

**REGULATION IS CRUCIAL FOR DAILY FANTASY SPORTS:
WHY ILLINOIS’S PROPOSED BILL IS ONE THE STATES
SHOULD FOLLOW**

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INTRODUCTION

Sunday: a day of importance for many different reasons. For some individuals, Sunday is a day of religious worship. For others, it represents “Sunday dinner” with family members. But for over 57.4 million individuals,¹ Sunday signifies one thing: fantasy sports. While traditional, season-long fantasy sports have been popular for over two decades, many individuals have retired from the games because they do not have the time to commit themselves to an entire fantasy season.² Cue daily fantasy sports—the increasingly appealing spin on traditional fantasy sports that only lasts twenty-four hours and offers instant gratification.³ Why wait *months* until the end of the season to find out if your fantasy team is victorious when you can claim your prize that same night? The daily fantasy sports industry is thriving and shows little sign of stopping.⁴ As the popularity of the daily fantasy sports industry continues to explode, however, so do the concerns about the legality of these games. Due to the short time frame, entry fees, astronomical cash prizes, and undeniable element of chance involved in daily fantasy sports, the line between daily fantasy sports and illegal gambling is blurred.⁵ As a result, several states have conducted

1. *Industry Demographics: Actionable Insights and Insightful Data*, FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> (last visited Dec. 2, 2016).

2. *Daily Fantasy Sports: A Complete Guide*, GAMBLING SITES (Dec. 10, 2016), <http://www.gamblingsites.org/daily-fantasy-sports/>.

3. See Joshua Brustein, *Fantasy Sports and Gambling: Line Is Blurred*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?pagewanted=all&r=4&>.

4. See Peter Spier, *Fantasy or Nightmare?: The Rapid Emergence of Daily Fantasy Sports and the Uncertain Legal Landscape Ahead*, GOULD + RATNER, GR REV. 2015, at 5 (2015), <http://www.gouldratner.com/wp-content/uploads/2016/02/Daily-Fantasy-Sports-2015.pdf> (“The explosive growth of the industry is perhaps best demonstrated by the fact that . . . FanDuel and DraftKings . . . have recently raised capital valuing the company in excess of \$1 Billion.”).

5. Under the common law, a contest is an illegal lottery if it consists of “(1) the distribution of prizes, (2) according to chance, (3) for a consideration.” *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 494 (N.J. 1955). Daily fantasy sports typically involve an entry fee, which is consideration, and the top players win cash prizes. Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79, 96 (2015). Therefore, whether daily fantasy sports are a form of illegal gambling depends

investigations into the games and concluded that daily fantasy sports are indeed illegal gambling.⁶ This Note will examine the legal issues and hurdles that the daily fantasy sports industry has faced within the last year and will continue to face in the future. Part II provides a brief history of fantasy sports, while Part III discusses both traditional and daily fantasy sports and the differences between the two types of games. Part IV of this Note reviews the federal laws that affect fantasy sports. Part V examines the “skill vs. chance” argument that typically determines whether fantasy sports constitute illegal gambling within a state, as well as how certain states have recently reacted to daily fantasy sports. Finally, Part VI discusses specific bills that states have proposed to regulate daily fantasy sports, as well as recommendations for regulation in the future, followed by a brief conclusion in Part VII. Ultimately, this Note proposes that regulations similar to Illinois’ “Fantasy Contests Act” be adopted across the states because it protects consumers while allowing a rapidly growing industry to continue to flourish.

I. HISTORY OF FANTASY SPORTS

It all began in 1962 when Wilfred “Bill” Winkenbach and a few others from the Oakland Raiders organization were sitting in the Milford Plaza Hotel in Manhattan.⁷ Winkenbach, who had been involved in his own fantasy baseball league for some time, brought up the idea of a fantasy football league to sportswriter Scotty Stirling and public relations official Bill Tunnell.⁸ Essentially, Winkenbach was interested in creating their own football league based on actual player performances, in which they were each team owners.⁹ Immediately intrigued by the idea, Stirling and Tunnell helped Winkenbach form the first fantasy football league, known as the Greater Oakland Professional Pigskin Prognosticators League (“GOPPPL”).¹⁰ The first ever fantasy football draft occurred in 1963 in Winkenbach’s

on whether they are games of chance. *Id.* For a discussion of the “games of skill vs. chance” argument, see *infra* Part V.

6. See Jason M. Breslow et al., *Is It Gambling? How States View Daily Fantasy Sports*, PBS FRONTLINE (Feb. 8, 2016), <http://www.pbs.org/wgbh/frontline/article/is-it-gambling-how-states-view-daily-fantasy-sports/>.

7. Nico Newman, *History of Fantasy Sports*, FANTASY-SPORT.NET (Nov. 4, 2015), <https://fantasy-sport.net/history-of-fantasy-sports/>.

8. *Id.*

9. *Id.*

10. *Id.*

basement.¹¹ Without the Internet at their fingertips, the participants had to rely on newspapers and other sources for player statistics.¹² Specifically, a member of the league had to collect the data and statistics for all of the players by hand—a time-consuming task that required a great deal of effort.¹³

In 1969, fantasy football took a monumental step forward. Andy Mousalimas, a member of the GOPPPL, created the first public fantasy football league which was open to patrons of his Oakland bar, Kings X.¹⁴ On Friday nights, patrons filled the bar and scrambled to submit their weekend lineups before midnight.¹⁵ On Sundays, the bar was packed with patrons watching football games, and on Mondays, football fans once again fled to Kings X to catch a glimpse of the leaderboards that were posted around lunchtime.¹⁶ People traveled from San Francisco and Los Angeles to experience fantasy football at Kings X, and soon Mousalimas was forced to hire additional staff to accommodate the bar's popularity.¹⁷ As fantasy football began to grow, so did other fantasy sports. In 1980, sportswriter Daniel Okrent was exposed to a competition between his professors in which they would each draft a team of professional baseball players, contribute a specific amount of money, and "whoever's . . . players performed the best in a particular statistical category won the money for that statistic."¹⁸ Attracted to the idea, Okrent discussed it with friends while sitting in a Manhattan restaurant called La Rotisserie Francaise.¹⁹ Shortly after this discussion came the creation of "Rotisserie baseball," named after the restaurant where it all began.²⁰ In this Rotisserie scoring system, participants drafted a team from a list of Major League Baseball

11. *Id.* The league consisted of eight teams, each with one owner and one coach, which were largely composed of Oakland Raiders sportswriters, staff, and Winkenbach's friends. *Id.* Oakland Raiders quarterback George Blanda was the first ever fantasy football pick. *Id.*

12. Patrick Hruby, *The Founding Fathers of Fantasy*, SPORTS ON EARTH (Dec. 2, 2013), <http://www.sportsonearth.com/article/64244480/the-founding-fathers-of-fantasy>.

13. Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS L. J. 21, 23 (2001).

14. Newman, *supra* note 7.

15. Hruby, *supra* note 12.

16. *Id.*

17. *Id.*

18. Thompson, *supra* note 13, at 22.

19. *Id.*

20. *Id.*

players and tracked their statistics in eight different categories throughout the season.²¹

Not long after the first draft, the *New York Times*, sportswriters, and Okrent himself wrote articles detailing how the game worked.²² These articles quickly spread the word about this new phenomenon and attracted many more baseball-loving participants.²³ Over the next several years, more and more publications about fantasy sports were circulated, and by 1989, over one million people were playing fantasy football *alone*.²⁴ The Internet boom in the late 1990s had perhaps the largest impact on fantasy sports.²⁵ As information became readily available on the Internet, the time-consuming task of consulting newspapers and other sources to obtain player statistics was eliminated.²⁶ Additionally, because individual players could now go online and compete against other players that were in different states, the Internet allowed more players to participate in the game.²⁷ In July of 1999, Yahoo began to offer online fantasy sports for no charge.²⁸ That same year, the Fantasy Sports Trade Association (“FSTA”)—a governing body for fantasy sports—was founded.²⁹ Over the next decade, popularity of the games continued to grow as several other fantasy sports operators emerged and legislation legalizing fantasy sports was enacted.³⁰ It was not until January of 2009 that the largest daily fantasy sports operator, FanDuel,³¹ was founded.³² Subsequently, in January of 2012, the second largest daily fantasy sports platform,

21. *Id.* at 23. The categories included batting average, home runs, runs batted in, stolen bases, earned run average, wins, saves, and ratio. *Id.* at 23 n.8.

22. *Id.* Okrent also wrote a how-to-play guidebook titled “Rotisserie League Baseball” that he published in 1984. *Id.* See generally DANIEL OKRENT, ROTISSERIE LEAGUE BASEBALL (1984).

23. Thompson, *supra* note 13, at 23.

24. Newman, *supra* note 7.

25. *Id.*

26. Thompson, *supra* note 13, at 23.

27. *Id.* at 23–24. Before the Internet, people were only able to play against players in the same room. *Id.*

28. *Daily Fantasy Sports USA*, PLAYING LEGAL, <https://playinglegal.com/fantasy-sports> (last visited Dec. 2, 2016).

29. *Id.*

30. *The Evolution of the Daily Fantasy Sports Industry*, ROTOGRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited Dec. 2, 2016). For a discussion of the Unlawful Internet Gambling Enforcement Act, see *infra* Part IV.

31. FANDUEL, <https://www.fanduel.com> (last visited Dec. 2, 2016).

32. *The Evolution of the Daily Fantasy Sports Industry*, *supra* note 30. On December 5, 2010, the first live final event in daily fantasy sports history—the FanDuel Fantasy Football Championship (“FFFC”)—was held in Las Vegas. *Id.*

DraftKings,³³ was launched.³⁴ The year of 2014 was a big year for FanDuel and DraftKings: FanDuel became an official partner of the National Basketball Association (NBA), and DraftKings became an official partner of Major League Baseball (MLB), National Hockey League (NHL), and Ultimate Fighting Championship (UFC).³⁵ In 2015, the two companies “spent more than a combined \$200 million on advertising,”³⁶ making it impossible to turn on the television without seeing a DraftKings or FanDuel commercial. The end of 2015, however, brought several challenges to the gaming sites, which will be discussed below. Due to the “lengthy legal battles” the companies endured over the last year, DraftKings and FanDuel announced on November 18, 2016 that they will merge by the close of the next year.³⁷

II. FANTASY SPORTS TODAY³⁸

A. Statistics

As of 2016, approximately 57.4 million people play fantasy sports in the United States and Canada.³⁹ That is an astonishing 37% increase from 2014 and a 58% increase from 2013.⁴⁰ These 57.4 million fantasy sports participants are comprised of approximately 66% males and 34% females, with an overwhelming majority favoring fantasy football.⁴¹ Moreover, approximately 70% of fantasy sports players pay a league fee, and the average annual spending per fantasy player is about

33. DRAFTKINGS, <https://www.draftkings.com> (last visited Dec. 2, 2016).

34. *The Evolution of the Daily Fantasy Sports Industry*, *supra* note 30. In 2014, DraftKings acquired DraftStreet—another daily fantasy sports site that launched in 2010—effectively “combining the second and third largest [daily fantasy sports] sites.” *Id.*

35. *Id.*

36. Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES MAG. (Jan. 6, 2016), http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0.

