strongly reject the comparison of entry fees to bets or wagers. See *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *18–25 (D.N.J. June 20, 2007) (holding that “entry fees for [seasonal] fantasy sports leagues are not ‘bets’ or ‘wagers’ because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) [the fantasy site operators] do not compete for the prizes.”) (emphasis added).

lineups were locked prior to the start of the third week of NFL games.⁴⁴ Daniel Wallach, a prominent sports and gambling lawyer, likened the allegations to insider trading and remarked that “[knowledge of other players’ roster selections] gives that person a distinct edge in a contest.”⁴⁵ Both companies quickly released statements defending the integrity of their businesses and barred their employees from competing in DFS.⁴⁶ Despite FanDuel and DraftKings’s swift response, “[t]he episode has raised questions about who at daily fantasy companies has access to valuable data, such as which players a majority of the money is being bet on; how it is protected; and whether the industry can—or wants—to police itself.”⁴⁷ Shortly after the data leak, Adam Johnson filed the first class action lawsuit against FanDuel and DraftKings, alleging negligence, fraud, misrepresentation, and several other consumer protection and deceptive trade practices related violations.⁴⁸ However, one commentator has noted that class adjudication may be barred by DraftKings’s arbitration provision which in pertinent part states:

[All claims] except for claims filed in a small claims court that proceed on an individual (non-class, non-representative) basis, shall be settled by binding arbitration Any and all claims shall be arbitrated on an individual basis only, and shall not be consolidated or joined with or in any arbitration or other proceeding involving a Claim of any other party.⁴⁹

On February 4, 2016, the U.S. Judicial Panel on Multidistrict Litigation ordered the transfer of almost eighty class action lawsuits against DFS

44. Joe Drape & Jaqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/sports/fanduel-draft-kings-fantasy-employees-bet-rivals.html?_r=1 [<https://perma.cc/GGP6-WNYH>]. The *New York Times* reported that “records and interviews show a long-held pattern of overlapping interests and close relationships among employees at the companies [FanDuel and DraftKings]—many of whom regularly rank among the most consistent big winners—and in some case investors.” Joe Drape & Jacqueline Williams, *In Fantasy Sports, Signs of Insiders’ Edge*, N.Y. TIMES (Oct. 11, 2015), <http://www.nytimes.com/2015/10/12/sports/fantasy-sports-draftkings-fanduel-insiders-edge-football.html> [<https://perma.cc/EHP6-3R2K>]. For example, a DraftKings analytics manager won a \$50,000 first prize in a 2015 FanDuel hockey contest and a FanDuel employee who sets player prices won \$50,000 in a June DraftKings contest. *Id.*

45. Drape & Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, *supra* note 44. Part III.A.2 discusses how knowledge of the percentages of fantasy players selected by owners results in a statistical advantage.

46. Drape & Williams, *In Fantasy Sports, Signs of Insiders’ Edge*, *supra* note 44.

47. Drape & Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, *supra* note 44.

48. First Am. Class Action Compl. at 1, 19–24, 27, 29–30, 32–34, *Johnson v. Fanduel, Inc.*, No. 15-cv-7963-GHW (S.D.N.Y. Oct. 16, 2015).

49. Andrew Phillips, *Can DraftKings Dodge Class Action Via Arbitration?*, LAW360 (Oct. 15, 2015, 1:49 PM), <http://www.law360.com/articles/714644/can-draftkings-dodge-class-action-via-arbitration> [<https://perma.cc/S8DK-U7PC>]. Since plaintiff Johnson did not contract with FanDuel, there is no arbitration agreement between Johnson and FanDuel. Since plaintiff Johnson did not contract with FanDuel, there is no arbitration agreement between Johnson and FanDuel. *Id.*

operators to a Massachusetts federal court.⁵⁰

On October 27, 2015, the Fantasy Sports Trade Association (FSTA), an “international organization dedicated to the advancement of fantasy sports,” announced the formation of the Fantasy Sports Control Agency (FSCA), “an independent agency charged with creating a strict, transparent and effective system of self-regulation for the businesses that comprise the fantasy sports industry.”⁵¹ Former Acting U.S. Secretary of Labor Seth Harris will chair the FSCA.⁵²

The allegations of insider trading, coupled with separate allegations of using predatory tactics, have caught the Federal Bureau of Investigation’s (FBI) attention.⁵³ FBI agents are purportedly “examining whether [DraftKings] encouraged and accepted deposits and bets from states where the contests were prohibited.”⁵⁴ Many federal lawmakers are also advocating for federal investigation into DFS.⁵⁵ In a letter to the Justice Department and the Federal Trade Commission, Democratic Senator Richard Blumenthal of Connecticut wrote, “If employees are using insider information to unfairly advantage themselves over others, this may constitute fraud regardless of any other federal or state gambling statutes.”⁵⁶ Representative Hakeem Jeffries, Democrat of New York and a House Judiciary Committee member, called for the committee to examine “whether permitting a multibillion-dollar industry to police itself serves the best interests of the American people.”⁵⁷

Given the sheer growth and magnitude of the DFS industry, a growing number of state lawmakers and attorneys general recently commenced investigations into the legality of DFS.⁵⁸ As of May 5, 2016, attorneys general in ten states have declared that DFS are illegal, or require a gam-

50. *See In Re: Daily Fantasy Sports Marketing and Sales Practices Litigation*, MDL No. 2677 (D. Mass. filed Feb. 4, 2016); Jessica Karmasek, *Class actions filed against daily fantasy sports websites consolidated*, LEGALNEWSLINE.COM (Feb. 25, 2016, 10:05 AM), <http://legalnewsline.com/stories/510697161-class-actions-filed-against-daily-fantasy-sports-websites-consolidated> [<https://perma.cc/L2G5-RVRP>].

51. Press Release: Fantasy Sports Trade Association Appoints Former Acting U.S. Secretary of Labor Seth D. Harris to Spearhead Fantasy Sports Control Agency, FANTASY SPORTS CONTROL AGENCY (Oct. 27, 2015), <http://fsta.org/fantasy-sports-trade-association-appoints-former-acting-u-s-secretary-of-labor-seth-d-harris-to-spearhead-fantasy-sports-control-agency> [<https://perma.cc/P3XJ-GZG9>].

52. *Id.*

53. Joe Drape & Jacqueline Williams, *Fantasy Sports Said to Attract F.B.I. Scrutiny*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/sports/draftkings-fanduel-fbi-investigation.html?rref=collection%2Fnewseventcollection%2Fsports-betting-daily-fantasy-games-fanduel-draftkings> [<https://perma.cc/4HD2-YW5N>].

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. Dan Adams & Curt Woodward, *As scrutiny rises, DraftKings under review across US*, BOSTON GLOBE (Dec. 26, 2015), <https://www.bostonglobe.com/business/2015/12/25/daily-fantasy-sports-under-scrutiny-around/2MWlInmn3tcUpDDMEAfR6NO/story.html> [<https://perma.cc/WY5L-4GJG>].

bling license.⁵⁹ But according to a *Legal Sports Report* tracker, at the same time, legislation is pending in more than a dozen states to legalize and regulate DFS.⁶⁰ Part IV discusses state level legal approaches related to DFS in more detail.

III. MOST STATES WILL CONCLUDE THAT DAILY FANTASY SPORTS CONSTITUTES UNLAWFUL GAMBLING

Since news of the DraftKings data leak broke in October of 2015, attorneys general from New York, Nevada, Vermont, Georgia, Alabama, Texas, Hawaii, Mississippi, and Illinois have all declared that DFS constitutes illegal gambling in regards to their respective state gambling laws.⁶¹ Only the New York Attorney General has filed criminal proceedings,⁶²

59. See *Attorney General Opinions on Daily Fantasy Sports*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/state-legality-of-dfs/> [https://perma.cc/83X4-2G7W]. Despite issuance of many attorneys general opinions, DFS operators have declined to operate in five other states. *Id.* The Tennessee Attorney General's opinion declaring DFS illegal was rendered moot after legislation was enacted legalizing DFS. *Id.*

60. See *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> [https://perma.cc/P384-4SYR].

61. See *News Advisory: Attorney General Determines Paid Daily Fantasy Sports Contests Are Illegal Gambling*, ALABAMA OFFICE OF THE ATTORNEY GENERAL (Apr. 5, 2016), <http://www.ago.state.al.us/news/810.pdf> [https://perma.cc/6H9G-HP92]; Letter from W. Wright Banks, Jr., Ga. Deputy Att'y Gen., to Joseph J. Kim, Senior Vice-President and Gen. Counsel, Ga. Lottery Corp., (Feb. 26, 2016), http://www.legalsportsreport.com/wp-content/uploads/2016/03/advice-to-kim_20160226101748.pdf [https://perma.cc/JA5B-98DM]; Haw. Att'y Gen. Op. No. 16-1 (Jan. 27, 2016), <http://ag.hawaii.gov/wp-content/uploads/2016/01/News-Release-2016-2.pdf> [https://perma.cc/F52A-G9Y6]; Ill. Att'y Gen. Op. No. 15-006 (Dec. 23, 2015), <http://www.illinoisattorneygeneral.gov/opinions/2015/15-006.pdf> [https://perma.cc/M52E-P3QF]; Miss. Att'y Gen. Op. No. 2015-00445 (Jan. 29, 2016), http://www.legalsportsreport.com/wp-content/uploads/2016/01/A.Godfrey_Jan.29-2016-Fantasy-Sports-Wagering-in-the-state-of-Mississippi.pdf [https://perma.cc/9NSP-6HB8]; Tex. Att'y Gen. Op. No. KP-0057 (Jan. 19, 2016), <http://ag.hawaii.gov/wp-content/uploads/2016/01/News-Release-2016-2.pdf> [https://perma.cc/D3HW-CQSQ]; Nev. Att'y Gen. Op., *supra* note 26; Notice to Cease and Desist And Notice of Proposed Litigation from Eric Schneiderman, N.Y. Att'y Gen., to Jason Robins, CEO DraftKings, Inc. (Nov. 10, 2015), <https://assets.documentcloud.org/documents/2511147/final-nyag-draftkings-letter-11-10-2015.pdf> [https://perma.cc/ZL78-VZCZ] [hereinafter N.Y. Att'y Gen. Cease and Desist Notice]. While the Vermont Attorney General's office did not issue a formal opinion, John Treadwell, a state assistant attorney general stated in an interview that "daily fantasy sports violate Vermont's gambling laws." Anthony Cabot & Karl Rutledge, *CLIENT ALERT: Recent Developments Concerning The Legality Of Daily Fantasy Sports In Texas, Vermont and Maryland*, LEWIS ROCA ROTHGERBER CHRISTIE (Jan. 19, 2016), <http://www.lrrc.com/client-alert-recent-developments-concerning-the-legality-of-daily-fantasy-sports-in-texas-vermont-and-maryland> [https://perma.cc/6X55-DUCL].

