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When Fantasy Becomes Reality: Attempts to Regulate the Highly Unregulated Daily Fantasy Sports Industry.

Garrett Greene

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COMMENT

WHEN FANTASY BECOMES REALITY: ATTEMPTS TO REGULATE THE HIGHLY UNREGULATED DAILY FANTASY SPORTS INDUSTRY

GARRETT GREENE*

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I. OVERVIEW

This Comment's goal is to address the changing legal landscape associated with daily fantasy sports websites and how they coincide with gambling. This Comment focuses on the call for an enhanced regulatory framework concerning daily fantasy sports websites. This Comment also examines how individual states are reacting to daily fantasy sports websites, whether it is by virtue of legislation or by the issuance of advisory opinions.

First, Section II presents a brief history of gambling in the United States and discusses the emergence of daily fantasy sports, their lucrative nature, and their meteoric rise in popularity. Section III considers the current federal legal framework for daily fantasy sports websites and the overall lack of regulation that exists to monitor the industry. Specifically, this section examines the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)¹ and how it provides the pathway for daily fantasy sports' growing success. Section IV explores existing state laws and how individual states are dealing with the emerging trend of daily fantasy sports. This section also briefly discusses a pair of once-proposed, but presently defunct, Texas bills² and the Texas Attorney General's advisory opinion declaring daily fantasy sports as illegal gambling. Finally, Section V views

1. Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367 (2012).

2. Although the bills did not muster enough support to survive the 84th Texas Legislature in 2015, the bills' proposed licensing requirement and the definition of a "sports betting website" may influence how other states view daily fantasy sports websites and how future Texas legislation builds upon these proposed bills. Only time will tell, as the next Texas legislative session is not until 2017.

the potential legal and regulatory issues inherent in the daily fantasy sports industry and the potential legal concerns stemming from lack of a regulatory infrastructure. This section also examines several proposed regulatory measures for the daily fantasy sports industry and the potential impact these regulatory measures could have on various daily fantasy sports operators.

A. Background

1. A Brief History of Gambling in the United States

Gambling was a pervasive activity long before this country's inception.³ America's introduction to gambling was by way of the first settlers.⁴ While the lottery was one of the earliest and most prevalent forms of gambling,⁵ early Americans also wagered on competitive events, or using

3. See *Numbers* 26:52–56 (describing Moses's allocation of the territory through the use of a "lot"); see also EDITH FAVOUR, ROBERT ABBE MUSEUM, INDIAN GAMES, TOYS, AND PASTIMES OF MAINE AND THE MARITIMES 10 (1974) (noting over 100 Native American tribes played dice-game variations, such as "hubbub"); David, *The History of Lotteries and Lotto Games*, LOTTOSEND.COM OFFICIAL BLOG (Nov. 12, 2014), <https://www.lottosend.com/blog/the-history-of-lotteries-and-lotto-games> ("The Emperor Cheung in 200 B.C. China was the organizer of the Chinese Lottery."). In fact, many believe "Keno," the Chinese lottery, provided the funds necessary to build the Great Wall of China. 6 *Historic Landmarks That Wouldn't Have Existed Without the Lottery*, SCRIBOL, <http://scribol.com/art-and-design/6-historic-landmarks-that-wouldnt-have-existed-without-the-lottery> (last visited May 12, 2016) ("It is widely believed that the Great Wall could not have been built without the income generated from those who played [the lottery]."). "The first instance of [lottery] tickets being sold to the public" took place in the Roman Empire. David, *The Early Origins of the Lottery*, LOTTOSEND.COM OFFICIAL BLOG (July 13, 2014), <https://www.lottosend.com/blog/the-early-origins-of-the-lottery>. Augustus Caesar organized this lottery to fund repairs for the City of Rome. *Id.*

4. *A History of American Gaming Laws*, HG.ORG, <https://www.hg.org/article.asp?id=31222> (last visited May 12, 2016). These risk-inherent "games of chance" were attractive to gallant first settlers. See ROGER DUNSTAN, CAL. RESEARCH BUREAU, GAMBLING IN CALIFORNIA II-2 (1997), <http://www.library.ca.gov/crb/97/03/97003a.pdf> (indicating the allure of gambling was probably made more prevalent by the "frontier spirit"). Some opine gambling embodied the frontier frame of mind because both relied mostly on "high expectations, risk taking, opportunism, and movement." *Id.*