37. A.J. Perez & Eli Blumenthal, *Daily Fantasy Sites DraftKings, FanDuel Announce Merger*, USA TODAY (Nov. 18, 2016), <http://www.usatoday.com/story/sports/fantasy/2016/11/18/draftkings-fanduel-merger/94067032/>.

38. See Jim McCormick, *So You Want to Play Fantasy Football?*, ESPN (July 9, 2010), <http://sports.espn.go.com/fantasy/football/ffl/story?page=nfldk2k10howtoplay> (“While the actual players risk life and limb for extra yards, we risk ego, pride and semi-public humiliation for fantasy glory.”).

39. *Numbers at a Glance*, FANTASY SPORTS TRADE ASS’N, <http://fsta.org/research/industry-demographics/> (last visited Dec. 2, 2016). Remarkably, approximately 20% of the United States population and 17% of Canada’s population play fantasy sports. *Id.*

40. *Id.*

41. *Id.*

\$556.⁴² Not only do a large number of people play fantasy sports, but those involved claim to be more interested in sports in general as a result of playing.⁴³

B. So, How Exactly Do Fantasy Sports Work?

Take fantasy football for example. Fantasy players are essentially the “owners,” or “managers,” of a team who accumulate “fantasy points” based on the real statistics of real professional football players.⁴⁴ The season officially kicks off on draft day—a cherished and highly anticipated day for the majority of fantasy players.⁴⁵ For some, however, the fantasy season begins long before the draft.⁴⁶ Skilled fantasy players pay meticulous attention to the player transactions professional teams make during the off-season, such as drafted players, player trades, free agent signings, and player injuries.⁴⁷ This “requires a great deal of time and effort and ‘is not unlike the process that general managers of major league teams must undertake in accessing player talent and constructing a team that maximizes the talent within a given payroll.’”⁴⁸ After drafting players for the season,⁴⁹ the owner of

42. *Id.* In 2012, the average annual spending per fantasy player was about \$80. *Id.*

43. *Id.* Specifically, 64% of fantasy players report watching more live sports and 61% claim that they read more about sports because of fantasy. *Id.*

44. McCormick, *supra* note 38. As the name “fantasy sports” suggests, these “fans get to live out their [fantasy] of owning and managing their own teams.” Brad Reagan, *A Fantasy Sports Wizard’s Winning Formula*, WALL ST. J. (June 4, 2014), <http://www.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587>.

45. In fact, draft day is considered a holiday for many fantasy players. McCormick, *supra* note 38. The most common type of draft is known as the “snake” draft, where each team draws a random number that determines their position in the draft’s first round. Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 207 (2014). In the second round, the teams flip positions and continue to flip each round for the remainder of the draft. *Id.* In other words, the positions “snake” back and forth. *Id.* The second type of draft is similar to an auction, where each player starts with a specific budget and bids on players until their roster is complete or they run out of spending money. *Id.*

46. Trippiedi, *supra* note 45, at 207.

47. *Id.*

48. Ehrman, *supra* note 5, at 103 (quoting Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1208 (2007)).

49. A typical fantasy football roster consists of thirteen players. *What Is Fantasy Football?* REALTIME FANTASY SPORTS, <http://www.rtsports.com/what-is-fantasy-football> (last visited Dec. 2, 2016). Eight of the thirteen spots make up the team’s starters, which include a quarterback, two running backs, two receivers, a tight end, a kicker, and an

the team must decide which players to start and which players to bench⁵⁰ each week.⁵¹ Like the pre-draft preparation, managing one's team on a weekly basis requires time, effort, and planning. For example, professional football players will inevitably sustain injuries throughout the season, and sometimes the most coveted players that were picked in the first few rounds of the draft may not live up to the fantasy owners' high expectations.⁵² Similarly, players who were not picked in the draft may have a surprisingly successful season, suddenly making them desirable to fantasy team owners.⁵³ To keep up with the unpredictable nature of the season, owners must constantly remain informed about which players other owners in the league are "picking up" or trading and which minor league players may be brought up to the big leagues.⁵⁴ Once the season begins, two fantasy teams are matched against each other every week.⁵⁵ When an owner's starting players score points in the actual NFL game, he or she accumulates fantasy points for their team.⁵⁶ Depending on the league, a fantasy owner can earn points for both passing yards and rushing yards.⁵⁷ Additionally, like in a real NFL game, a fantasy team's kicker gains points by kicking field goals and extra points.⁵⁸ Additionally, a team's defense accumulates points for "sacks, interceptions, fumble recoveries, points allowed and touchdowns scored."⁵⁹

Ultimately,

[t]he success of a fantasy sports team depends on the participant's skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the seasons and deciding

NFL team's entire defense. *Id.* The remaining five spots in the roster are "bench spots." *Id.*

50. Players who are "benched" are those who are not selected to play in the game. See McCormick, *supra* note 38.

51. *Id.*

52. Trippiedi, *supra* note 45, at 207.

53. *Id.*

54. *Id.* at 207-08.

55. *What Is Fantasy Football?*, *supra* note 49.

56. *Id.*

57. *Id.* "Some [fantasy] leagues reward points for touchdowns only," while some leagues also "reward players for yards gained" (i.e., rushing and passing yards) by running backs, receivers, tight ends, or quarterbacks. *Id.* For example, a specific league may reward a fantasy owner with "[one] point for every 20 yards gained, receiving or rushing." *Id.*

58. *Id.*

59. *Id.*

who among his or her players will start and which players will be placed on the bench.⁶⁰

At the end of the season, “[t]he team with the best performance—based upon the statistics of the players chosen by the participant—is declared the winner.”⁶¹

1. How Are Daily Fantasy Sports Different from Traditional Fantasy Sports?

Although many people participate in traditional fantasy sports, some individuals simply do not have the time to commit themselves to these games. The typical fantasy league continues throughout the entirety of the particular sport’s season,⁶² and the lengthy commitment to these leagues can sometimes be too difficult to maintain in addition to work, family, and other obligations.⁶³ In response to this problem, the fantasy industry created daily fantasy sports—a rapidly growing phenomenon that was responsible for \$492 million in annual spending as of 2013.⁶⁴ To date, DraftKings and FanDuel—the leaders of the daily fantasy sports industry—have awarded over \$1 million a week to their users.⁶⁵ Similar to traditional fantasy sports, daily fantasy sports players build a team of professional athletes while staying within the designated salary cap⁶⁶ and accumulate points based on how their

60. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *2 (D.N.J. June 20, 2007).

61. *Id.*

62. Pras Subramanian, *5 Surprising Stats About Fantasy Sports*, YAHOO! FIN. (Sept. 4, 2013), <http://finance.yahoo.com/blogs/breakout/5-surprising-stats-fantasy-sports-154356461.html>. For example, the average fantasy football season spans about five months, while fantasy baseball or basketball seasons last six months. *Id.*

63. *Id.*

64. Brustein, *supra* note 3. Todd Eilers, CEO of Eilers Research, estimated “that daily games will generate around \$2.6 billion in entry fees [in 2015] and grow 41% annually, reaching \$14.4 billion in 2020.” Darren Heitner, *The Hyper Growth of Daily Fantasy Sports Is Going to Change Our Culture and Our Laws*, FORBES (Sept. 16, 2015), <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/#7ad741fd5f25>.

65. Zack Hall, *FanDuel vs DraftKings – Who’s Number 1 in Daily Fantasy?*, Legal Sports Rep. (Aug. 18, 2016), <http://www.legalsportsreport.com/3832/fanduel-or-draftkings/>.

66. Most daily fantasy leagues use a “salary cap structured drafting system” in which each professional athlete is assigned a specific price. Trippiedi, *supra* note 45, at 209. Daily fantasy players have the opportunity to draft any professional athlete as long as their team’s total salary stays within the designated salary cap. *Id.* Although this type of draft appears similar to the less popular auction-style draft in traditional fantasy sports,

chosen athletes perform.⁶⁷ Unlike traditional fantasy sports, however, daily fantasy sports typically only last one day.⁶⁸ Essentially, daily fantasy sports contests are determined by one factor—“who can pick the best players for a single night’s worth of games.”⁶⁹ Unlike traditional fantasy sports players who have to wait until the end of the season to know the outcome, daily fantasy players know the outcome by the time they go to sleep that night.⁷⁰

Another difference between traditional and daily fantasy sports is the people one competes against.⁷¹ In traditional fantasy sports, participants compete against other teams in their own league.⁷² On the other hand, daily fantasy sports offer a variety of different game options. In some, you may be competing against a single player, and in others, you may be competing against thousands of players.⁷³ One type of game daily fantasy players can participate in is the basic “head-to-head” game. As the name suggests, a fantasy player plays “against one opponent in a winner take all league where the team with the highest fantasy point total will win the entire prize pool.”⁷⁴ Another type of daily fantasy game is the “Double up,” or “50/50” game. Similar to head-to-head games, the concept of Double up and 50/50 is simple—the “top half of the league will win and the bottom half of the league will lose.”⁷⁵

daily fantasy players do not truly participate in an auction because they can draft the same athletes as another player. *Id.*

67. *How It Works*, FANDUEL, <https://www.fanduel.com/how-it-works> (last visited Dec. 2, 2016).

68. Jonathan Bales, *Here’s What It Takes to Make a Living Playing Fantasy Sports*, BUS. INSIDER (Nov. 6, 2013) [hereinafter Bales, *What It Takes*], <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11#ixzz2kU0ZUwd1>. While most leagues only last one day, daily fantasy sports players can also participate in weeklong contests. See FANDUEL, <https://www.fanduel.com> (last visited Dec. 2, 2016).

69. Reagan, *supra* note 44.

70. *Id.*; see also Heitner, *supra* note 64.

71. Ehrman, *supra* note 5, at 86.

72. *Id.*

73. *Id.*

74. Derek Farnsworth, *Basic Head to Head Strategy*, ROTOGRINDERS: ROTOACADEMY, <https://rotogrinders.com/lessons/basic-head-to-head-strategy-174280> (last visited Dec. 2, 2016); see also *Frequently Asked Questions*, DRAFTKINGS, <https://www.draftkings.com/help/faq> (last visited Dec. 2, 2016) (follow “Basics” hyperlink; then follow “What Types of Contests Do You Offer?” hyperlink).