62. On November 10, 2015, New York Attorney General Schneiderman served FanDuel and DraftKings with notices that they cease and desist from "illegally accepting wagers in New York State in connection with [DFS games]." *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521, at *3 (N.Y. Sup. Ct. Dec. 11, 2015). Three days later, both companies commenced separate actions against the NYAG seeking declaratory and injunctive relief enjoining the NYAG "from taking any enforcement action or other action derived from any allegation that the operation of daily sports contests are a violation of law." *Id.* at *5-6. On November 17th, the NYAG commenced action against DraftKings and FanDuel, asserting nine different causing of actions. *Id.* at *6-7. On December 11th, New York Supreme Court Justice Manuel Mendez granted NYAG's request for temporary injunctions against the companies restraining them from "accepting entry fees, wagers or bets from New York consumers," but later that day, an appellate panel of New York's Supreme

but it is likely that more states will follow suit. Attorneys general in a few other states have taken a different approach and declared DFS legal.⁶³

While each states' gambling laws are unique, there are many commonalities associated with the legal tests used by states to determine whether an activity constitutes gambling. Traditionally, at common law, three elements must be present for an activity to constitute unlawful gambling: "(1) the award of a prize, (2) determined on the basis of chance, (3) where consideration was paid."⁶⁴ In general, DFS proponents do not contest the notion that payments to DFS contest winners constitute "prizes." Thus under most state laws, the legality of DFS turns on whether DFS contests satisfy the second and third elements of "chance" and "consideration." This part argues that despite various state-level formulations "imply[ing] different degrees of permissiveness towards gambling,"⁶⁵ most state courts and executive law enforcement agencies will conclude that DFS constitutes unlawful gambling under their respective laws. Furthermore, attempts by states to regulate DFS will likely be preempted by PASPA.

A. SKILL PREDOMINATES OVER CHANCE

No issue related to DFS is more hotly contested than whether DFS contests are games of skill or games of chance. Admittedly, advocates on both sides of the issue present strong arguments. Illustrative of the difficulty in settling this issue, one prominent gambling law commentator has remarked, "In reality, of course, almost all human endeavors contain some chance. Therefore, the issue then becomes how one determines whether a betting activity will have a sufficient element of chance associated with it to rise to the level of a criminal offense."⁶⁶ States adhere to

Court temporarily stayed the injunctions. *Id.* at *26; Zachary Zagger, *NY Appeals Court Halts Injunction in Daily Fantasy Action*, LAW360 (Jan. 11, 2015, 2:16 PM), <http://www.law360.com/articles/745155/ny-appeals-court-halts-injunction-in-daily-fantasy-action> [<https://perma.cc/P4MA-CVZJ>]. The appellate panel issued a more permanent injunction in favor of the DFS operators on the condition that their appeals be perfected for the May 2016 term. Zagger, *supra* note 62.

63. See e.g., Letter from Peter F. Kilmartin, R.I. Att'y Gen., to Gina Raimondo, Gov. of R.I., M. Teresa Paiva Weed, Pres. of the R.I. S., Nicholas A. Mattiello, R.I. Speaker of the H.R., (Feb. 4, 2016), <http://www.legalsportsreport.com/wp-content/uploads/2016/02/Rhode-Island-DFS-Opinion.pdf> [<https://perma.cc/X5ST-K2CT>] [hereinafter R.I. Att'y Gen. Op.]; Steve Annear, *Maura Healey says DraftKings operation is legal*, BOSTON GLOBE (Oct. 7, 2015), <http://www.bostonglobe.com/metro/2015/10/07/healey-says-draft-kings-operation-legal-but-she-concerned-about-insider-trading/O0gcbQF3c6JuvFz2SCHHfO/story.html?event=event25?event=event25> [<https://perma.cc/3HY3-EP2G>]. In remarks to a Boston Globe reporter, Mass. Att'y Gen. Maura Healy stated that "there [are] no federal or state laws that prohibit daily fantasy sports sites from operating," and that DraftKings' customers should not worry that they are violating the law. Annear, *supra* note 63.

64. Anthony Cabot & Louis Csoka, *Gaming Law Symposium Fantasy Sports: One Form Of Mainstream Wagering In The United States*, 40 J. MARSHALL L. REV. 1195, 1203 (2007).

65. See Steven Levitt, Thomas Miles & Andrew Rosenfield, *Is Texas Hold 'Em a Game of Chance? A Legal and Economic Analysis*, 101 GEO. L.J. 581, 593 (2013).

66. Cabot & Csoka, *supra* note 64, at 1203.

one of several different tests to determine whether a contest constitutes an illegal offense.⁶⁷ In terms of decreasing leniency, these tests are the “predominance” or “dominant factor” test, the “material element” test, the “any chance” test, and the “gambling instinct” test.⁶⁸ Regardless of which test is used, courts and state attorneys general should not conclude that DFS contests are games of skill.

1. *Chance Tests*

A majority of states adhere to the dominant factor or predominance test, which turns on “whether the outcome of a particular contest is predominately within the control of a participant, or . . . predominantly subject to chance.”⁶⁹ The difficulty in applying this test can be readily comprehended by envisioning a sliding scale.⁷⁰ On one end of the scale are games like roulette and slots which rely solely on chance, and on the other end are games relying almost entirely on skill, like chess.⁷¹ But DFS lies in the “grey middle ground” of hybrid games which mix both elements of skill and chance.⁷² Comparably, some courts have found that poker is a game of skill, while other courts have concluded it is a game of chance.⁷³

While no attorney general or court in a state applying the dominant factor test has yet declared DFS illegal, Rhode Island has declared the contests legal.⁷⁴ In an opinion released February 4, 2016, the Attorney General of Rhode Island, Peter Kilmartin, stated that while “DFS does implicate certain provisions of existing civil and criminal statutes,” it should be allowed to operate legally within the state.⁷⁵ Kilmartin further noted that “[t]he Supreme Court of Rhode Island has adopted the ‘dominant factor’ test,” which he called “an especially high burden.”⁷⁶ While a small victory for DFS proponents, Kilmartin failed to offer any substantive explanation to support his opinion that skill dominates over chance, and instead advocated for regulation to address some of the social harms caused by gambling and potential revenue generation for the state.⁷⁷ Incidentally, Rhode Island is home to the North American headquarters for

67. Daniel Wallach, *Mass. AG Review May Spell Trouble For Daily Fantasy Sports*, LAW360 (Sept. 21, 2015, 11:34 AM), <http://www.law360.com/articles/705096/mass-ag-review-may-spell-trouble-for-daily-fantasy-sports> [<https://perma.cc/45UU-RAD6>].

68. See Cabot & Csoka, *supra* note 64, at 1205; Wallach, *supra* note 67.

69. Wallach, *supra* note 67.

70. See Levitt, *supra* note 65, at 6.

71. Cabot & Csoka, *supra* note 64, at 1204.

72. *Id.*

73. Cabot & Csoka, *supra* note 64, at 1204. Legendary poker player Doyle Brunson has won a record ten World Series of Poker events, including two back-to-back world championships—a rather statistically improbable series of occurrences if skill was not a factor to some degree. *History*, DOYLE BRUNSON, <http://www.doylebrunson.com/history> [<https://perma.cc/877B-KNZM>].

74. See R.I. Att’y Gen. Op., *supra* note 63.

75. *Id.*

76. *Id.*

77. See *id.*

International Game Technologies's (IGT) lottery and gaming business unit.⁷⁸ IGT is "the world's largest lottery-systems provider" and one of the largest private employers in the state.⁷⁹ The creation of state-run DFS lotteries could result in increased business for IGT, thereby benefitting the state as a whole.

Commentators have noted that if DFS contests are found to rely predominately on chance under the most "DFS friendly," dominant factor test, then such contests would presumably be considered illegal under the other stricter tests.⁸⁰ Arguably, the closest a court has come to applying the dominant factor test to daily fantasy sports contests is the Supreme Court of Washington in *Seattle Times v. Tielsch*.⁸¹ The contest at issue in *Tielsch* involved a football forecasting contest in which participants competed to select the results from twenty football games played each week over the course of a nine-week period.⁸² Contestants who submitted entries correctly picking the winner from all twenty contests in a single week received \$1,000.⁸³ In noting how "[t]he result of a football game may depend upon weather, the physical condition of the players and the psychological attitude of the players," the court concluded that chance was the dominant factor in the contest.⁸⁴ While the nature of the contest in *Tielsch* differs from that in DFS, the case provides persuasive authority for future courts in dominant factor jurisdictions on where to place DFS along the skill versus chance spectrum.