75. Derek Farnsworth, *Basic 50/50 and Double-Up Strategy*, ROTOGRINDERS: ROTOACADEMY, <https://rotogrinders.com/lessons/basic-50-50-and-double-up-strategy-174233> (last visited Dec. 2, 2016). A typical “Double-up” or “50/50” game ranges from 10 to 200 entries. *Id.* If a player finishes in the top 50% of the contest, he will get paid, while the bottom 50% of players lose their entry fee. *Id.* Interestingly, each fantasy player in the

Finally, the Guaranteed Prize Pool (“GPP”) games are perhaps the most enticing and competitive daily fantasy sports games. GPPs are large field events that allow participants to submit multiple entries, and only the top participants win a prize.⁷⁶ Although “GPPs involve a higher degree of risk, the potential payouts reflect the risk involved.”⁷⁷

Additionally, daily fantasy sports generally do not require the same amount of time and effort that traditional, season-long fantasy sports do because daily players do not have to “micromanage their team’s roster over the course of an entire season.”⁷⁸ For example, if an athlete gets injured or performs poorly, the traditional fantasy player’s season may be ruined if that athlete is on their roster.⁷⁹ These injuries or poor performances do not have the same crippling effect on a daily fantasy player, who can simply create a new roster the following week.⁸⁰ Another difference between traditional and daily fantasy leagues is the amount of money a player can win. Many traditional fantasy leagues have a relatively small monetary prize, and that prize is typically distributed amongst multiple people.⁸¹ For example, a fantasy football league comprised of ten teams may require each team to contribute \$50 to play, resulting in a total prize of \$500 to the winner.⁸² That \$500, however, may be distributed accordingly to first, second, and third place.⁸³ Therefore, a prize of \$100 is equivalent to approximately “\$6.25 per week” over the course of the sixteen-week fantasy football season.⁸⁴ In daily fantasy sports, however, the amount of money a player can win is essentially “infinite.”⁸⁵ Even more appealing, these large sums of money can be won within twenty-four hours, as opposed to four to seven months in a traditional league.⁸⁶

top-half of the contest wins the same amount of money, regardless of the cost of the entry fee. *Id.*

76. Ehrman, *supra* note 5, at 86.

77. *Id.* Today, some large GPP contests offer a \$1,000,000 prize to the first-place finisher. *Id.*; see also Peter Jennings, *Basic Daily Fantasy Tournament Strategy (GPP)*, ROTOGRINDERS: ROTOACADEMY, <https://rotogrinders.com/lessons/basic-daily-fantasy-tournament-strategy-gpp-174281> (last visited Dec. 2, 2016).

78. Trippiedi, *supra* note 45, at 208; see also Bales, *What It Takes*, *supra* note 68.

79. Trippiedi, *supra* note 45, at 209.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*; see also Reagan, *supra* note 44 (“Given that the seasons for professional sports leagues last anywhere from four to seven months, the payout on an hourly basis for the average fantasy league doesn’t even come close to the minimum wage.”).

85. See Trippiedi, *supra* note 45, at 210.

86. *Id.*

III. FEDERAL LAW

Gambling has long been considered a harmful activity with many negative consequences, including “increased crime rates, economic loss, and erosion of morality.”⁸⁷ Opponents of gambling believe that gambling increases organized crime, illegal profit laundering, and the “incidence of crimes that result from compulsive gambling behavior.”⁸⁸ Additionally, opponents argue that gambling results in economic loss not only due to the “societal costs of gambling addiction,” but also because the “redistribution of discretionary spending from local business to gambling operators may harm the community.”⁸⁹ Moreover, opponents maintain that increased legalization of gambling leads to new gamblers, which leads to an “increase in compulsive gambling.”⁹⁰ Specifically, opponents of gambling are concerned that youths will be attracted to the activity, and early exposure to gambling will lead to a higher “risk of addiction.”⁹¹ Because of the various consequences associated with gambling, several federal laws have been enacted to prevent some of these harms from occurring. The transmission of gambling information in interstate or foreign commerce is prohibited by numerous federal statutes, including the Federal Wire Act of 1961 (“Wire Act”),⁹² the Travel Act,⁹³ and the Interstate Transportation of Wagering Paraphernalia Act.⁹⁴ In addition, gambling is generally prohibited under the Illegal Gambling Business Act.⁹⁵ In 1992, sports gambling was prohibited by the Professional and Amateur Sports Protection Act (“PASPA”).⁹⁶ PASPA, however, made no mention of fantasy sports. It was not until 2006—when the Unlawful Internet Gambling Enforcement Act (“UIGEA”)⁹⁷ was passed—that the phenomenon of fantasy sports was addressed under federal law.

87. Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 221 (2002) (quoting Ronald J. Rychlak, *The Introduction of Casino Gambling: Public Policy and the Law*, 64 MISS. L.J. 291, 346 (1995)).

88. *Id.* at 22. Opponents argue that “legalized gambling creates ‘problem gamblers’ who ‘turn to more serious criminal activity to support their habits.’” *Id.*

89. Davidson, *supra* note 87, at 223–24.

90. *Id.* at 224.

91. *Id.*

92. 18 U.S.C. § 1084 (2012).

93. *Id.* § 1952.

94. *Id.* § 1953.

95. *Id.* § 1955.

96. 28 U.S.C. § 3702 (2012).

97. 31 U.S.C. § 5362 (2012).

A. *The Wire Act*

To create a federal ban against gambling through interstate commerce⁹⁸ and assist states in enforcing gambling laws, Congress enacted the Wire Act.⁹⁹ Under the Act, individuals are prohibited from “[engaging] in the business of betting or wagering [and] knowingly [using] 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.”¹⁰⁰ Although the Internet was not yet invented at the time the Wire Act was drafted, several subsequent cases have held that the Internet constitutes a “wire communication facility.”¹⁰¹ While it is undisputed that some fantasy sports are played on the Internet,¹⁰² the question is whether the games constitute “betting” or “wagering.”¹⁰³ The Wire Act does not define these terms, but a “bet” has been defined as “[s]omething ([especially] money) staked or pledged as a wager,” and a “wager” has been defined as “money or other consideration risked on an uncertain event.”¹⁰⁴ Therefore, the “legality of fantasy sports . . . depends on whether [the games are] . . . considered a game of skill or a game of chance.”¹⁰⁵

B. *The Travel Act*

Enacted the same year as the Wire Act, the Travel Act penalizes anyone who

98. Congress derives its power “[t]o regulate Commerce . . . among the several States” under the Interstate Commerce Clause. U.S. CONST. art. I, § 8, cl. 3.

99. Ehrman, *supra* note 5, at 89.

100. 18 U.S.C. § 1084(a). This statute defines “wire communication facility” as “any and all instrumentalities, personnel, and services (among other things, the receipt, forwarding, or delivery of communications) 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.* § 1081.

101. *See United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014); *United States v. Cohen*, 260 F.3d 68, 76 (2d Cir. 2001).

102. While the majority of fantasy sports leagues are played on the Internet, some leagues—such as those that are played with groups of friends or coworkers—may use other types of “wire communication facilities,” such as email or the telephone. Thompson, *supra* note 13, at 31. Regardless of the type of “wire communication facility” the leagues use, they are still at risk of violating the Wire Act. *See id.*

103. Aaron Levy, Note, *A Risky Bet: The Future of Pay-to-Play Online Fantasy Sports*, 39 CONN. L. REV. 325, 335 (2006).

104. *Id.*

105. *Id.*

travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to: (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.¹⁰⁶

Under the Travel Act, “unlawful activity” includes “any business enterprise involving gambling.”¹⁰⁷ Similar to the Wire Act’s failure to define “betting” or “wagering,” the Travel Act does not define “gambling.”¹⁰⁸ As discussed above, it is clear that the majority of fantasy sports leagues use a “facility in interstate or foreign commerce”: the Internet. In the fantasy sports context, the question in determining whether the popular games violate the Travel Act is simple—do fantasy sports constitute gambling?¹⁰⁹ If so, fantasy sports could be brought to a “screeching halt.”¹¹⁰

C. *The Interstate Transportation of Wagering Paraphernalia Act*

The Interstate Transportation of Wagering Paraphernalia Act (“Paraphernalia Act”), signed in 1961, was created to eliminate illegal gambling by “[erecting] a substantial barrier to the distribution of certain materials used in the conduct of various forms of illegal gambling.”¹¹¹ Specifically, the Paraphernalia Act prohibits “[sending] in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used [in] . . . wagering pools with respect to a sporting event.”¹¹²

106. 18 U.S.C. § 1952(a) (2012).

107. *Id.* § 1952(b).

108. *See id.*

109. Thompson, *supra* note 13, at 32.

110. *Id.*

111. Levy, *supra* note 103, at 337; *see also* Erlenbaugh v. United States, 409 U.S. 239, 246 (1972) (“By interdicting the flow of these materials to and between illegal gambling businesses, the statute purposefully seeks to impede the operation of such businesses.”).

112. 18 U.S.C. § 1953(a). The Act provides:

Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined under this title or imprisoned for not more than five years or both.

While “a ban on Internet fantasy sports sites, computer software, and specialty magazines would not lead to the demise of fantasy sports leagues, such a ban would present a substantial barrier and impede the operation of fantasy sports leagues.”¹¹³ Despite the broad language of the Paraphernalia Act, fantasy sports may be protected under a few of the Act’s exemptions.¹¹⁴ First, the Act does not apply to “the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State.”¹¹⁵ Second, the Act does not apply to “the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.”¹¹⁶ Fantasy sports providers transport fantasy statistics, which are “publications containing results or predictions.”¹¹⁷ As a result, fantasy sports leagues may be exempted from the Paraphernalia Act.

D. The Illegal Gambling Business Act

In 1970, Congress passed the Illegal Gambling Business Act, which penalizes anyone who “conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business.”¹¹⁸ To constitute an “illegal gambling business” under the Act, three conditions must be satisfied: (1) “[it] is a violation of the law of a State”; (2) there are five or more people involved in the business; and (3) it has been in “continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”¹¹⁹ Given the “complexity” of internet-based fantasy sports leagues, the leagues are typically operated by five or more people, thereby satisfying the second condition of the Act.¹²⁰ While season-long fantasy leagues are unlikely to be considered the type of “high stakes illegal gambling” activity that the Illegal Gambling Business Act targets, daily fantasy sports—which are extremely lucrative ventures—may be more at risk of satisfying the third

Id.

113. Davidson, *supra* note 87, at 212.

114. *Id.*

115. 18 U.S.C. § 1953(b)(2).

116. *Id.* § 1953(b)(3).

117. Davidson, *supra* note 87, at 212–13; *see also* H.R. REP. No. 87-96 (1961); *United States v. Kelly*, 328 F.2d 227, 236–37 (6th Cir. 1964) (holding that a newspaper which almost exclusively published results from races was exempted from the Paraphernalia Act).

118. 18 U.S.C. § 1955(a).

119. *Id.* § 1955(b)(i)–(iii).

120. Ehrman, *supra* note 5, at 91.

condition.¹²¹ As a result, whether daily fantasy sports violate the Illegal Gambling Business Act depends on the legality of the games “within a given state.”¹²²

E. The Professional and Amateur Sports Protection Act

PASPA makes it unlawful for a governmental entity or person to

sponsor, operate, advertise, promote, 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 or more performances of such athletes in such games.¹²³

Although PASPA outlawed all state-authorized sports gambling, it included a grandfather clause that exempted any state that operated a sports betting scheme between 1976 and 1990.¹²⁴ This clause exempted the limited sports lotteries in Oregon and Delaware, as well as the sports pools in Nevada and Montana.¹²⁵ Additionally, PASPA provided a “one-year window” for states that operated licensed casino gambling for the last ten years to legalize sports betting, particularly for New Jersey.¹²⁶ However, New Jersey passed on this opportunity and, as a result, is prohibited from legalizing sports betting like the majority of states.¹²⁷ According to the proponents of the proposed law, PASPA would further the important goal of stopping the spreading of state-sponsored sports gambling.¹²⁸ PASPA supporter, and then-commissioner of the National Football League, Paul Tagliabue, stated:

121. *Id.*

122. *Id.*

123. 28 U.S.C. § 3702 (2012).

124. *Id.* § 3704(a)(1); see also Eric Meer, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 287 (2011).

125. Meer, *supra* note 124, at 287; see also Jeffrey Rodefer, *Professional and Amateur Sports Protection Act of 1992*, GAMBLING L. U.S., <http://www.gambling-law-us.com/Federal-Laws/sports-protection.htm> (last visited Dec. 2, 2016) (describing PASPA's effect on gambling laws within various states).

126. Rodefer, *supra* note 125, at 407.

127. See *id.*

128. S. REP. NO. 102-248, at 4 (1991). Specifically, proponents stated: “Sports gambling is a national problem. The harms it inflicts are felt beyond the borders of those States that sanction it. The moral erosion it produces cannot be limited geographically. Once a

Sports gambling threatens the character of team sports. Our games embody our very finest traditions and values. They stand for clean, healthy competition. They stand for teamwork. And they stand for success through preparation and honest effort. With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived.¹²⁹

Furthermore, supporters claimed that PASPA would protect the integrity of professional sports because the “[w]idespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think ‘the fix was in’ whenever their team failed to beat the point-spread.”¹³⁰ Not only were the law’s supporters concerned about the integrity of sports, but they were also concerned about the potential effect of legalized sports betting on America’s youth.¹³¹

F. The Unlawful Internet Gaming Enforcement Act

As the popularity of the Internet grew, Congress pushed to pass some type of legislation for online gambling.¹³² After years of unsuccessful attempts, Congress finally passed the UIGEA in 2006.¹³³ The law provides that “[n]o person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling,” any financial transaction, including credit, electronic fund transfers, checks, or any similar instrument.¹³⁴ In other words, it is a “crime for Internet betting sites to accept bets.”¹³⁵ Under the UIGEA, betting or wagering includes

staking or risking . . . 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

State legalizes sports gambling, it will be extremely difficult for other States to resist the lure.” *Id.* at 5.

129. *Id.*

130. *Id.*

131. *Id.*

132. See Trippiedi, *supra* note 45, at 213.

133. *Id.*; see 31 U.S.C. § 5363 (2012).

134. 31 U.S.C. § 5363.

135. Meer, *supra* note 124, at 292.

person will receive something of value in the event of a certain outcome.¹³⁶

However, the UIGEA carved out various exceptions to betting and wagering, including an exception for fantasy sports.¹³⁷ Specifically, participation in fantasy sports was not banned by the UIGEA so long as three conditions were met.¹³⁸ First, any prizes or awards offered to the winners must be “established and made known to the participants in advance of the game or contest,” and the value of those prizes must not be “determined by the number of participants or the amount of any fees” they pay.¹³⁹ Second, the “winning outcomes [must] reflect the . . . knowledge and skill of the participants and [must be] determined predominately by accumulated statistical results of the performance of [athletes] in multiple real-world sporting . . . events.”¹⁴⁰ Finally, the winning outcome cannot be based either “on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams” or “solely on any single performance of an individual athlete in any single real-world sporting . . . event.”¹⁴¹ The UIGEA “puts fantasy sports . . . overall in a far safer legal position than online poker, sports books, and many other types of online contests that involve both chance and skill.”¹⁴² This “carve out,” however, does not shield all forms of fantasy sports. Rather, “[e]ach fantasy game must be reviewed separately under the carve-out” and state law.¹⁴³

IV. TRADITIONAL VERSUS DAILY FANTASY SPORTS: SAME PROTECTION?

Although traditional fantasy sports are generally covered under the UIGEA, it remains unclear whether daily fantasy sports are afforded the same protection. As discussed above, there are several differences between traditional and daily fantasy leagues that cause many individuals to believe that daily games are not protected under the

136. 31 U.S.C. § 5362(1)(A).

137. *Id.* § 5362(1)(E)(ix).

138. *See id.*

139. *Id.* § 5362(1)(E)(ix)(I).

140. *Id.* § 5362(1)(E)(ix)(II).

141. *Id.* § 5362(1)(E)(ix)(III).

142. Marc Edelman, *Fantasy Sports Legal Issues Will Remain a Hot Topic in 2014*, FORBES (Jan. 14, 2014), <http://www.forbes.com/sites/marcedelman/2014/01/14/legal-issues-in-fantasy-sports-will-remain-a-hot-topic-in-2014/#7c43542d3fc5>.

143. *Id.*

law.¹⁴⁴ However, there are also similarities between the types of leagues that lead others to believe daily fantasy leagues are covered. For example, in both traditional and daily fantasy leagues, the “basic tenants of fantasy sports management—opportunity cost,^[145] consistency,^[146] game theory,^[147] and risk/reward^[148]—still act as the governing principles in creating a successful team.”¹⁴⁹ Although the games share a similar foundation, the differences discussed above make the line between daily fantasy sports and gambling blurry and indistinguishable.¹⁵⁰

144. See *supra* Section III.C.

145. Opportunity cost is the “cost of an alternative that must be forgone in order to pursue a certain action.” JJ Zachariason, *Drafting QBs: Opportunity Cost*, ROTOWORLD (May 3, 2013), <http://www.rotoworld.com/articles/nfl/43194/71/drafting-qbs-opportunity-cost>. Put another way, “whatever you *didn’t* do is your opportunity cost.” *Id.* In fantasy sports, opportunity cost comes into play when a participant drafts his or her players. *Id.* For example, if a fantasy football participant drafts a quarterback in the first round, they have a quarterback on their roster. *Id.* However, they *do not* have a highly rated running back or receiver, because they made the choice to select a quarterback and lost the opportunity to choose a different player. *Id.*

146. Consistency in fantasy sports refers to how consistent a particular athlete plays and how consistently that athlete can accumulate fantasy points. Jon Bales, *Similarities Between Season Long and Daily Fantasy*, ROTOGRINDERS: ROTOACADEMY [hereinafter Bales, *Similarities Between Season Long and Daily Fantasy*], <https://rotogrinders.com/lessons/similarities-between-season-long-and-daily-fantasy-174277> (last visited Dec. 2, 2016). “Without consistency, there’s no predictability, and thus no value.” *Id.* For an example of “Consistency Ratings” for fantasy football, see Tristan H. Cockcroft, *Consistency Ratings: 2015 Season*, ESPN (July 1, 2016), http://espn.go.com/fantasy/football/story/_/page/consistency2015/final-2015-fantasy-football-consistency-ratings.

147. Game theory refers to the skillful approach a fantasy sports participant takes when drafting players for his or her roster. See Bales, *Similarities Between Season Long and Daily Fantasy*, *supra* note 146. Fantasy “gurus” assert that a participant’s goal should be to “create[] the greatest net effect after your opponents’ actions are taken into consideration.” *Id.* In other words, if a fantasy participant has the 11th pick in a 12-team league, their post-first round picks “should be governed by what the owner drafting 12th did” in the previous rounds. *Id.* “In season-long fantasy, that might mean bypassing your highest-rated player because you know he’ll drop in the draft, while in daily fantasy, it might mean skipping over an elite value because you know he’ll be in most lineups.” *Id.*

148. In both traditional and daily fantasy sports, “everything [a participant does] comes down to how much it maximizes upside and inhibits downside.” *Id.* For an example of “high-risk/high-reward” fantasy players, see *High-Risk/High-Reward Fantasy Players for 2015*, NFL (Aug. 19, 2015), <http://www.nfl.com/photoessays/0ap3000000512377> (“Fantasy football, like high finance, is all about managing risk.”).

149. Bales, *Similarities Between Season Long and Daily Fantasy*, *supra* note 146.

150. Brustein, *supra* note 3.

A. State Laws: Skill Versus Chance

The question of whether an activity is a game of skill or a game of chance often determines whether that activity is legal within a given state.¹⁵¹ “Skill” is defined as the “exercise of ‘sagacity upon known rules and fixed probabilities where sagacity includes keenness of discernment or penetration with soundness of judgment; shrewdness; or the ability to see what is relevant and significant.’”¹⁵² On the other hand, “chance” is defined as “a lack of control over events or the absence of controllable causation, that is, the opposite of intention.”¹⁵³ In making this crucial determination, the majority of states use the “dominant factor” test, sometimes referred to as the “predominance” test.¹⁵⁴ Under this test, the inquiry is “whether chance or skill is the dominating factor in determining the result of [the activity].”¹⁵⁵ Most states agree that “where the elements of skill . . . predominate over the elements of chance . . . in determining the outcome, then the ‘chance’ element is lacking and the [activity] involved” does not constitute gambling.¹⁵⁶ While the majority of states apply this test, other states take a stricter approach to gambling and also prohibit games “whose outcomes are primarily determined by skill.”¹⁵⁷ As a result, traditional fantasy sports games, which are generally considered a game of skill, are typically deemed illegal in the states that apply this stricter approach.¹⁵⁸

151. Ken LaMance, *Games of Chance vs. Games of Skill Lawyers*, LEGALMATCH, <http://www.legalmatch.com/law-library/article/games-of-chance-vs-games-of-skill.html> (last modified Feb. 6, 2015).

152. Ehrman, *supra* note 5, at 101–02 (quoting 38 AM. JUR. 2D *Gambling* § 4 (2015)).

153. 38 AM. JUR. 2D *Gambling* § 2 (2015).

154. Trippiedi, *supra* note 45, at 215. For a full list of which states apply the “dominant factor” test, see Chuck Humphrey, *State Gambling Law Summary: Summary Chart*, GAMBLING L. US, <http://www.gambling-law-us.com/State-Law-Summary> (last updated Sept. 30, 2007).

155. Trippiedi, *supra* note 45, at 215. Activities with a dominating factor of skill are deemed contests, while activities with a dominating factor of chance are considered gambling. *Id.*

156. Humphrey, *supra* note 154.

157. Jon Boswell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1264 (2008). Among the states whose anti-gambling statutes do not distinguish between games of skill and games of chance are Arizona, Arkansas, Florida, Hawaii, Illinois, Iowa, Louisiana, Maryland, and Tennessee. *Id.* at 1264 n.48.

158. Although these states generally ban both games of skill and games of chance, traditional fantasy sports are not necessarily illegal in all of them. See, e.g., Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648 (D.N.J. June 20, 2007) (holding that defendants’ fantasy sports leagues were “not ‘bets’ or ‘wagers’ because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are more

Applying a different approach, New Jersey and New York have rejected the “dominant factor” test, and instead prohibit activities in which “the element of chance is a factor that is material to the final result.”¹⁵⁹ Other states that do not apply the dominant factor test use a variety of alternative approaches to determine whether an activity is illegal gambling.¹⁶⁰ While the majority of courts believe that chance is the dominating factor in sports betting, the predominant view regarding traditional fantasy sports is that they are a game of skill.¹⁶¹ The dominant factor in these season-long games “is the skill required to draft and manage a winning team” and to “recogniz[e] and adjust[] to [any] chance occurrences” throughout the season.¹⁶² In other words, while there is clearly some aspect of chance in traditional, season-long fantasy games, skill is the dominant factor. The distinction between skill and chance in daily fantasy sports is less clear.¹⁶³ While traditional fantasy sports have been deemed a game of skill because of the vast amount of research, analysis, and skilled decision-making the game entails, some argue that daily fantasy sports involve much less skill and strategy.¹⁶⁴

The biggest issue is determining the “*amount* of skill involved” in these daily games—a determination that will ultimately establish the legality of daily fantasy sports in a given state.¹⁶⁵ Proponents of daily

amounts certain and guaranteed are allowed to be rewarded; and (3) [d]efendants do not compete for the prizes”); *State v. Am. Holiday Ass’n*, 727 P.2d 807, 812 (Ariz. 1986) (holding that “neither initial entrance fees nor voluntary additional fees charged participants in corporation’s contests were bets or wagers and thus gambling statute did not apply”). As a result, fantasy sports leagues that “award pre-determined prizes to league winners do not engage in illegal gambling” in those states. Boswell, *supra* note 157, at 1264 n.49.