A subtle variation of the dominant factor test is the material element test, in which a game may be considered illegal if "chance has more than a mere incidental effect on the game."⁸⁵ New York, which adheres to the material element test defines "contest of chance" as any "contest, game, gaming scheme or gaming devise in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestant may also be a factor therein."⁸⁶ In the old computer game Minesweeper, "a great deal of skill is generally exercised by players, but there are moments when players are forced to guess at random, with the results of that guess determining the winner and loser of the game. Skill

78. John Kostrzewa, *As part of \$6B merger, GTECH to rebrand as IFT, 'shuffle' workers*, PROVIDENCE J. (Mar. 15, 2015, 10:25 AM), <http://www.providencejournal.com/article/20150315/NEWS/150319504> [<https://perma.cc/6QZ3-JWLA>].

79. *See id.*; R.I. Dep't of Labor and Training, Labor Market Information, R.I.'s Largest Employers, <http://www.dlt.ri.gov/lmi/es202/largestemp.htm> [<https://perma.cc/TS3N-XJQB>]. IGT merged with GTECH Corporation in 2015. Kostrzewa, *supra* note 78.

80. Wallach, *supra* note 67.

81. *See Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1370 (Wash. 1972).

82. *Id.* at 1366–67.

83. *Id.* at 1367.

84. *Id.* at 1367, 1370–71; *see also* Commonwealth v. Laniewski, 173 Pa. Super. 245, 249–51 (1953) (concluding that chance was the dominant factor in football forecasting game).

85. Memorandum of Law in Opposition to Fanduel's Motion for a Preliminary Injunction, and in Further Support of the NYAG's Motion for a Preliminary Injunction at 25, *Fanduel, Inc. v. Schneiderman*, No. 1616912015, 2015 WL 4320417, at *1 (N.Y. Supp. Nov. 24, 2015).

86. N.Y. PENAL LAW § 225.00(1) (Consol. 2016) (emphasis added).

predominates, but chance plays the material role in determining the game's outcome."⁸⁷

A minority of states follow the any chance test, which finds contests "illegal if results are based even in the smallest part on chance."⁸⁸ In an opinion declaring DFS illegal, Texas Attorney General Ken Paxton noted, "Texas law does not require that skill predominate If an element of chance is involved in a particular game, it is embraced within the definition of 'bet.'"⁸⁹ It will be difficult for DFS operators to fend off legal challenges in states that use the any chance test and the gambling instinct test discussed below because they render moot DFS operators' arguments related to skill.⁹⁰ This author has failed to find any statements attributable to FanDuel and DraftKings denying the existence of at least some element of chance in determining contest outcomes.⁹¹

A close variant of the any chance test is the gambling instinct test. It is the strictest of the various tests and prohibits activities that appeal to a player's gambling instinct—regardless of whether the game is one of skill or one of chance.⁹² In Hawaii, which follows the gambling instinct test, "playing a game, whether of skill or chance, for money or other thing of value constitutes . . . gambling."⁹³ Even if DFS operators could establish that their contests are 100% skills based, jurisdictions employing this test would still likely consider the games to constitute gambling since players pay entry fees for the prospect of winning money. DFS operators could try and argue that DFS participants are not playing DFS for the money, but instead playing for the positive externalities some commentators have

87. *The Legality of Skill Gaming*, SKILLZ (Apr. 19, 2016, 17:52), <https://skillz.zendesk.com/hc/en-us/articles/200620348-The-Legality-of-Skill-Gaming> [https://perma.cc/4ABL-DNPW].

88. Marc Edelman, *Is It Legal To Play Fantasy Football For Money?*, FORBES (Sept. 3, 2013), <http://www.forbes.com/sites/marcedelman/2013/09/03/is-it-legal-to-play-fantasy-football-for-money/#461693b957dc> [https://perma.cc/R8R7-2AS2].

89. Tex. Att'y Gen. Op., *supra* note 61, at 4. *See also* State v. Gambling Device, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.").

90. Despite Tennessee's adoption of the any chance test, the recently enacted "Fantasy Sports Act declares DFS contests to be 'primarily' based on skill and explicitly excludes them from the state's definition of gambling," thus rendering moot Tenn. Att'y Gen. Herbert Slatery's opinion that "fantasy sports contests constitute illegal gambling because they are 'contingent on some degree of chance.'" Godwin Proctor LLP, *Good Things Happen In Threes: Tennessee Becomes Third State To Enact DFS Law*, JD SUPRA (May 2, 2016), <https://perma.cc/F5MZ-FFCN>; Godwin Proctor LLP, *Alabama and Tennessee AGs Issue Opinions on Fantasy Sports*, JD SUPRA (Apr. 15, 2016), <http://www.jdsupra.com/legalnews/alabama-and-tennessee-ags-issue-17445/> [https://perma.cc/73HL-MF8K].

91. DraftKings's complaint seeking declaratory and injunctive relief against Ill. Att'y Gen. Lisa Madigan contains perhaps a slight admission that chance plays some role in the outcome of DFS contests: "[F]antasy results are based on statistics compiled by real-world athletes, but are never mere proxies for the binary outcomes of real-world sporting events." Compl. for Decl. and Inj. Relief at 9, *Draftkings, Inc. v. Madigan*, No. 2015CH18622, Cook Cnty. Cir. Ct., Ch. Div. (Dec. 24, 2015).

92. Cabot & Csoka, *supra* note 64, at 1205.

93. State v. Prevo, 361 P.2d 1044, 1049 (Haw. 1961); Cabot & Csoka, *supra* note 64, at 1205 n.66.

associated with DFS.⁹⁴ But such an argument would be absurd in the face of FanDuel and DraftKings' marketing and advertising strategies which tout the possibility of winning real money, perhaps "in life changing amounts."⁹⁵ Arguably, the whole reason behind the recent growth in the DFS industry is because operators like FanDuel and DraftKings explicitly appeal to the gambling instinct of participants with promises of winning cash.

2. Courts Base Determinations of Chance on Qualitative, Not Quantitative Factors

Given the low likelihood that DFS operators will convince courts that DFS contests are 100% skill based, or alternatively that they do not appeal in any way to players' gambling instinct, the skill versus chance debate is most applicable in jurisdictions that adhere to the dominant factor and material element tests. So how do courts determine whether skill predominates over chance? Historically, courts have answered this question "in the qualitative or causative sense, rather than the quantitative sense."⁹⁶ Nevertheless, DFS proponents generally offer quantitative support to back their proposition that skill predominates over chance.⁹⁷

After the federal government shutdown the Internet poker industry in 2006,⁹⁸ noted economist Steven Levitt, and legal scholars Thomas Miles and Andrew Rosenfield, conducted extensive empirical analysis on the role of skill versus luck in online poker.⁹⁹ The authors sorted through data based on over twelve million hands of real-money no-limit Texas Hold 'Em poker.¹⁰⁰ The results of their analysis were consistent with the notion that skill plays some role in poker.¹⁰¹ For example, the authors found that "[e]ven tiny differences in skill manifest themselves in near certain victory if the time horizon is long enough."¹⁰² DFS operators cite the results of their own empirical analysis to show that highly skilled DFS players beat lower skilled players.¹⁰³

Following Illinois Attorney General Lisa Madigan's DFS opinion, DraftKings initiated a suit seeking declaratory and injunctive relief stipu-

94. See Jon Boswell, Note, *Fantasy Sports: A Game of Skill that is now Implicitly Legal Under State Law, and now Explicitly Legal Under Federal Law*, 25 CARDOZA ARTS & ENT L.J. 1257, 1277 (2008) (noting that many people participate in fantasy leagues for the "strong social value" and "intimate, friendly competition between friends and family").

95. See e.g., Mem. of Law in Supp. of Pl.'s Mot. for a Prelim. Inj. at 9-10, *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (N.Y. Sup. Ct. Dec. 11, 2015). "He's a personal trainer, and he turned \$2 into over \$2 million on FanDuel." *Id.* at 10.

96. See Levitt et al., *supra* note 65, at 593.

97. See e.g., Compl. for Decl. and Inj. Relief, *Draftkings, Inc. v. Madigan*, No. 2015CH18622, at ¶ 54.

98. See *infra* Part IV.

99. See Levitt et al., *supra* note 65 at 584.

100. *Id.* at 620.

101. *Id.* at 633.

102. *Id.* at 634.

103. See Compl. for Decl. and Inj. Relief, *Draftkings, Inc. v. Madigan*, No. 2015CH18622, at ¶ 54.

lating that their activities are lawful.¹⁰⁴ They allege that only skill can account for the repeat nature with which certain players win DFS contests.¹⁰⁵ For example, the complaint cites one study that found that “in the first half of the 2015 MLB season, 91% of DFS player profits were won by just 1.3% of players.”¹⁰⁶ The study’s authors identified two methods which they believe enabled skilled users to succeed over unskilled users:

- (1) skilled users employ lineups that create covariance by choosing multiple athletes from the same real-life team in order to produce the extreme DFS outcomes—good and bad—that are necessary to win a large field tournament; and (2) skilled users exploit salary cap pricing inefficiencies by using sophisticated models to optimize their lineups by projecting which athletes are most likely to under- or over-perform relative to their salary on a given day.¹⁰⁷

To show “the degree of control DFS users exercise over their outcomes,” DraftKings cites results from “sophisticated computer simulations” showing that, when compared to randomly generated lineups, “skilled users dramatically outperformed the computer simulation in head-to-head contests: [sic] 96% of the time in NBA, 84% of the time in NFL, 83% of the time in MLB, and 82% of the time in NHL.”¹⁰⁸ A *Rotogrinders* analysis conducted for *Bloomberg* showed that “the top 100 ranked players enter 330 winning lineups per day, and the top 10 players combine to win an average of 873 times daily. The remaining field of approximately 20,000 players tracked by *Rotogrinders* win just 13 times per day, on average.”¹⁰⁹ In fall 2015, the media was filled with stories about DFS players whose cumulative winnings totaled in the five and six figures.¹¹⁰ Commentators note that savvy DFS players use complex statistical models to find pricing inefficiencies associated with fantasy player salary-cap prices, and then exploit this knowledge by entering into as many contests as possible—including contests with new and unskilled

104. *Id.* at ¶¶ 1–2.