159. *Boardwalk Regency Corp. v. Attorney Gen. of N.J.*, 457 A.2d 847, 850 (N.J. Sup. Ct. Law Div. 1982) (holding that the “proper focus of the inquiry . . . is not on the level of skill which may affect the outcome of the contested activity but rather on whether the element of chance is a factor that is material to the final result”); *see also* N.J. STAT. ANN. § 2C:37-1(a) (West 2016); N.Y. PENAL L. § 225.00(1) (McKinney 2015).

160. For example, Delaware, Kansas, Michigan, Ohio, Wisconsin, Washington, and Vermont apply the concept of contract law consideration to determine whether a certain activity is gambling. Ehrman, *supra* note 5, at 98. Under this approach, “consideration is met, even absent an entry fee, so long as the contest participant expends substantial time or effort that benefits the contest’s host in some way.” *Id.* Other states, including Arkansas, Iowa, and Tennessee, apply the “any chance test,” which outlaws games that include *any* element of chance. *Id.* at 98–99.

161. *Id.* at 102.

162. *Id.*

163. *Id.*

164. Trippiedi, *supra* note 45, at 220.

165. Ehrman, *supra* note 5, at 102 (emphasis added).

fantasy sports argue that the game requires a large amount of skill.¹⁶⁶ Specifically, daily fantasy players, like traditional fantasy players, “must utilize good judgment and be able to appreciate the significance of a great deal of data including player statistics, weather conditions, offensive strategies, matchups, and valuation of players in order to be successful.”¹⁶⁷ Advocates for daily fantasy sports assert that managing all of these variables is “truly an act of skill.”¹⁶⁸ Additionally, DraftKings and FanDuel firmly stand by their arguments that the daily fantasy games played on their sites are games of skill, and therefore legal.¹⁶⁹ Specifically, the companies argue that the “contests are not gambling because players pay a fixed entry fee to participate, the prize money is known ahead of time, and compiling a successful roster of players is a highly skilled endeavor that involves more knowhow than season-long fantasy sports.”¹⁷⁰ To further support this argument, daily fantasy sports companies and advocates assert that the most skilled players win at a much higher rate than players who are not skilled, making it clear that skill is the most crucial factor in the games.¹⁷¹ For example, “[i]n the first half of the 2015 Major League Baseball (MLB) season, 91% of [daily fantasy sports] player profits were won by just

166. *Id.* at 103.

167. *Id.* at 102.

168. *Id.* Dan Eaton, a lawyer and professor at San Diego State University, as well as a proponent of daily fantasy sports, emphasized that daily fantasy sports are different from gambling because individuals are not “just accepting the cards that [they] are dealt,” but rather they are picking their own cards. Nathan Rott, *Skill or Chance? Question Looms over Fantasy Sports Industry*, NPR (Nov. 25, 2015), <http://www.npr.org/2015/11/25/457279313/skill-or-chance-question-looms-over-fantasy-sports-industry>.

169. *See FanDuel Support*, FANDUEL, <https://fanduel.custhelp.com/app/answers/list/session/L3RpbWUvMTQ3NTUzNDcyMS9zaWQvMjRyeHdjKm0=/p/11/~/general-questions> (last visited Dec. 2, 2016) (addressing the frequently asked question if FanDuel is legal); *Frequently Asked Questions*, DRAFTKINGS, <https://www.draftkings.com/help/faq> (last visited Dec. 2, 2016) (addressing, under the category “The Basics,” Draft Kings’ position that DraftKings is legal).

170. ASSOCIATED PRESS, *Fantasy Sports Sites Have Their day in Court*, CRAIN’S N.Y. BUS. (Nov. 25, 2015), <http://www.crainsnewyork.com/article/20151125/entertainment/151129936/draftkings-and-fanduel-appeared-in-state-supreme-court-wednesday-to-argue-their-games-are-skill-based-and-thus-not-subject-to-gambling-laws>. Professor Eaton described an analogy that supports his pro-daily fantasy sports opinion: “[H]ow much control, really, do you have over enterprises in which you buy stock? Virtually none You do research, you analyze [sic] the market, you take advice from advisers and you invest your money. That’s not gambling.” Rott, *supra* note 168.

171. Ed Miller & Daniel Singer, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, MCKINSEY & CO. (Sept. 2015), <http://www.mckinsey.com/industries/media-and-entertainment/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill>.

1.3% of players.”¹⁷² On the other hand, opponents of daily fantasy sports argue that the games are no different from gambling because participants have no control over the outcome. For example, “an injury, a hailstorm or a ball bouncing strangely could affect [the] result” of a game.¹⁷³ Due to these unpredictable chance occurrences, opponents argue that daily fantasy games are no different from “placing a bet with a bookmaker.”¹⁷⁴ Notably, those who are against daily fantasy sports recognize that some skill is involved.¹⁷⁵ However, as Judge Mendez of the New York Supreme Court recently stated, “the fact is that you need skill to pick the players but you’re relying on someone else’s skill to play the game.”¹⁷⁶

*B. Daily Fantasy Sports Continue to Face Challenges in the States*¹⁷⁷

Over the past few years, and particularly in 2015, several states determined that daily fantasy sports are a game of chance, and therefore illegal within the state.¹⁷⁸ Certain states’ battles with daily

172. *Id.*

173. Brustein, *supra* note 3.

174. *Id.*

175. Rott, *supra* note 168. Professor Eaton “describes [daily fantasy sports] as sitting somewhere on a continuum between chance and skill.” *Id.*

176. Chris Grove, *New York Court Leaves the Door open for Daily Fantasy Sports*, LEGAL SPORTS REP. (Nov. 25, 2015), <http://www.legalsportsreport.com/6533/new-york-dfs-ruling/>.

177. After daily fantasy sports companies had already fallen under scrutiny, a scandal erupted that made the sites even more controversial. Daniel Roberts, *Full Timeline: The DraftKings/FanDuel Data Scandal*, FORTUNE (Oct. 7, 2015) [hereinafter Roberts, *Full Timeline*], <http://fortune.com/2015/10/07/draftkings-fanduel-scandal-timeline/>. On Sunday, September 27, 2015, before the NFL games began, a DraftKings employee, Ethan Haskell, “accidentally posted the ownership data for the weekly DraftKings Millionaire Maker contest on the DraftKings blog.” *Id.* The following Sunday, October 4th, Haskell “placed second in FanDuel’s NFL Sunday Millions contest, winning \$350,000.” *Id.* “If Haskell had access to DraftKings ownership data *before* selecting his lineup in the FanDuel contest[,] . . . it would have given him the competitive advantage of knowing which NFL players were likely to not be selected by many users in the FanDuel contest.” *Id.* (emphasis added). Because of this incident, the New York Attorney General’s office, as well as the FBI, launched an investigation into DraftKings and FanDuel. *Id.* DraftKings representatives, however, assured that Haskell did *not* have access to the data before selecting his FanDuel lineup. *Id.* Despite the negative attention this scandal brought to the industry, it has essentially been resolved, and employees are now banned from playing on either site. *Id.*

178. As of May 31, 2015, eleven states (Washington, Nevada, Arizona, Texas, Hawaii, Montana, Louisiana, Alabama, Iowa, Illinois, and New York) consider daily fantasy sports illegal. Breslow, *supra* note 6. Additionally, sixteen states have daily fantasy sports laws under review or bills being considered, while twenty-two states continue to allow daily fantasy sports. *Id.*

fantasy sports have gained more attention than others, including New Jersey, Nevada, New York, and Illinois, which are discussed below.

1. New Jersey

i. *The “Before”*

Over the past few years, the state of New Jersey has made continuous attempts to legalize sports betting within the state.¹⁷⁹ As mentioned above, the state chose to forego the opportunity to be exempted from PASPA when the law was passed in 1992.¹⁸⁰ Despite the fact that New Jersey is prohibited from legalizing sports betting under PASPA, it amended its constitution on December 8, 2011 to “permit gambling ‘on the results of any professional, college, or amateur sport or athletic event’ except collegiate games involving New Jersey colleges or venues.”¹⁸¹ After this amendment, New Jersey passed the Sports Wagering Law on January 17, 2012, permitting gambling pursuant to the recent amendment.¹⁸² In response to the passing of New Jersey’s Sports Wagering Law, the “Leagues,”¹⁸³ as well as the National Collegiate Athletic Association (NCAA), filed suit in the United States District Court for the District of New Jersey on August 7, 2012, claiming that the new law violated PASPA.¹⁸⁴ Particularly, the Leagues emphasized that the “integrity of their games and reputation with their fan base [would] be injured by implementation of the Sports Wagering Law.”¹⁸⁵ New Jersey Governor Chris Christie, along with the other defendants in the case,¹⁸⁶ conceded that the Sports Wagering Law

179. New Jersey’s fight to legalize sports gambling is understood to be an attempt to “revive its troubled casino and racetrack industries.” *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015).

180. *See supra* Part IV.

181. *NCAA v. Christie*, No. 12-4947, 2012 WL 6698684, at *2 (D.N.J. Dec. 21, 2012) (citing N.J. CONST. art. IV, § VII, para. 2 (D)), *aff’d*, 730 F.3d 208 (3d Cir. 2013). This amendment to New Jersey’s Constitution limited gambling to “Atlantic City’s casinos and gambling houses as well as horse racing tracks.” *Id.*

182. N.J. STAT. ANN. § 5:12A-1 et seq. (West 2012) (repealed 2014).

183. The “Leagues” are comprised of Major League Baseball (MLB), the National Football League (NFL), the National Hockey League (NHL), and the National Basketball Association (NBA).

184. *Christie*, 2012 WL 6698684 at *2. For a discussion of PASPA, see *supra* Part IV.

185. *Christie*, 2012 WL 6698684, at *2.

186. In addition to Governor Christie, defendants included David L. Rebeck (Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey) and Frank Zanzuccki (Executive Director of the New Jersey Racing Commission). *NCAA v. Christie*, 926 F. Supp. 2d 551 (D.N.J. 2013), *aff’d*, 730 F.3d 208 (3d Cir. 2013).

violated PASPA, but argued that PASPA was unconstitutional.¹⁸⁷ Finding that PASPA was a constitutional exercise of Congress' powers pursuant to the Commerce Clause, the court issued a permanent injunction against the defendants, effectively repealing New Jersey's Sports Wagering Law because it violated PASPA.¹⁸⁸

The Third Circuit affirmed on appeal,¹⁸⁹ and the Supreme Court subsequently denied certiorari on June 23, 2014.¹⁹⁰ Undeterred, Governor Christie signed into law legislation designed to “*partially repeal*[] the prohibitions, permits, licenses, and authorizations concerning wagers on professional, collegiate, or amateur sport contests or athletic events” in New Jersey on October 17, 2014.¹⁹¹ This law, however, only repealed laws “to the extent they appl[ied] or may be construed to apply [to sports wagering] at a casino or gambling house operating in [New Jersey] in Atlantic City or a running or harness horse racetrack [] . . . by persons 21 years of age or older.”¹⁹² Similar to the Sports Wagering Law of 2012, this new law excluded any “collegiate sport contest or collegiate athletic event that takes place in New Jersey or a sport contest or athletic event in which any New Jersey college team participates regardless of where the event takes place.”¹⁹³ In response, the Leagues filed a complaint that sought to enjoin the defendants from implementing the new law and alleged that, “[f]or years, New Jersey has been attempting to devise a way to get around [PASPA’s] unambiguous prohibitions and authorize sports gambling . . . throughout the state.”¹⁹⁴ Once again, the court found that New Jersey’s 2014 law violated PASPA, and issued a permanent injunction,¹⁹⁵ which was affirmed by the Third Circuit.¹⁹⁶ This would

187. *Id.* at 556.

188. *Id.* at 578–79.

189. *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013).

190. *Christie v. NCAA*, 134 S. Ct. 2866 (2014) (denying certiorari).

191. *NCAA v. Christie*, 61 F. Supp. 3d 488, 494 (D.N.J. 2014) (emphasis added), *aff'd*, 832 F.3d 389 (3d Cir. 2016); see N.J. STAT. ANN. § 5:12A-7; S. 2460, 216th Leg. (N.J. 2014).

192. *Christie*, 61 F. Supp. 3d at 494–95; see S. 2460, 216th Leg. (N.J. 2014).

193. S. 2460, 216th Leg. (N.J. 2014). The legislative statement following this law states that the law “implements the decision of the United States Court of Appeals for the Third Circuit in *NCAA v. Governor of New Jersey*, 730 F.3d 208 (3d Cir. 2013), wherein the court . . . stated that it does ‘not read PASPA to prohibit New Jersey from repealing its ban on sports wagering’ . . . [and that] ‘it is left up to each state to decide how much of a law enforcement policy it wants to make of sports gambling, or *what the exact contour of the prohibition will be.*” *Id.* (quoting *NCAA v. Governor of N.J.*, 730 F.3d at 232–33).

194. *Christie*, 61 F. Supp. 3d at 495.

195. *Id.* at 508.

196. *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015), *reh’g en banc*, 832 F.3d 389 (3d Cir. 2016), *reh’g en banc granted, opinion vacated*, 799 F.3d 259 (3d Cir. 2015).

not be the final say on the matter, however, as the Third Circuit granted a rehearing en banc of the New Jersey sports betting case on October 14, 2015.¹⁹⁷ While this briefly rejuvenated New Jersey's hopes of legalizing sports betting,¹⁹⁸ the victory was short-lived. The Third Circuit heard oral arguments on February 17, 2016,¹⁹⁹ and subsequently invalidated the New Jersey law on August 9, 2016.²⁰⁰

ii. *The "After": So, How Does the New Jersey Sports Betting Battle Relate to Fantasy Sports?*

Part of New Jersey's frustration with the prohibition on sports betting stems from the Leagues' steadfast support of fantasy sports. On September 14, 2015, New Jersey Congressman Frank Pallone sent a letter to the Energy and Commerce Committee asking it to "hold a hearing examining the relationship between professional sports and fantasy sports to review the legal status of fantasy sports and sports betting."²⁰¹ Despite the Leagues' assertion that they strive to protect "their sports and athletes from the dangers of gambling," Representative Pallone believed they were "more interested in protecting profits than players."²⁰² In a letter, Representative Pallone emphasized that the Leagues have historically been opposed to sports betting, pointing specifically to the Leagues' strong support of PASPA and continuous efforts to enjoin New Jersey from legalizing sports

197. *NCAA v. Governor of N.J.*, 832 F.3d 389 (3d Cir. 2016) (vacating the opinion and entering judgment on August 25, 2015).

198. Dustin Gouker, *New Life for New Jersey Sports Betting Case: Rehearing Granted by Court*, LEGAL SPORTS REP. (Oct. 14, 2015), <http://www.legalsportsreport.com/4987/nj-sports-betting-case/>.

199. Dustin Gouker, *New Jersey Sports Betting*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/nj/> (last visited Dec. 2, 2016).

200. *NCAA v. Governor of N.J.*, 832 F.3d 389, 390 (3d Cir. 2016); *Appeals Court Hands Loss to New Jersey Sports Betting Effort*, CHI. TRIB. (Aug. 9, 2016), <http://www.chicagotribune.com/news/nationworld/ct-new-jersey-sports-betting-20160809-story.html>. New Jersey "can appeal the ruling to the Supreme Court, which has already declined to hear the case once before." *Id.*

201. Letter from Frank Pallone, Jr., Congressman, to Fred Upton, Chairman of the Comm. on Energy & Commerce, and to Michael C. Burgess, Chairman of the Subcomm. on Commerce, Manufacturing, & Trade 1 (Sept. 14, 2015) [hereinafter Pallone Letter], <https://democrats-energycommerce.house.gov/sites/democrats.energycommerce.house.gov/files/hearing%20request%20Fantasy%20Sport%20Sept14.2015.pdf>.

202. Michael O'Keefe, *N.J. Congressman Frank Pallone Slams Pro Leagues for Opposing Gambling While Profiting Off Fantasy Sports*, NY DAILY NEWS (Sept. 21, 2015), <http://www.nydailynews.com/sports/i-team/congressman-gambling-fantasy-sports-article-1.2369123>.

betting.²⁰³ Interestingly, the Congressman pointed out that the same Leagues that oppose sports betting wholly embrace fantasy sports.²⁰⁴ For instance, the MLB, NHL, and Major League Soccer (MLS) have invested in DraftKings, while the NFL and NBA have invested in FanDuel.²⁰⁵ Not only do the Leagues have a stake in these companies, but several professional players also have individual sponsorship deals with daily fantasy sports operators.²⁰⁶ Additionally, Representative Pallone stressed that the Leagues profit from fantasy sports even without direct investment because fantasy sports lead fans to be more “active[ly] engage[d] with the sport.”²⁰⁷ Due to this “deep involvement with daily fantasy sports,” the Congressman, like many others, questioned how “fantasy sports are distinguishable from sports betting and other forms of gambling.”²⁰⁸

2. Nevada

In perhaps one of the most shocking rulings by a state in the daily fantasy sports battle thus far, Nevada—the gambling mecca of the world—announced on October 15, 2015 that all unlicensed daily fantasy sports companies, including DraftKings and FanDuel, “must cease and desist in the state.”²⁰⁹ Although the State did not explicitly ban daily fantasy sports companies, it determined that the companies are gambling operators and, therefore, must obtain a gambling license if

203. See Pallone Letter, *supra* note 201, at 3.

204. *Id.*

205. O’Keeffe, *supra* note 202. Additionally, Madison Square Garden (the owner of the New York Knicks and New York Rangers) and Legends Hospitality (a joint venture between the New York Yankees and Dallas Cowboys) have invested in DraftKings, while FanDuel has partnerships with sixteen NFL teams and thirteen NBA teams. *Id.*

206. See Pallone Letter, *supra* note 201, at 4.

207. *Id.* at 3. Specifically, individuals who participate in fantasy sports “watch more games than the average fan, increasing ratings and advertising dollars for the sports leagues.” *Id.*

208. *Id.* at 5; see also Chuck Todd (@chucktodd), TWITTER (Aug. 30, 2015, 5:09 PM), <http://twitter.com/chucktodd/status/638096152982867968?refsrc=email&s=11> (“Now that the NFL and MLB is [sic] condoning daily fantasy, isn’t it fair to say leagues are now embracing gambling?”).

209. Daniel Roberts, *DraftKings and FanDuel Are No Longer Allowed in Nevada*, FORTUNE (Oct. 15, 2015) [hereinafter Roberts, *Draftkings and FanDuel*], <http://fortune.com/2015/10/15/fantasy-sports-nevada/>. For the Attorney General’s full opinion, see Memorandum from J. Brin Gibson, Bureau Chief, Gaming & Gov’t Affairs, Ketan D. Bhirud, Head, Complex Litig. to A.G. Burnett, Chairman, Nev. Gaming Control Bd., and to Terry Johnson, Member, Nev. Gaming Control Bd., Shawn Reid, Member, Nev. Gaming Control Bd. (Oct. 16, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>.

they wish to operate within the state.²¹⁰ Specifically, the Nevada Gaming Control Board found that “entries in daily fantasy sports contests” constitute wagers on sporting events and “[daily fantasy sports] companies are in the business of accepting those wagers.”²¹¹ As a result, DraftKings and FanDuel were temporarily banned from operating in Nevada.²¹² The companies, however, were immediately permitted to apply for a gambling license.²¹³

3. New York

Following suit, New York State Attorney General Eric T. Schneiderman entered a cease and desist order against DraftKings and FanDuel on November 10, 2015.²¹⁴ Mr. Schneiderman, who believed that “DraftKings and FanDuel are the leaders of a massive, multibillion-dollar scheme intended to evade the law and fleece sports fans across the country,” demanded that the companies immediately “stop accepting bets from New York residents.”²¹⁵ This came as a devastating blow to DraftKings and FanDuel, as the companies host over six-hundred thousand daily fantasy players in the state of New York.²¹⁶

The official “Notice to Cease and Desist” was written by Internet Bureau Chief Attorney General Kathleen McGee. In the official notice, McGee explained that the daily sites constitute gambling and violate New York law because DraftKings and FanDuel customers “are clearly placing bets on events outside of their control or influence, specifically

210. Roberts, *Draftkings and FanDuel*, *supra* note 209.

211. *Id.*

212. *Id.*

213. *Id.*

214. Walt Bogdanich et al., *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), http://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html?_r=0. For the official notices to cease and desist, see Letter from Kathleen McGee, Chief, Internet Bureau, N.Y. Office of the Att’y Gen., to Jason Robins, Chief. Exec. Officer, to Jason Robbins, Chief Exec. Officer, DraftKings, Inc. (Nov. 10, 2015), <http://www.nytimes.com/interactive/2015/11/10/sports/document-final-nyag-draftkings-letter-11-10-2015.html> [hereinafter Letter to Draftkings]; Letter from Kathleen McGee, Chief, Internet Bureau, N.Y. Office of the Att’y Gen., to Jason Robins, Chief. Exec. Officer, to Nigel Eccles, Chief Executive Officer, FanDuel, Inc. (Nov. 10, 2015), <http://www.nytimes.com/interactive/2015/11/10/sports/document-final-nyag-fanduel-letter-11-10-2015-signed.html> [hereinafter Letter to FanDuel].