105. *See id.*

106. *Id.* at ¶ 54. The same study found that “the top 11 players paid \$2 million in entry fees and made profits of \$135,000 each while accounting for 17 percent of all entry fees.” Drape & Williams, *In Fantasy Sports, Signs of Insiders’ Edge*, *supra* note 44.

107. Compl. for Decl. and Inj. Relief, *Madigan*, No. 2015CH18622, at ¶ 55.

108. *Id.* at ¶¶ 56–57.

109. Joshua Brustein & Ira Boudway, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG (Sept. 10, 2015, 7:00 AM), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> [<https://perma.cc/SA8B-LKHJ>].

110. *See e.g.*, Brad Reagan, *A Fantasy Sports Wizard’s Winning Formula*, WALL ST. J. (June 4, 2014, 10:54 AM), <http://www.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587> [<https://perma.cc/AZK5-YVGB>] (profiling a 29 year-old graduate student who spends his evenings playing DFS, and who won more than \$100,000 on a single NFL Sunday using a self-developed complex algorithm to select players); Brustein & Boudway, *supra* note 109 (profiling a 31 year-old accountant who spends as much \$8,000 in contest entry fees on a typical NFL Sunday, and who claims to win in the high five to low six figure dollar range per year).

participants.¹¹¹ A fundamental input into these statistical models—which illustrates the concerns related to the DraftKings data leak and stories of success from DFS employees competing in DFS contests—is the distribution of real-life player ownership on fantasy players’ rosters.¹¹² Many DFS players fill their fantasy rosters with star players, resulting in similar point totals.¹¹³ Highly skilled DFS players supplement their roster selections with less popular players in the hope that the lesser selected players have good performances—thus allowing skilled DFS players to achieve point totals that breakout from the mean.¹¹⁴

Similar to the results from Levitt’s empirical poker analysis, these statistics suggest that skill plays *some* role in DFS contest outcomes. But despite this statistical evidence, “courts have rejected the notion that calculating probabilities and handicapping odds convert a ‘contest of chance’ into a game of skill.”¹¹⁵ As New York Attorney General Eric Schneiderman notes, “handicapping and evaluating odds is fundamental to *every form of sports and horserace betting*.”¹¹⁶ DFS operators’ quantitative statistics are also less convincing when one looks at the frequency with which “a skilled player *consistently* beats an unskilled player.”¹¹⁷ In reference to a FanDuel study that found that “the top 10% of players beat the bottom 90% just 59% of the time,” Schneiderman points out that “DFS simply does not compare to a game of skill, like chess, where a skilled player *consistently* beats an unskilled player.”¹¹⁸ FanDuel’s study suggests that the complex algorithms employed by top players provide only a marginal advantage over unskilled players in the short run, yielding profitable returns only over multiple rounds of play. The study also helps explain why top players sometimes enter more than 800 contests per day (i.e., the skill advantage is so slight that profitable returns can only be exploited through many iterations).¹¹⁹

111. Ed Miller & Daniel Singer, *For daily fantasy sports operators, the curse of too much skill*, SPORTS BUS. J. (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx> [<https://perma.cc/LL4E-AXA4>]. There is arguably more protection for novices in traditional casino games, because a novice player can elect to gamble in a low stakes game in which a high stakes, skilled gambler would not find it worth their time to participate. *Id.* On the other hand, a skilled DFS player may enter the same small buy-in tournament (populated with recreational players) several hundred times. *Id.*

112. See Jeremy Greenfield, *How to Cheat—and Win—at Daily Fantasy Football*, THE STREET (Oct. 16, 2015), <http://www.thestreet.com/story/13327452/1/how-to-cheat-and-win-at-daily-fantasy-football.html> [<https://perma.cc/3NLR-XFZS>] (“Quantifying exactly how much knowledge of ownership distributions would help a bettor requires modeling odds of points and salary cost along with this prior distribution. The practice of including prior certainties of specific factors in an equation is known as Bayesian statistical inference.”).

113. *See id.*

114. *See id.*

115. Mem. of Law in Supp. of Pl.’s Mot. for a Prelim. Inj. at 25, *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (N.Y. Sup. Ct. Dec. 11, 2015).

116. *Id.* (emphasis in original).

117. *See id.* (emphasis in original).

118. *Id.* (emphasis in original).

119. *See* Brustein & Boudway, *supra* note 109.

One of the common themes among the recent attorneys general opinions is the qualitative-based conclusion that DFS contests are games of chance because the outcomes are the result of future contingent events beyond the influence of participants.¹²⁰ New York's Attorney General has noted that "[a] player injury, a slump, a rained out game, even a ball taking a bad hop, can each dictate whether a bet wins or loses" and that "[g]iven the frequency and number of chance occurrences, no amount of research, investigation, or judgment can assure in advance that a certain DFS result will occur or how."¹²¹ Similarly, Texas Attorney General Ken Paxton supported his decision to declare DFS unlawful by alluding to actual occurrences from recent professional sporting events that altered the outcome of the game, which would have been unpredictable to a DFS player (e.g. Dez Bryant's controversial no-catch and the Deflategate scandal).¹²²

For their part, proponents of DFS counter by claiming that contestants must have "an intensive knowledge of various sports, rules, athletes, and statistics" as well as the ability to "understand and incorporate into their gameplay the different rules and features of the fantasy contests themselves that require and reward different strategies."¹²³ DFS proponents further argue that players must "skillfully manage a salary cap, identify 'value' players who outperform their assigned salary, master a complex scoring system, and modify their strategies based on the structure of the contest itself."¹²⁴ Perhaps the Nevada Attorney General's opinion offers the simplest explanation on why DFS contests are predominately controlled by chance occurrences:

With daily fantasy sports, although the owners select a lineup for their simulated team, the owners have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner simply waits to see what happens based upon the performance of the actual players involved.¹²⁵

In this context, when DFS players select lineups, they merely use historical data to create forecasts for how players will perform in the future. Players seeking to increase the "rarity score" of their roster make additional guesses as to the distribution of fantasy player selection by other DFS players.¹²⁶ One can call it forecasting, predicting, guessing, or estimating, but no amount of effort or control on the part of a DFS player

120. Mem. of Law in Supp. of Pl.'s Mot. for a Prelim. Inj. at 1, *Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521.

121. *Id.* at 2.

122. Tex. Att'y Gen. Op., *supra* note 61, at 4–5.

123. Compl. for Decl. and Inj. Relief at ¶ 9, *Draftkings, Inc. v. Madigan*, No. 2015CH18622.

124. *Id.*

125. Nev. Att'y Gen. Op., *supra* note 26, at 16.

126. *See Greenfield*, *supra* note 112.

can influence the outcome of the contest once it has commenced, much less influence the performance of the real athletes involved. Since no quantitative framework currently exists to measure the relative amounts of skill and chance in DFS, courts should continue to base their decisions on whether an activity constitutes gambling on the qualitative factors which show that DFS contest outcomes are determined by events occurring beyond the control of the DFS player.

B. CONSIDERATION: DFS CONTEST ENTRY FEES ARE BETS AND WAGERS

DFS operators have defended the legality of their business by challenging the assertion that contest entry fees constitute bets or wagers within the meaning of state gambling statutes—thus negating the common law element of consideration.¹²⁷ This argument has found a sympathetic ear with some courts, although not in lawsuits directly pertaining to the legality of DFS. In *Langone v. Kaiser*, a federal district court in Illinois dismissed a suit to recover gambling winnings from FanDuel under the Illinois Loss Recovery Act.¹²⁸ The act permits persons, who by gambling, lose “any sum of money or thing of value” to collect such money or thing of value in a civil action against the “winner.”¹²⁹ In dismissing the suit, the court held that FanDuel was not a “winner” within the meaning of the act because it did not risk anything when it collected entry fees from participants.¹³⁰ In declining to consider the entry fees as wagers, the court noted: “FanDuel acts as the conduit for transmission of the prize to the winner, but . . . does not risk any of its money in producing the prize money.”¹³¹

In a similar case, *Humphrey v. Viacom, Inc.*, a New Jersey district court dismissed a suit which alleged that *traditional* fantasy sports league contest entry fees constituted bets or wagers (the suit sought recovery of entry fees under New Jersey’s *qui tam* gambling loss-recovery statute).¹³² The court articulated “that it would be ‘patently absurd’ to hold that ‘the combination of an entry fee and a prize equals gambling’” and distinguished a “bet” (“a situation in which the money or prize belongs to the persons posting it, each of whom has a chance to win it”) from a “prize” (“money or other prize [which] belongs to the person offering it, who has no chance to win it and who is unconditionally obligated to pay it to the successful contestant”).¹³³ Since “(1) the entry fees [were] paid unconditionally; (2) the prizes offered to fantasy sports contestants [were] for amounts certain and [were] guaranteed to be awarded; and (3) Defendants [did] not compete for prizes,” the entry fees were not found to be

127. Compl. for Decl. and Inj. Relief at ¶ 8, *Madigan*, No. 2015CH18622.

128. 2013 U.S. Dist. LEXIS 145941, at *23–24 (N.D. Ill. Oct. 9, 2013).

129. *Id.* at *3.

130. *Id.* at *17–21.

131. *Id.* at *19.