215. Bogdanich, *supra* note 214.

216. Darren Rovell, *New York Attorney General Amends Lawsuit Against Daily Fantasy Sites*, ESPN (Jan. 2, 2016), http://espn.go.com/chalk/story/_id/14458955/new-york-attorney-general-wants-draftkings-fanduel-return-profits.

on the real-game performance of professional athletes,” and that “each . . . wager represents a wager on a ‘contest of chance’ where winning or losing depends on numerous elements of chance to a ‘material degree.’”²¹⁷ Additionally, Ms. McGee expressed concern that daily fantasy sports were creating the same “public health and economic concerns” associated with gambling, especially addiction.²¹⁸ Specifically, McGee asserted that daily fantasy sports are particularly threatening due to the rapid rate of daily games, the huge prizes they offer, and the “false perception that [the games are] eminently winnable”—the kinds of evils that New York’s gambling laws aim to prevent.²¹⁹

On November 17, 2015, Mr. Schneiderman filed an injunction to prevent DraftKings and FanDuel from operating in New York, which the New York Supreme Court granted on December 11, 2015.²²⁰ That same day, however, an appellate court granted a stay of the injunction, allowing the daily fantasy sports sites to resume business within New York for the time being.²²¹ A appellate hearing was held in early March.²²² Taking his crusade against the daily fantasy sites a step further, Schneiderman filed an amended lawsuit on December 31, 2015 asking DraftKings and FanDuel to refund all of the money they have made in the state of New York to those individuals who lost the money.²²³ Additionally, the amended lawsuit requested that the

217. Letter to DraftKings, *supra* note 214. Under New York law, “[a] person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence.” N.Y. PENAL L. § 225.00 (McKinney 2015).

218. Letter to DraftKings, *supra* note 214.

219. *Id.* Mr. Schneiderman emphasized that DraftKings and FanDuel promote daily fantasy sports like a lottery because the companies advertise the games “as a path to easy riches that anyone can win.” *Id.* Despite advertisements promising overnight wealth and “life-changing piles of cash,” Mr. Schneiderman noted that the daily sites are more similar to poker because “a small number of professional gamblers profit at the expense of casual players.” *Id.*

220. Chris Grove, *Daily Fantasy Sites Get Reprieve After Initial Loss in New York Court Battle; FanDuel Reenters NY*, LEGAL SPORTS REP. (Dec. 11, 2015), <http://www.legalsportsreport.com/6690/dfs-sites-ny-court-battle>; *see also* People v. FanDuel, Inc., No. 453056/15, 2016 WL 1134804 (N.Y. Super. Ct. Dec. 11, 2015). For the order to grant the initial preliminary injunction, see Order Granting Mot. Prelim. Inj., <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=6q5VACnMNppm9tc2vom6hQ==&system=prod>.

221. Grove, *supra* note 220.

222. *DFS State Watch: Monitoring Daily Fantasy Sports Action in State Government*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-state-watch> (last updated Sept. 8, 2016).

223. Rovell, *supra* note 216. It is estimated that DraftKings and FanDuel made more than \$200 million in entry fees in 2015 solely from daily fantasy players in New York. *Id.*

companies pay a fine of up to \$5000 per case, which could total over three billion dollars for the two companies combined.²²⁴ On August 3, 2016, the Governor of New York “signed into law legislation explicitly permitting daily fantasy sports in the [state].”²²⁵ “The new law renders moot most, if not all, of the long-running litigation between New York Attorney General Eric Schneiderman and industry leaders DraftKings and FanDuel.”²²⁶

4. Illinois

On December 23, 2015, Illinois Attorney General Lisa Madigan announced that DraftKings and FanDuel “clearly constitute gambling’ and are illegal under state law.”²²⁷ Noting that the Illinois criminal code “prohibits the playing of both ‘games of chance or skill for money,’” Ms. Madigan explained that the daily sites violate Illinois law because “participants . . . must pay an entry fee or buy-in amount in order to win a prize.”²²⁸ Despite any “degree of skill” involved in drafting a daily fantasy team, the attorney general emphasized that the “players do not have any control or influence to determine the outcome of the game.”²²⁹ As a result, Ms. Madigan asked the companies to immediately place Illinois on the list of states that prohibit its residents from participating in daily fantasy sports “unless and until’ legislation is passed to exempt daily fantasy sport contests from ‘the criminal prohibition on

224. Carl Campanile & Bob Fredericks, *FanDuel and DraftKings Losers Might Get All Their Money Back*, N.Y. POST (Jan. 1, 2016), <http://nypost.com/2016/01/01/fanduel-and-draftkings-losers-might-get-all-their-money-back/>.

225. Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Aug. 27, 2016), http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states. According to the Governor of New York, the “legislation strikes the right balance that allows this activity to continue with oversight from state regulators, new consumer protections, and more funding for education.” *Id.*

226. *Id.*

227. Carlos Sadovi, *Attorney General: Daily Sports Fantasy Betting Illegal Under Illinois Law*, CHI. TRIB. (Dec. 23, 2015), <http://www.chicagotribune.com/news/local/breaking/ct-madigan-daily-fantasy-betting-is-illegal-gambling-20151223-story.html>. For Madigan’s full opinion, see Letter from Lisa Madigan, Ill. Att’y Gen., to Elgie R. Rims, Chairman, Judiciary Criminal Comm., and to Scott R. Drury, Vice-Chairman, Judiciary Criminal Comm. (Dec. 23, 2015), <http://www.chicagotribune.com/ct-lisa-madigan-opinion-daily-fantasy-sports-20151223-htmlstory.html>.

228. Sadovi, *supra* note 227 (emphasis added).

229. *Id.*

gambling.”²³⁰ In response, DraftKings and FanDuel filed separate lawsuits against Ms. Madigan on Thursday, Dec. 24, 2015.²³¹

V. TIME TO REGULATE

The vast amount of negative attention that the daily fantasy sports industry has received over the past year has everyone asking one question: what will happen next? Some individuals believe that the end of the multi-million dollar daily fantasy sports industry is inevitable and imminent because of the murky line between daily fantasy games and illegal gambling. Others believe that regulation is necessary and it is essential that the states take action soon. Moreover, others believe that regulation is not needed and that the daily fantasy sports industry should be allowed to continue as is.²³² Regardless of which stance you take, one thing is certain—clarity is needed in the world of daily fantasy sports. In an effort to achieve this clarity, more than half of the states have considered or introduced some type of bill or law to regulate daily fantasy games.²³³

A. *New Jersey*

In November 2015, a New Jersey senator drafted a bill that would legalize daily fantasy games with one catch: the industry would be placed “under the regulatory authority of the Division of Gaming Enforcement, the state body that oversees Atlantic City’s casinos and online gambling.”²³⁴ Under this bill, a “casino licensee” or a “daily fantasy sports provider” would be able to apply for a permit to operate a daily fantasy sports contest in the state and, if granted, would be

230. *Id.*

231. For DraftKings’ lawsuit against Illinois Attorney General Madigan, see *Complaint, DraftKings, Inc. v. Madigan*, No. 2015CH18622, 2015 WL 9415140 (Cook Cty. Cir. Ct. Ch. Div. Dec. 24, 2015).

232. See e.g., *Chris Christie Sounds Off on Regulating Daily Fantasy Sports*, ESPN (Oct. 29, 2015), http://espn.go.com/chalk/story/_id/14003635/chris-christie-says-regulating-daily-fantasy-sports-stupid-idea.

233. *DFS State Watch*, *supra* note 222; see also *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Dec. 2, 2016).

234. John Brennan, *N.J. Fantasy Sports Bill Would Allow Games, With a Catch*, NORTHJERSEY.COM (Nov. 6, 2015), <http://archive.northjersey.com/news/n-j-fantasy-sports-bill-would-allow-games-with-a-catch-1.1450712>. For the full draft of New Jersey Senator Jim Whelan’s bill, see S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016), http://www.njleg.state.nj.us/2016/Bills/S2000/1927_I1.PDF.

required to pay a permit fee.²³⁵ However, the New Jersey bill would only allow daily fantasy sports to be played by individuals at least twenty-one years of age “who are physically present in [New Jersey].”²³⁶ Additionally, all computers and servers that are used to conduct daily fantasy sports would be required to be “physically located within the boundaries of [Atlantic City].”²³⁷ Because DraftKings and FanDuel have “emphatically sought to distance themselves from any suggestion that their competitions are gambling,” the proposed New Jersey bill may not be met with acceptance on the part of the daily fantasy companies.²³⁸

B. New York

During its long court battles with DraftKings and FanDuel, multiple bills were proposed to regulate daily fantasy sports in New York. Two of the bills sought to put daily fantasy sports under the purview of the gaming commission in order to “put added consumer protections in place.”²³⁹ Another bill sought to exempt daily fantasy sports from the gambling code as a game of skill using UIGEA language,²⁴⁰ and a fourth bill sought to amend the state constitution.²⁴¹ A fifth bill, which surfaced in February of 2016 and gained the most attention, took a drastically different approach.²⁴² This bill would create the “Fantasy Sports Contests Division,” which would be responsible for “promulgat[ing] regulations to implement interactive fantasy sports in [New York].”²⁴³ Each registrant or operator would be required to “pay a

235. See S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016), http://www.njleg.state.nj.us/2016/Bills/S2000/1927_I1.PDF

236. *Id.*

237. *Id.*

238. Brennan, *supra* note 234. Although the New Jersey bill has been introduced, state officials have made it clear that the issue of daily fantasy sports will not be considered until the sports betting case is finalized. Dustin Gouker, *If New Jersey Wins Sports Betting Appeal, What Might Happen Next in U.S.?*, LEGAL SPORTS REP. (Feb. 16, 2016), <http://www.legalsportsreport.com/7524/new-jersey-sports-betting-case-impacts/>. Now that the Third Circuit has invalidated New Jersey’s sports betting law, see *supra* Section IV.B.1.i, the issue of daily fantasy sports may be able to move into the spotlight.

239. S.B. 6305, 2016 Leg. Sess. (N.Y. 2016), <https://www.nysenate.gov/legislation/bills/2015/s6305>; Assemb. B. 8554, 2016 Leg. Sess. (N.Y. 2015), <https://www.nysenate.gov/legislation/bills/2015/a8554/amendment/original>.

240. Assemb. B. 8588, 2016 Leg. Sess. (N.Y. 2015), <https://www.nysenate.gov/legislation/bills/2015/a8588>.

241. Assemb. B. 8587, 2016 Leg. Sess. (N.Y. 2015), <https://www.nysenate.gov/legislation/bills/2015/a8587>.

242. S.B. 6793, 2016 Leg. Sess. (N.Y. 2016), <https://www.nysenate.gov/legislation/bills/2015/s6793>.

243. *Id.*

one-time fee of five-hundred thousand dollars,” and operators would be taxed 15% on gross revenue generated by players within the state of New York.²⁴⁴ Moreover, the bill would mandate that players are at least eighteen years old and would prohibit contests involving collegiate sporting events or horse races.²⁴⁵ Additionally, the New York bill sought to increase consumer protections by restricting employees from participating in fantasy contests and ensuring confidential information that could affect the fantasy contests is secure.²⁴⁶ It also required players’ funds to be segregated so they would be “protected from corporate insolvency, financial risk for criminal or civil actions against the registrant.”²⁴⁷ As discussed above, this bill was finally passed in August of 2016.