132. See No. 06-2768, 2007 WL 1797648, at *5–6 (D.N.J. June 20, 2007).

133. *Id.* at *19, *21.

bets or wagers.¹³⁴

As promising as the holdings in these two cases might sound to proponents of DFS, they are distinguishable from the issue of whether entry fees constitute bets or wagers with respect to state gambling laws. In granting New York Attorney General Eric Schneiderman's request for a preliminary injunction against DraftKings and FanDuel, Justice Mendez noted that *Humphrey* pertained to a nonrefundable one-time, season-long fantasy sports entry fee.¹³⁵ Additionally, the logic in which the *Langone* and *Humphrey* courts used to support their holdings is only applicable within the context of the specific *qui tam* statutes at issue. For example, the *Langone* court did not actually reject Langone's argument that FanDuel engaged in gambling because it sold sports pools.¹³⁶ Langone analogized:

A "Daily Fantasy" transaction is much like a horse-racing wager. The bettor buys a ticket, [c]hoosing a number of horses. The money wagered is pooled by the racetrack. The racetrack wins money on every wager. But the racetrack loses money on every race when it pays the winning wagers. The Racetrack always wins more than it loses. Thus the bettors always lose to the racetrack.¹³⁷

The court never refutes Langone's analogy, instead, stating that whether or not FanDuel's activities could be characterized as "selling pools" was irrelevant for the purpose of the Loss Recovery Act.¹³⁸ Thus the holding in *Langone* does not stand for the blanket proposition that entry fees are not bets or wagers. Few, if any, would dispute that the money paid at a horse track for horses to win, place, or show is not a bet. The logic behind this analogy is simply no different than that behind the payment of entry fees for DFS contests. In fact, there is a term for this specific type of gambling: pari-mutuel betting.¹³⁹

Even accepting as true the requirement that a DFS operator must stand to lose something of value for an entry fee to be a bet,¹⁴⁰ there is an argument that with guaranteed prize pools such an occurrence can result. As described in Part I, in guaranteed prize pool contests the prize amount is paid out regardless of how many participants enter the contest. When a DFS operator collects less in entry fees than it has guaranteed to pay out,

134. *Id.* at *24–25.

135. *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521, at *16–17 (N.Y. Supp. Ct. Dec. 11, 2015).

136. *See Langone*, 2013 U.S. Dist. LEXIS 145941, at *22.

137. *Id.* at *21–22.

138. *Id.* at *22.

139. Merriam-Webster's dictionary defines pari-mutuel as "a betting pool in which those who bet on competitors finishing in the first three places share the total amount bet minus a percentage for the management." *See Pari-Mutuel*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/pari%E2%80%93mutuel> [<https://perma.cc/3D2D-878U>].

140. *See Langone*, 2013 U.S. Dist. LEXIS 145941, at *23 ("Since FanDuel does not risk its own money on the fantasy games it cannot be a winner or loser under the Loss Recovery Act.").

an overlay results and the operator eats the difference out of their profits. In this respect, perhaps DFS companies do risk something of value.

DFS operators are also unlikely to escape the specific statutory language defining “betting” or “wagering” contained in many state gambling statutes. For example, in Nevada, a wager is defined as “a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain.”¹⁴¹ In Texas, a bet means “an agreement to win or lose something of value solely or partially by chance.”¹⁴² Illinois’s statute uses the language “money or other thing of value.”¹⁴³ And in New York, the statutory definition of gambling includes “stak[ing] or risk[ing] something of value.”¹⁴⁴ One thing these statutes all have in common is that there is no requirement that all parties to the transaction stand to win or lose something.¹⁴⁵ In *People v. Fanduel, Inc.*, Justice Mendez noted, “[t]he payment of an ‘entry fee’ as high as \$10,600 on one or more contests daily could certainly be deemed risking ‘something of value.’”¹⁴⁶ DraftKings’s own data shows that a majority of players are net losers and that “89.3% of DFS players had a negative return on investment across 2013 and 2014,”¹⁴⁷ meaning that most players are not recouping the cost of their contest entry fees and losing something of value. Nevada’s Attorney General offers perhaps the simple explanation for why entry fees are wagers:

[F]antasy sports owners pay money to play the simulated games
If an owner wins, the owner gets money back. If an owner loses, the owner loses the bet made. When owners play against each other, some will win and some will lose. Thus, because owners risk money on an occurrence for which the outcome is uncertain, wagers are present.”¹⁴⁸

Despite the holdings in *Humphrey* and *Langone*,¹⁴⁹ DFS proponents will have a hard time convincing lawmakers and courts that entry fees are not bets or wagers, especially in the face of statutory language containing “staking or risking something of value.” Interestingly, neither the federal Wire Act nor the Illegal Gambling Business Act (IGBA), which are discussed in Part IV, define bet or “wager.”¹⁵⁰ Nevertheless, the common law in almost all jurisdictions provides that monetary payments constitute

141. NEV. REV. STAT. § 463.01962 (Lexis-Nexis 2016).

142. TEX. PENAL CODE ANN. § 47.01(1) (West 2015).

143. ILL. COMP. STAT. ANN. 720 ILCS 5/28-1(a)(1) (West 2016).

144. NY PENAL LAW § 225.00(2) (Consol. 2016).

145. *But cf. Langone*, 2013 U.S. Dist. LEXIS 145941, at *23; *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at *24 (D.N.J. June 20, 2007).

146. 2015 N.Y. Misc. LEXIS 4521, at *17 (N.Y. Sup. Ct. Dec. 11, 2015).

147. Mem. of Law in Supp. of Pl.’s Mot. for a Prelim. Inj. at 10, *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (N.Y. Sup. Ct. Dec. 11, 2015).

148. Nev. Att’y Gen. Op., *supra* note 26, at 9.

149. *See Langone*, 2013 U.S. Dist. LEXIS 145941, at *23; *Humphrey*, No. 06-2768, 2007 WL 1797648, at *24.

150. *See infra* Part IV.

valid consideration.¹⁵¹ And while the IGBA does not define bet or wager, it does define unlawful gambling to include pool-selling.¹⁵²

Perhaps the clearest evidence that contest entry fees are bets or wagers is found in DFS operators' own advertising and public statements. In an interview on the website *Reddit* entitled "Ask Me Anything," DraftKings's CEO bluntly stated, "[The] concept is a mashup between poker and fantasy sports. Basically, you pick a team, deposit your *wager*, and if your team wins, you get the pot."¹⁵³ DraftKings has also embedded gambling keywords into its website's programming code to increase the likelihood that internet search engines will send users looking for gambling directly to DraftKings's site.¹⁵⁴ In the United Kingdom, both FanDuel and DraftKings have applied for and received licenses from the U.K. Gambling Commission, yet each company denies that the same business activities constitute gambling in the United States.¹⁵⁵ In noting that courts are often willing to look beyond creative labels used to disguise gambling terms, one commentator has proffered that "it would seem fairly straightforward to conclude that DraftKings' and FanDuel's customers are *paying entry fees in order to win cash prizes*, and not just simply 'for the *privilege* of entering the [DFS] contest.'¹⁵⁶

Lastly, in some states like Texas and Illinois, there is a sub-issue as to whether DFS players are the "actual contestants" in a "bona fide" contest. For example, Illinois provides an exemption from the general prohibition on gambling for "[o]ffers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contests."¹⁵⁷ Under this exemption, it would be permissible for a golfer to wager on a golf game played with the other members of his foursome, but unlawful for a non-playing spectator to make the same wager. DraftKings maintains that "[t]he athletes themselves are not competing in the DFS contest; their statistical performance is merely a piece of the DFS puzzle that DFS players must assemble."¹⁵⁸ Thus DraftKings seeks to shift the focus away from the actual sporting events, and instead

151. I. Nelson Rose, *Gambling and the Law: An Introduction to the Law of Internet Gambling*, 10 UNLV GAMING RESEARCH & REV. J. 1, 2 (2006).

152. See 18 U.S.C. § 1955(b)(4) (1970); Nev. Att'y Gen. Op., *supra* note 26, at 6 (DFS contests are "sports pools" under Nev. Rev. Stat. 463.0193). DFS entry fees have also been described as "'parlay' bets contingent on combinations of games and 'prop' bets relying on statistics." *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521, at *13 (N.Y. Supp. Ct. Dec. 11, 2015).

153. See *Ask Me Anything*, REDDIT, https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ [<https://perma.cc/T8CB-M8PN>] (emphasis added).

154. Mem. of Law in Supp. of Pl.'s Mot. for a Prelim. Inj. at 8–9, *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (N.Y. Sup. Ct. Dec. 11, 2015).

155. *Id.* at 9.

156. Daniel Wallach, *Everything You Need To Know About The Illinois Daily Fantasy Sports Legal Battle*, LEGAL SPORTS REPORT (Jan. 4, 2016, 5:00 PM), <http://www.legalsportsreport.com/7106/illinois-dfs-primer/> [<https://perma.cc/GP5S-59CT>].

157. See ILL. COMP. STAT. ANN. 720, ILCS 5/28-1(a)(1) (West 2016).

158. Wallach, *supra* note 156.

redefine the contest at issue as the matchup between DFS participants. This argument is not likely to gain traction with courts because, in general, courts have “drawn a distinction between ‘actually participating’ in a contest and being able to *control or affect its outcome versus ‘forecasting’ the result* of a contest involving others.”¹⁵⁹ It intuitively makes much more sense to say that DFS participants merely forecast the result of a contest involving others than to say that their wagering against other participants is the contest itself.

C. RUNNING AFOUL OF PASPA

Given the significant popularity and growth in the DFS industry, many lawmakers, commentators, and even DFS operators advocate that the future legality of DFS should rest with individual state-level regulation.¹⁶⁰ The previously hostile relationship between the fantasy sports industry, media companies, and professional sports leagues has evolved into one of strategic partnerships with lucrative multi-million dollar sponsorships.¹⁶¹

Legislation legalizing and regulating DFS has passed in four states, and is pending in at least a dozen other states.¹⁶² Generally, the regulations seek to protect consumers, increase revenues for the state, or both. For example, a bill currently in the California Senate would allow DFS companies to lawfully operate within the state, provided they first register with the state and pay an annual regulatory fee.¹⁶³ Indiana’s recently passed legislation allows DFS companies to lawfully operate if they pay a

159. *Id.* See also Tex. Att’y Gen. Op., *supra* note 61, at 2; Ill. Att’y Gen. Op., *supra* note 61, at 12–13.

160. See *supra* Part I; Andy Moore, *Does Regulation of Fantasy Sports Violate PASPA?*, LAW360 (Dec. 8, 2015, 10:24 AM), <http://www.law360.com/articles/734823/does-state-regulation-of-fantasy-sports-violate-paspa>; Sharon Terlep, *FanDuel CEO Calls for Government Regulation* [<https://perma.cc/S754-28LV>]; Sharon Terlep, *FanDuel CEO Calls for Government Regulation*, WALL ST. J. (Oct. 29, 2015), <http://www.wsj.com/articles/fan-duel-ceo-calls-for-government-regulation-1446127412?alg=Y> [<https://perma.cc/5Y83-ZZ2R>].

161. See Harwell, *supra* note 4; *DraftKings Becomes the Official Daily Fantasy Game of Major League Baseball*, *supra* note 12. Both Jerry Jones, owner of the Dallas Cowboys, and the Kraft Group, the ownership group for the New England Patriots, have investment stakes in DraftKings. Darren Rovell, *Jerry Jones defends DraftKings stake: It ‘creates more interest’*, ESPN (Oct. 26, 2015), http://espn.go.com/nfl/story/_/id/13974122/jerry-jones-dallas-cowboys-defends-investment-draftkings [<https://perma.cc/Y6NB-QPTQ>]. Media companies like Fox, Time Warner, NBC Sports Ventures, and Comcast Venutes, and private-equity groups like KKR and Google Capital have invested in either FanDuel or DraftKings. David Purdum & Darren Rovell, *N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy*, ESPN (Nov. 11, 2015), http://espn.go.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling [<https://perma.cc/3FXY-FYE4>].

162. See *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REPORT, *supra* note 60.

163. Patrick McGreevy, *Bill legalizing fantasy sports websites in California makes it out of state Assembly*, L.A. TIMES (Jan. 27, 2015, 1:24 PM), <http://www.latimes.com/politics/la-pol-sac-fantasy-sports-20160126-story.html> [<https://perma.cc/CNF9-PPGH>].

\$50,000 licensing fee.¹⁶⁴ And in Massachusetts, a series of proposed regulations would among other things: prohibit persons under the age of twenty-one from playing DFS; limit accounts to one per player; ban the use of “scripts;” restrict advertising to minors; ban gameplay by employees and affiliates of DFS companies; and require identification of “highly-experienced” players.¹⁶⁵

While these proposed regulations certainly address legitimate state interests, they are most likely preempted by the Professional and Amateur Sports Protection Act (PASPA).¹⁶⁶ PASPA makes it unlawful for a governmental entity to:

[S]ponsor, operate, advertise, *license*, or *authorize by law or compact* . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one of more performances of such athletes in such games.”¹⁶⁷

However, § 3703 limits the availability for filing civil actions to enjoin violations of § 3702 to only the United States Attorney General and professional and amateur sports organizations whose competitive games are alleged to be the basis of the violation.¹⁶⁸ While no court has analyzed the issue of whether state-level regulation of DFS operators would violate PASPA, a plain reading of the act indicates that states are preempted from lawfully licensing and regulating DFS games.¹⁶⁹

If there is one saving grace about PASPA for DFS operators, it is the narrow restrictions on who may seek civil action to enjoin violations.¹⁷⁰ While passage of PASPA was supported by sports leagues who feared “Pete Rose type scandals,”¹⁷¹ the cozy relationship between professional sports leagues and the DFS industry now makes it unlikely that professional sports league commissioners would avail themselves of their option to enjoin DFS operators from offering contests featuring players in their

164. Dustin Gouker, *Indiana Becomes Second State To Pass Daily Fantasy Sports Regulation*, LEGAL SPORTS REPORT (Mar. 24, 2016, 14:12), <http://www.legalsportsreport.com/9239/indiana-passes-dfs-regulation/> [<https://perma.cc/C4SV-VFHT>].

165. Draft Regulation 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts, COMMONWEALTH OF MASS. OFFICE OF THE ATTORNEY GENERAL 3, 5–6, 9–10, <http://www.mass.gov/ago/docs/regulations/proposed/940-cmr-34-draft.pdf> [<https://perma.cc/E3D9-SHB4>].

166. See Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–3704 (2000).

167. 28 U.S.C. § 3702 (2000) (emphasis added). Nevada, Delaware, Oregon, and Montana, are the only states that fall within PASPA’s grandfather provision exempting authorized government sponsored sports gambling in existence prior to PASPA’s passage. See 28 U.S.C. § 3704 (2000); Marc Edelman, *Is it Legal To Run An NCAA Tournament Pool?*, FORBES (Mar. 8, 2016), <http://www.forbes.com/sites/marcedelman/2016/03/08/is-hosting-an-ncaa-tournament-pool-legal/#108663e66a0f> [<https://perma.cc/599Z-EJPF>].

168. 28 U.S.C. § 3703 (2000).

169. Moore, *supra* note 160.

170. See 28 U.S.C. § 3703 (2000).

171. Chil Woo, Note, *All Bets Are Off: Revisiting The Professional And Amateur Sports Protection Act (PASPA)*, 31 CARDOZO ARTS & ENT. L.J. 569, 575–76 (2013).

respective leagues.¹⁷² In the fall of 2015, the NCAA and commissioners for ten prominent football conferences privately requested that DraftKings and FanDuel cease “offering fantasy games based on college sports because they were inconsistent with our values, bylaws, rules and interpretations regarding sports wagering.”¹⁷³ Following completion of the NCAA basketball tournament, both DraftKings and FanDuel voluntarily agreed to stop taking bets on NCAA games—perhaps “avoiding a landslide of lawsuits the NCAA could have filed if [DraftKings and FanDuel] continued to conduct college contests after winning state approval to do business.”¹⁷⁴

While it is likely that professional sports leagues will not object to state-level violations of PASPA, a challenge initiated by the United States Attorney General could result in a death penalty for the DFS industry. State-level regulations will likely result in regulations with varying degrees of favorableness—frustrating the ability of DFS operators to conduct business in those jurisdictions with unfavorable regulations—but that possibility has to be more palatable for DFS operators than a federal challenge which could effectively terminate the industry overnight, as it did with the online Internet poker industry. This begs the question of whether the current, or a future, United States Attorney General would initiate such action. One commentator has noted his belief that purely consumer protection oriented legislation, like that proposed in Massachusetts, is not likely to result in a challenge because of the protective nature of the legislation and because it does not “explicitly contain provisions authorizing DFS in the state.”¹⁷⁵ However, recently enacted and proposed legislation, like in Indiana and California, go beyond just offering mere consumer protections, and instead, explicitly license sports gambling, thus seemingly running afoul of one of PASPA’s specific prohibitions.¹⁷⁶ The United States Attorney General’s continued silence on the issue will only embolden some states to continue pursuing lucrative regulation of DFS.

Despite the traditional deference to states for matters related to enforcement of gambling laws,¹⁷⁷ the DraftKings data leak and instances of DFS employees winning large sums of money on competitors’ sites¹⁷⁸ might mark the proverbial line in the sand that causes the United States

172. See Harwell, *supra* note 4; *DraftKings Becomes the Official Daily Fantasy Game of Major League Baseball*, *supra* note 12.

173. Marc Tracy, *N.C.A.A. Distances Itself From Daily Fantasy Websites*, N.Y. TIMES (Oct. 20, 2015), http://www.nytimes.com/2015/10/21/sports/ncaa-distances-itself-from-daily-fantasy-websites.html?_r=1 [https://perma.cc/NPU3-U9WX] (internal quotations omitted).

174. Evan Grossman, *DraftKings, FanDuel agree to stop taking bets on college sports after NCAA hoops tourney*, NY DAILY NEWS (Mar. 31, 2016), <http://www.nydailynews.com/sports/college/draftkings-fanduel-agree-stop-bets-ncaa-sports-article-1.2584384> [https://perma.cc/JFY9-7H5U].

175. *Id.*

176. See 28 U.S.C. § 3702(1) (2000); Gouker, *supra* note 164; McGreevy, *supra* note 163.

177. See Moore, *supra* note 160.

178. See Drape & Williams, *In Fantasy Sports, Signs of Insiders’ Edge*, *supra* note 44.

Attorney General to intervene. As noted in Part IV, the United States Attorney's office for the Southern District of New York is currently in the early stages of an investigation into DraftKings and FanDuel, and their findings will no doubt be persuasive as to what action, if any, the federal government takes to shut down the industry.¹⁷⁹ Congress is slated to hold hearings in mid-May regarding the legality and nature of DFS, and the issue of whether recent state DFS legislation is in conflict with PASPA will likely be discussed.¹⁸⁰ Given the multi-billion dollar size of the industry and the significant negative externalities associated with gambling, there is too much at stake for the federal government not to insert itself into the matter—especially given PASPA's, the UIGEA's and the Wire Act's statutory invitations.

IV. THE FEDERAL RULES

The United States federal government has traditionally played a minor role in the regulation of gaming—instead leaving regulation of the gaming industry to the states.¹⁸¹ As one commentator has noted, “With the primary exception of the Professional and Amateur Sports Protection Act, rather than preempting state gambling laws, federal laws that govern gambling crimes have been designed to aid individual states in the enforcement of state gambling laws.”¹⁸² However, existing federal legislation and historical precedence suggests that federal law enforcement agents have recourse to shut down DFS operators.¹⁸³ The *Wall Street Journal* recently reported that Preet Bharara, the United States Attorney for the Southern District of New York, is in the early stages of an investigation into whether the business model behind DFS violates federal law.¹⁸⁴ This news alone should give DFS proponents some consternation.