C. Illinois

DraftKings and FanDuel have expressed support for the “light touch” regulation²⁴⁸ that Illinois has proposed.²⁴⁹ The Illinois proposed Fantasy Contests Act lays out a set of policies and procedures that fantasy sports operators must implement within the state.²⁵⁰ For example, the Fantasy Contests Act requires fantasy sports operators to ensure that all participants are at least eighteen years old.²⁵¹ Further, fantasy sports operators must “prevent employees . . . from competing in any fantasy contest offered by a fantasy contest operator” and “prevent sharing of confidential information that could affect fantasy play with third parties.”²⁵² Additionally, fantasy sports operators must prevent professional athletes from participating in a fantasy contest

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. A “light touch” regulation is one that “bring[s] daily fantasy sports under governmental oversight but stop[s] short of the controls typically applied to commercial gambling activity.” Chris Grove, *Momentum for “Light Touch” Regulation of Daily Fantasy Sports Grows, But Clear Path Yet to Be Set*, LEGAL SPORTS REP. (Oct. 23, 2015), <http://www.legalsportsreport.com/5526/outlook-for-light-touch-dfs-regulation/>.

249. Dustin Gouker, *Everything You Need to Know About Illinois’ Fantasy Contests Act*, LEGAL SPORTS REP. (Oct. 27, 2015), <http://www.legalsportsreport.com/5597/illinois-fantasy-contests-act/>. Daily fantasy sports operators favor regulation that falls in the “light touch” category because it is significantly less burdensome to comply with. *Id.*

250. H.B. 4323, 99th Gen. Assemb. (Ill. 2016), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=HB&DocNum=4323&GAID=13&LegID=92715&SpecSess=&Session.>

251. *Id.*

252. *Id.*

“that is determined, in whole or in part, on the accumulated statistical results of a team of individuals in the game or contest in which they are a player.”²⁵³

To increase consumer protection, the Fantasy Contests Act requires fantasy sports operators to provide a way for participants “to restrict themselves from entering a fantasy contest . . . and take reasonable steps to prevent those individuals from entering” such contests.²⁵⁴ The Act also requires operators to disclose the number of entries a participant “may submit to each fantasy contest and take reasonable steps to prevent players from submitting more than the allowable number.”²⁵⁵ Before allowing withdrawals, this bill mandates that fantasy sports operators in Illinois “check for tax liens and child support obligations of greater than \$10,000” for all players.²⁵⁶ “[F]or the benefit and protection of . . . fantasy contest players’ funds,” operators must also “segregate player funds from operational funds and maintain a reserve in the form of cash, cash equivalents, an irrevocable letter of credit, or a bond . . . in the amount of the deposits in player accounts.”²⁵⁷ Finally, the Fantasy Contests Act mandates an annual audit by a third party to “ensure compliance with all of the requirements in [the] Act,” which must be submitted to the Attorney General.²⁵⁸

One of the most alluring aspects of the Illinois Fantasy Contests Act for daily fantasy sports companies is that it specifically exempts daily fantasy sports from the gambling code, stating that “participants in fantasy contests as defined under [this act] shall not be convicted of gambling.”²⁵⁹ Because DraftKings and FanDuel strive to distance themselves from the term “gambling,” the Illinois bill is the type of bill the daily companies want other states to adopt.²⁶⁰ In addition to exempting daily fantasy sports from the gambling code, the Fantasy Contests Act does not seek to impose any licensing fees or taxes on daily fantasy sports operators—another factor that likely increased the level of support from DraftKings and FanDuel.²⁶¹ Moreover, a violation of the act results only in “a civil penalty of not more than \$1,000 for each

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. Gouker, *supra* note 249.

261. *Id.*

violation.”²⁶² For these reasons, it is not surprising that DraftKings and FanDuel support the Illinois Fantasy Contests Act. However, in May of 2016, the bill was “tabled for the current legislative session.”²⁶³ Because it was not defeated, the bill could resurface in the summer session or in a veto session.²⁶⁴ But for now, the focus is back on the litigation between DraftKings and FanDuel and Illinois’ Attorney General.²⁶⁵

D. Recommendations

Daily fantasy sports were created to provide a quicker, more manageable alternative to traditional fantasy sports, which were afforded various protections from regulation under the UIGEA. As previously discussed, it is indisputable that daily fantasy sports, as well as traditional fantasy sports, involve an element of chance.²⁶⁶ Some fantasy participants unquestionably put a great deal of time and effort into analyzing statistics and making strategic decisions regarding which players to select in both traditional and daily fantasy leagues. But ultimately, no matter how much skill a participant has, the outcome of the game is not within his or her control. That being said, are daily fantasy sports as dangerous as traditional gambling? It is unlikely.²⁶⁷ While many people have flocked to DraftKings and FanDuel as a result of the companies’ advertisements “promising riches just a few finger taps away,”²⁶⁸ the majority of fantasy players continue to play the games as a hobby that typically does not rise to the level of addiction associated with gambling.²⁶⁹ Additionally, daily fantasy sports

262. H.B. 4323, 99th Gen. Assemb. (Ill. 2015), <http://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=88&GA=99&DocTypeId=HB&DocNum=4323&GAID=13&LegID=92715&SpecSess=&Session=>

263. Dustin Gouker, *Illinois Daily Fantasy Sports Bill Dead for Now; Focus Returns to DraftKings, FanDuel Lawsuits*, LEGAL SPORTS REP. (May 29, 2016), <http://www.legalsportsreport.com/10224/illinois-dfs-bill-tabled/>.

264. *Id.*

265. *Id.*

266. *See supra* Part V.

267. Ehrman, *supra* note 5, at 108–13.

268. Louis Bien, *Everything You Ever Wanted to Know About Daily Fantasy Sports and Why They’re Getting Sued*, SB NATION (Nov. 24, 2015), <http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling>.

269. Ehrman, *supra* note 5, at 112. Although some individuals are “quitting their jobs to focus on daily fantasy sports full-time,” most fantasy players enjoy daily fantasy sports because it “remains a way of engaging with their favorite sports and competing with friends.” *Id.* at 109. *Cf.* Walt Bogdanich & Jacqueline Williams, *For Addicts, Fantasy Sites Can Lead to Ruinous Path*, N.Y. TIMES (Nov. 22, 2015), <http://www.nytimes.com/2015/11/23/sports/fantasy-sports-addiction-gambling-draftkings-fanduel.html>.

have a lesser impact on crime rates and moral implications than traditional gambling does.²⁷⁰ While daily fantasy sports may not produce negative consequences to the same extent as traditional gambling, the industry still continues to cause concerns.

Specifically, states are concerned for their residents because “a small number of professional gamblers [in daily fantasy sports] profit at the expense of casual players.”²⁷¹ Therefore, if DraftKings, FanDuel, and other daily fantasy sports companies want to continue to operate, the states need to feel confident that their residents are protected. To ensure this protection, several procedures must be put into place. Employees of daily fantasy sports operators, who may have access to confidential information and, as a result, have a competitive advantage, cannot be allowed to participate in daily fantasy sports.²⁷² Additionally, professional athletes who are playing in the games that are subject to daily fantasy contests cannot be allowed to play daily fantasy sports because they, unlike daily fantasy participants, have the potential to affect the outcome of the game. Age verification is another important aspect of consumer protection. While daily fantasy sports are unlikely to produce the same negative effects of gambling, it is clearly in the states’ interest to protect their youth from any possible consequences, such as addiction or deception. Both DraftKings²⁷³ and FanDuel²⁷⁴ require all participants to be at least eighteen years old, and several states have proposed regulations with the same minimum age requirement.²⁷⁵ Other states have proposed a minimum age requirement of twenty-one.²⁷⁶ However, there is no practical reason for requiring participants to be at least twenty-one years old. “[U]pon reaching the age of 18[,] one is treated like any other adult” and is able to participate in adult activities, such as voting and serving in the

270. Ehrman, *supra* note 5, at 110–12; Trippiedi, *supra* note 45, at 217.

271. Letter to DraftKings, *supra* note 214.

272. See Roberts, *Full Timeline*, *supra* note 177 (discussing the DraftKings insider trading scandal).

273. *Terms of Use*, DRAFTKINGS, <https://www.draftkings.com/help/terms> (last updated July 21, 2016).

274. *Rules & Scoring*, FANDUEL, <https://www.fanduel.com/rules> (last visited Dec. 2, 2016).

275. As of February 2016, fourteen states have proposed bills requiring a player to be at least eighteen years old. Philip Marcelo, *State Legislatures See Flurry of Daily Fantasy Sports Bills*, TIMES STANDARD (Feb. 28, 2016), <http://www.times-standard.com/article/ZZ/20160228/NEWS/160225754>.

276. For example, Massachusetts and New Jersey propose a minimum age requirement of twenty-one. See 940 MASS. CODE. REGS. 34.00 (2016); S.B. 1927, 217th Leg., Reg. Sess. (N.J. 2016), http://www.njleg.state.nj.us/2016/Bills/S2000/1927_I1.PDF.

military.²⁷⁷ It is difficult to imagine a rational basis for “exclud[ing] young adults ages eighteen to twenty from participating in daily fantasy sports contests,” especially when other efforts to protect all consumers are put into place.²⁷⁸ Moreover, players’ funds must be kept separate from daily fantasy sports sites’ operational funds. “Lawmakers have expressed concern that the [daily fantasy sports] sites are using or could use money deposited by consumers to pay their operating expenses.”²⁷⁹ Ensuring that a player’s funds are kept separately from other funds will reduce states’ concerns that their residents are being deceived or scammed. Finally, players must be able to restrict themselves from entering a fantasy sports contest, and operators must take reasonable steps to ensure that those players do not enter such contests. This practice is essential to prevent addiction and provides a way for those who struggle with addiction to resist temptation and be blocked from accessing the contests.

CONCLUSION

The daily fantasy sports industry has taken the world by storm, and millions of individuals spend an immense amount of time living out their fantasy while playing these games. However, the year of 2015 was full of obstacles for the daily fantasy sports industry, and many believed the end of the phenomenon was near. Nevertheless, despite the similarities that daily fantasy sports and illegal gambling share, the negative consequences associated with each are different. It is undeniable that daily fantasy sports involve an element of chance, which would deem the games illegal in many states. Yet, despite the inevitable degree of chance involved, daily fantasy sports require skill as well, making their legality even less clear. But why abolish this multi-million-dollar industry that brings joy to so many people when regulation can solve the problem? The most important aspect of any future regulation is consumer protection. For that reason, the Illinois Fantasy Contests Act provides a helpful and reasonable framework for regulating daily fantasy sports that other states should follow. It effectively sets parameters for the industry that provide increased

277. Letter from JB Kelly, Cozen O’Connor, and Kevin C. Conroy, Foley Hoag LLP, to Maura Healey, Att’y Gen., Mass. Office of the Att’y Gen. (Jan. 22, 2016), <http://www.mass.gov/ago/docs/dfs-comments/letter-comment-20.pdf>.

278. *Id.*

279. Chris Mitchell & J.J. Cooper, *Daily Fantasy Sports Cope with Uncertain Future*, *BASEBALL AM.* (Mar. 4, 2016), <http://www.baseballamerica.com/fantasy/daily-fantasy-sports-cope-uncertain-future/>.

protections for consumers while allowing the popular games to continue to thrive. Regulation like that provided under the Illinois Fantasy Contests Act is universally beneficial because it provides clarity for states, security for daily fantasy sports operators, and continued enjoyment for consumers.



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