Dubbed “Black Friday” by online poker enthusiasts, on April 15, 2011, Bharara and Janice Fedarcyk, the Assistant Director in Charge of the FBI's New York Field Office, unsealed indictments charging eleven defendants, including founders of the three largest Internet poker companies doing business in the United States, with violations of the federal Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) and the

179. See *infra* Part IV.

180. See Chris Grove, *Source: Congress to Examine Daily Fantasy Sports Issues In May 11 Committee Hearing*, LEGAL SPORTS REPORT (Apr. 14, 2016, 9:54 PM), <http://www.legalsportsreport.com/9524/congressional-hearing-daily-fantasy-sports/> [https://perma.cc/863E-5WJ3].

181. Andy Moore, *What Nevada Action Means For Future of Daily Fantasy Sports*, LAW360 (Nov. 3, 2015, 12:43 PM), <http://www.law360.com/articles/722521/what-nevada-action-means-for-future-of-daily-fantasy-sports> [https://perma.cc/8W3D-M2E7].

182. Moore, *Does Regulation of Fantasy Sports Violate PAFSA?*, *supra* note 160.

183. See Kerry O'Brien, Note, *The Great Wildcard: How 2011 Shook The Online Poker World And Became A Game-Changer In The Battle For Legalization*, 38 J. LEGIS. 295, 296 (2012).

184. Devlin Barrett & Christopher M. Matthews, *U.S. Prosecutor Probing Daily Fantasy-Sports Business*, WALL ST. J. (Oct. 21, 2015, 12:08 AM), <http://www.wsj.com/articles/u-s-prosecutor-probing-daily-fantasy-sports-business-1445400505> [https://perma.cc/PB8K-8C6X].

Illegal Gambling Business Act of 1970 (IGBA), as well as other bank and wire fraud and money laundering offenses.¹⁸⁵ Shortly after issuing the indictments, the FBI seized the implicated websites' domain names—effectively ending what had been a multi-billion dollar industry in the United States.¹⁸⁶ Interestingly, neither the UIGEA nor the IGBA by itself actually criminalizes Internet gambling; instead functioning as an enforcement act dependent upon a predicate violation of some other federal or state anti-gambling law. On the other hand, the Interstate Wire Act of 1961 could be construed in a manner that would both serve as an independent basis for federal action, as well as the illegal violation of law necessary to invoke enforcement under the IGBA and UIGEA.

A. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT DID NOT LEGALIZE DFS

Congress passed the UIGEA as part of a completely unrelated port security bill in the final minutes before recessing for the 2006 election period.¹⁸⁷ Democratic Senator Frank Lautenberg of New Jersey reportedly remarked that “no one on the Senate-House Conference Committee had even seen the final language of the bill.”¹⁸⁸ As Congress's first foray into legislation targeting online gambling, the UIGEA is credited with allegedly “[giving] birth to DFS when FanDuel CEO Nigel Eccles discovered an exemption in the law for ‘skill-based’ fantasy sports games during a trans-Atlantic flight in 2009.”¹⁸⁹ A decade after its enactment, the UIGEA remains controversial and misunderstood.¹⁹⁰ As this section shows, the UIGEA did not legalize DFS.

UIGEA § 5363 prohibits persons engaged in the business of “betting” or “wagering” from knowingly accepting any financial instrument in connection with the participation of another person in *unlawful* Internet

185. *Manhattan U.S. Attorney Charges Principles of Three Largest Internet Poker Companies with Bank Fraud, Illegal Gambling Offenses, and Laundering Billions in Illegal Gambling Proceeds*, FED. BUREAU OF INVESTIGATION (Apr. 15, 2011), <https://www.fbi.gov/newyork/press-releases/2011/manhattan-u.s.-attorney-charges-principals-of-three-largest-internet-poker-companies-with-bank-fraud-illegal-gambling-offenses-and-laundering-billions-in-illegal-gambling-proceeds> [https://perma.cc/8Z9L-LY9B].

186. Janet Morrissey, *Poker Inc. to Uncle Sam: Shut Up and Deal*, N.Y. TIMES (Oct. 8, 2011), http://www.nytimes.com/2011/10/09/technology/internet/in-online-poker-a-push-to-legalize-and-regulate-the-game.html?pagewanted=all&_r=0 [https://perma.cc/UNN9-XBD6].

187. I. Nelson Rose, *Viewpoint: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, 10 GAMING L. REV. 537, 537 (2006).

188. *Id.*

189. Kevin P. Braig, *Federal law and the birth of daily fantasy sports*, OHIO STATE BAR ASSOCIATION, <https://www.ohiobar.org/NewsAndPublications/News/OSBANews/Pages/Daily-fantasy-football-under-fire-part-1.aspx> [https://perma.cc/36NY-A4X4].

190. *See e.g.*, *Interactive Media Entm't & Gaming Ass'n v. Att'y Gen. of United States*, 580 F.3d 113, 115–16 (3rd Cir. 2009) (upholding lower court ruling rejecting constitutional vagueness challenge to the UIGEA); *Nev. Att'y Gen. Memo*, *supra* note 26, at 7 (distinguishing the Nevada AG's office's position from that of “some operators and commentators who have taken the position that the [UIGEA] legalized fantasy sports within the United States.”).

gambling.¹⁹¹ Articulated differently, the act “[p]rohibits Internet gambling operators from accepting money related to any online gambling that violates State or Federal law.”¹⁹² Much of the debate on the legality of DFS centers on the oft-discussed “exemption” found in § 5362, which excludes from the definition of bet or wager participation in fantasy or simulation sports games where all of the following three criteria are met:

- (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
- (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
- (III) No winning outcome is based (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.¹⁹³

DFS seemingly meets the requirements in element (I) because prizes are known to participants prior to the start of contests and prize amounts are fixed regardless of the number of participants.¹⁹⁴ In fact, depending on the number of participants in a guaranteed prize pool contest, it is possible for a DFS operator to collect less in entry fees than the guaranteed payout—thus losing money.¹⁹⁵ Non-guaranteed prize pool contests simply provide no guarantee that a contest will take place absent a minimum number of participants (entry fees are refunded when contests are cancelled for lack of reaching the minimum number of participants).¹⁹⁶ However, it is debatable whether the exemption should even apply to DFS. As Part III argues, element (II) should be inapplicable because chance predominates over skill—meaning that all winning outcomes are not based upon “the relative knowledge and skill of the participants.”¹⁹⁷

191. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5363 (2006).

192. *Unlawful Internet Gambling Enforcement Act of 2006 – Fact Sheet*, STOP PREDATORY GAMBLING FOUNDATION, <http://stoppredatorygambling.org/blog/category/research-center/internet-gambling/> [https://perma.cc/3JPV-QQBC].

193. 31 U.S.C. §5362(1)(E)(ix) (2016).

194. Nev. Att’y Gen. Memo, *supra* note 26, at 4.

195. *Id.*

196. *Id.*

197. See e.g., *Terms of Use*, FANDUEL, <https://www.fanduel.com/terms> (“FanDuel is a game of skill . . . [W]inners are determined by individuals who use their skill and knowledge of relevant professional sports information and fantasy sports rules to accumulate the most fantasy points.”). *But see* Mem. of Law in Supp. of Pl.’s Mot. for a Prelim. Inj. at 1, *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (N.Y. Supp. Ct. Dec. 11, 2015) (arguing that bettor’s outcomes are based on “‘future contingent event[s]’ wholly outside the control or influence of [the] bettor.”).

DFS contests presumably do not violate the requirements in element (III) because winning outcomes are determined based on combinations of individual athletes competing across multiple sporting events.

Assuming that the exemption does apply to DFS, DFS operators and proponents mistakenly cite the § 5363 fantasy sports carve-out as legalizing pay-to-play DFS.¹⁹⁸ DraftKings's website proffers its legal interpretation that it "operates in compliance with federal law, including a statute called the Unlawful Internet Gambling Enforcement Act, or UIGEA, which exempts fantasy sports contests from its regulation."¹⁹⁹ But the Nevada Attorney General calls this position "simply untenable."²⁰⁰

Even accepting as true the premises that the legality of DFS is the same as season-long fantasy sports and that DFS is a game of skill, the UIGEA does not *legalize* daily fantasy sports, or even season-long fantasy sports. In § 5361(b), titled "Rules of Construction," UIGEA states: "No provision of [31 U.S.C. §§ 5361 et seq.] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."²⁰¹ As the Nevada Attorney General concluded, "[The] UIGEA neither made legal nor illegal any form of gambling within the United States," but instead "simply provides '[n]ew mechanisms for enforcing gambling laws on the Internet,' which Congress deemed necessary as it believed 'traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.'"²⁰² Commentators have noted that "a federal exemption is not the legal equivalent of federal authorization and comprehensive regulation"²⁰³ and the § 5363 exemption "does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA."²⁰⁴ Furthermore, "if the UIGEA had truly authorized and comprehensively regulated DFS, then the DFS platforms could safely offer DFS in all states because the Supremacy Clause of the United States Constitution would likely pre-empt any contradictory state law."²⁰⁵

Amidst fall 2015's uproar over the information leak at DraftKings, former United States Representative Jim Leach, author of the UIGEA legislation, stated that while lawmakers never conceived that DFS would "morph into today's cauldron of daily betting," it would be "sheer chutzpah for a fantasy sports company to cite the law as a legal basis for

198. See e.g., *People v. Fanduel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 at *18–19 (N.Y. Supp. Ct. Dec. 11, 2015).

199. *Legality*, DRAFTKINGS, <https://www.draftkings.com/help/why-is-it-legal> [<https://perma.cc/P7SF-Q6E2>].

200. Nev. Att'y Gen. Memo, *supra* note 26, at 7.

201. 31 U.S.C. § 5361(b) (2006).

202. Nev. Att'y Gen. Memo, *supra* note 26, at 7 (quoting 31 U.S.C. § 5361(a)(4)) (emphasis added).

203. Braig, *supra* note 189.

204. Cabot & Csoka, *supra* note 64, at 1201.

205. Braig, *supra* note 189.

existing.”²⁰⁶ In his view, the UIGEA merely provides fantasy sports an “exemption from one law enforcement mechanism where the burden for compliance has been placed on private sector financial firms.”²⁰⁷ As noted earlier, it is debatable whether the UIGEA’s fantasy sports carve-out provision is even applicable to *daily* fantasy sports. Representative Leach said, “There is no credible way fantasy sports betting can be described as not gambling” and “[o]nly a sophist can make such a claim.”²⁰⁸

Admittedly, prosecutors seeking to bring UIGEA violations against DFS operators face an obstacle in that the Internet gambling at issue must be *unlawful*.²⁰⁹ Merely using the Internet to gamble does not in and of itself constitute a violation. “Unlawful Internet gambling” is defined in § 5362 as:

[P]lac[ing], receiv[ing] or otherwise knowingly transmit[ing] a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law . . . in which the bet or wager is initiated, received, or otherwise made.²¹⁰

However, given the rash of recent memoranda and opinions issued by state attorneys general, federal prosecutors should have an abundance of state-level gambling violations to cite should they choose to charge DFS operators with UIGEA violations.²¹¹

B. THE INTERSTATE WIRE ACT

At the behest of Attorney General Robert F. Kennedy, Congress passed the Wire Act²¹² in 1961 to combat bookmaking operations related to organized crime.²¹³ In addition to assisting the various states in enforcing their gambling laws and suppressing organized gambling activities, the Wire Act provides a basis for independent federal action.²¹⁴ Subsection

206. Tim Dahlberg, *Author of anti-gambling law says “sheerchutzpah” for daily fantasy sites to claim legitimacy*, US NEWS (Oct. 12, 2015, 6:24 PM), <http://www.usnews.com/news/sports/articles/2015/10/12/former-congressman-says-dfs-is-cauldron-of-daily-betting> [https://perma.cc/EDZ8-PU2Y].

207. *Id.* (referring to 31 U.S.C. § 5364 which gave the Secretary of the Treasury and the Board of Governors of the Federal Reserve System nine months to create policies and procedures requiring certain payment systems operators to identify and prevent restricted transactions). See 31 U.S.C. § 5364(a)-(b) (2016).

208. Dahlberg, *supra* note 206.

209. See 31 U.S.C. § 5363 (2016).

210. 31 U.S.C. § 5362(10)(A) (2016). The UIGEA defines a bet or wager as “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.” 31 U.S.C. § 5362(1)(A) (2016).

211. See *e.g.*, Ill. Att’y Gen. Op., *supra* note 61, at 13; Nev. Att’y Gen. Memo, *supra* note 26, at 8–17; N.Y. Att’y Gen. Cease and Desist Notice, *supra* note 61.

212. Wire Act, 18 U.S.C. §1084 (1961).

213. Peter J. Henning, *The Paths for an Investigation of Fantasy Sports*, N.Y. TIMES (Oct. 19, 2015), http://www.nytimes.com/2015/10/20/business/dealbook/the-paths-for-an-investigation-of-fantasy-sports.html?_r=0 [https://perma.cc/GBU5-D4DB].

214. See *Martin v. United States*, 389 F.2d 895, 898 (5th Cir. 1968).

(a) provides:

Whoever being engaged in the business of *betting or wagering* knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any *sporting event or contest*, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.²¹⁵

Courts have extended the Wire Act to encompass the Internet.²¹⁶ The applicability of the Wire Act as a means for prosecution of DFS operators turns on two determinations. First, DFS contest entry fees must be classified as bets or wagers. Second, DFS play must be considered sports betting because in late 2011, the Department of Justice released a memorandum which reversed its previous position that the Wire Act applied to both sports and non-sports betting alike, and now holds that the Wire Act applies only to sports betting.²¹⁷ The Fifth Circuit reached a similar conclusion in 2002, in *In re MasterCard Intern. Inc.*, when it held that the “plain language and legislative history of the Wire Act made its application to sports betting abundantly clear.”²¹⁸ As discussed in Part III, this author predicts that courts will conclude that entry fees constitute bets or wagers and that courts would deem the contests at issue as sporting events.

Subsection (b) of the Wire Act contains a safe-harbor provision, but this provision is most likely inapplicable to DFS as it applies only to the transmission of *information assisting* in placing bets or wagers that originate and terminate in states where such betting is legal, as opposed to the actual bets or wagers themselves.²¹⁹

C. THE ILLEGAL GAMBLING BUSINESS ACT

The Illegal Gambling Business Act of 1970 was enacted as part of the broader Organized Crime Control Act of 1970 and it criminalized *illegal* gambling businesses at the federal level.²²⁰ An *illegal* gambling business is one that (1) violates the laws of a State in which it is conducted; (2) involves five or more persons in the business; and (3) “remains in substantially continuous operation for a period in excess of thirty days or has a

215. 18 U.S.C. § 1084(a) (emphasis added). A “wire communication facility” is defined as “any and all instrumentalities, personnel, and services . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.” *Id.* at § 1081.

216. See generally *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 68 (2d Cir. 2001).

217. Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, 29 Las Vegas Center for Gaming Research, Occasional Paper Series (2014) at 6–7.

218. 313 F.3d 257, 262–63 (5th Cir. 2002); Minton, *supra* note 217, at 6–7.

219. See 18 U.S.C. § 1084(b) (1961).

220. See Illegal Gambling Business Act, 18 U.S.C. § 1955 (1970).

gross revenue of \$2,000 in any single day.”²²¹ Similar to the UIGEA, the ability for federal prosecutors to prosecute DFS operators for violations of the IGBA hinges on first finding a predicate violation of a state-level gambling law. As one commentator explains, “[E]ven with the exemption for fantasy sports in the UIGEA, DFS operators who operate in states where DFS has been determined to violate state gambling laws . . . could be charged by a federal prosecutor with violating the IGBA.”²²² The IGBA thus provides another avenue for federal prosecution.

V. CONCLUSION

The purpose of this comment is to argue that DFS contests likely constitute illegal gambling based on existing state and federal law and not to argue that DFS should be unlawful on account of policy reasons. If outlawed, DFS proponents could point out the fallacy that many states explicitly sanction gambling in the form of state-run lotteries. Returning to the analogy of a skill versus chance spectrum, it seems paradoxical that 100% chance-based, state-run lottery games could be legal, but not DFS contests (conceding that at least some element of skill is present in DFS). It would thus be logical to rationalize that states should be allowed to permit partially skill-based DFS contests if they are allowed to permit pure-chance based contests. Or similarly, that states should be allowed to permit DFS contests if they are allowed to permit on-site gambling at casinos and horse tracks.

However, several factors distinguish DFS from existing forms of legal gambling, which merit either an outright federal ban or federal regulation (assuming PASPA is first repealed). First, because the Internet is the medium for the gambling, DFS participants have near constant access to the means with which to gamble, as opposed to the physical presence required with brick and mortar casinos. The “gamble from your bedroom” option heightens the challenge for gambling addicts fighting the compulsive urge to gamble. Second, DFS’s use of the Internet reduces the ability of DFS operators to prevent minors from entering contests. Third, if the statistics that indicate that most DFS contests are won by the same small subset of participants is true, then there are fundamental issues of unfairness present in DFS not found in pure chance games like in state lotteries. Lastly, leaving it up to the states to regulate DFS would likely result in wide disparities between the levels of consumer protection offered in the various states. While some states might opt to ban the games outright, others might implement strict regulatory laws. But with the Internet as the gambling medium, there is the potential for either participants or operators to circumvent the laws of DFS unfriendly states. As noted earlier, the FBI is investigating whether DraftKings encouraged and accepted bets from participants in states where DFS is prohibited.²²³ Perhaps fu-

221. *Id.* at § 1955(b)(1)(i)-(iii).

222. Moore, *supra* note 181.

223. See Drape & Williams, *Fantasy Sports Said to Attract FBI Scrutiny*, *supra* note 53.

ture commentators will explore whether DFS's nexus with the Internet preempts states from regulating DFS under the Dormant Commerce Clause.

If the future of DFS is legalization and regulation, then regulation should encompass robust consumer protections. Gambling in a casino does not limit oneself to binding arbitration, but gambling in online DFS does.²²⁴ Is the DFS industry one where we really want people to waive their right to sue directly? Today, the worst punishment an employee who violates DraftKings's policy not to compete on competitors' DFS websites faces is termination. But consider the consequences an investment banker would face if they used proprietary or inside information to make personal trades. There are certainly parallels between insider trading and using non-publicly available player ownership percentages. Civil and criminal sanctions are needed to ensure fairness and transparency between DFS operators and players. One also has to wonder whether the Fantasy Sports Control Agency will be effective, and if the industry should even be allowed to regulate itself. Imagine the outcry if accounting firms or investment banks were allowed to band together to establish their own non-governmental regulatory agencies. Lastly, we should ask ourselves if we are comfortable with an industry where skilled players are arguably allowed to exploit advantages over regular players. As a multi-billion dollar industry, encompassing strong negative externalities, the nature of DFS demands that a single, cohesive legal solution is needed—and that solution is best provided by the federal government.

224. See Phillips, *supra* note 49.