5. CATALIN BARBOIANU, THE MATHEMATICS OF LOTTERY: ODDS, COMBINATIONS, SYSTEMS 5 (CarolAnn Johnson ed., 2009) ("Lottery is by far the oldest and most widely known game of chance, having been practiced since antiquity."). During the early colonial period, playing the lottery was viewed as a civic responsibility. DUNSTAN, *supra* note 4, at I-6. Specifically, colonies used lotteries for purposes of revenue-raising and civic betterment. See *id.* (explaining lottery revenues were used to fund government projects and build universities, churches and libraries); see also *A Brief History of Gambling in the U.S.*, DRUG FREE ACTION ALLIANCE, <https://www.drugfreeactionalliance.org/smart-bet/providers/gambling-in-us> (last visited May 12, 2016) (stating lotteries funded a multitude of the top colleges in America, such as Yale, Columbia, Dartmouth, and Harvard). Indeed, some posit America was founded on lotteries. Will Hobson,

today's language, sports betting.⁶

While gambling declined during the Civil War due to several states' bans on lotteries,⁷ the South used lotteries after the Civil War to relieve its devastating war debt.⁸ However, corruption surrounding the Louisiana Lottery prompted unprecedented federal regulation of lotteries.⁹ The diminishment of the lottery was further spurred during Andrew Jackson's presidency, and by 1840, lottery gambling had been outlawed in all

Sports Gambling in U.S.: Too Prevalent to Remain Illegal?, WASH. POST (Feb. 27, 2015), https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html (opining "America was founded on lotteries" partly because the Continental Congress attempted to fund the Revolutionary War with a lottery where "the tickets were among the first documents to bear the words 'United States'").

6. See Ed Crews, *Gambling: Apple-Pie American and Older than the Mayflower*, COLONIAL WILLIAMSBURG FOUND. (Autumn 2008), <http://www.history.org/foundation/journal/autumn08/gamble.cfm> ("Englishmen bet on everything; bull baiting, dog fights, backgammon, chess problems, military actions, sieges, births, deaths, walking and running contests, and cricket games."). Even Native Americans participated in a form of sports betting. *Id.* (noting colonists observed Native Americans wagering on "athletic events," such as "intense football-like" games).

7. See *A Short History of Gambling in the United States*, GALE CENGAGE LEARNING, <http://ic.galegroup.com/ic/ovic/ViewpointsDetailsPage/ViewpointsDetailsWindow?displayGroupName=Viewpoints&disableHighlighting=false&prodId=OVIC&action=2&catId=&documentId=GALE%7CEJ3010079223&userGroupName=sacr73031&jsid=62916e0a417a2c9be8c6da4f4edc7ffc> (last visited May 12, 2016) ("From 1840 to 1860, all but two states prohibited lottery activity . . ."); see also Hobson, *supra* note 5 ("A wave of state bans on lotteries [occurred] in the 1820s and 1830s and lasted until the Civil War."). Additionally, the popularity of riverboat gambling was hampered by the effect the Civil War had on river travel. DUNSTAN, *supra* note 4, at II-4.

8. *A Short History of Gambling in the United States*, *supra* note 7 (explaining, after the Civil War, the South used lotteries "to finance the construction of roads, bridges, school buildings[,] and various other social capital projects"); see also Hobson, *supra* note 5 (explaining Southern states resorted back to the lottery after the Civil War). The most notable southern lottery was the Louisiana Lottery. *A Short History of Gambling in the United States*, *supra* note 7.

9. Compare *Champion v. Ames*, 188 U.S. 321, 363–64 (1903) (allowing Congress to regulate the transportation of lottery tickets across state lines by independent carriers), with *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918), *overruled by* *U.S. v. Darby*, 312 U.S. 100 (1941) (refusing to allow Congress to regulate interstate shipment of goods produced by child labor). The sharp distinction between *Ames* and *Dagenhart* lends credence to the notion that the rampant corruption of the Louisiana Lottery prompted the Supreme Court's knee-jerk, morality-based reaction in *Champion v. Ames*. See *Ames*, 188 U.S. at 357 ("Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another."); see also *A Short History of Gambling in the United States*, *supra* note 7 (discussing the controversy surrounding the Louisiana Lottery that eventually led to its abolishment by the federal government). The controversy concerning the lottery stemmed from the pending expiration of its charter that authorized it to operate in Louisiana. *A Short History of Gambling in the United States*, *supra* note 7. The individuals responsible for operating the lottery bribed state officials to renew the charter. *Id.* When news of these attempted bribes was released, public outrage led to a push for more federal regulation of the lottery. Hobson, *supra* note 5. Indeed, the scandal and corruption besieging the Louisiana Lottery drew so much ire from the citizenry that it eventually earned the nickname "the Serpent." *Id.*

states.¹⁰ Yet, even as certain areas in the United States viewed lotteries in a sordid and unsavory light, gambling eventually found its footing in the wake of American financial tragedy.¹¹ Today, gambling remains an integral part of the American entertainment industry.¹²

2. Daily Fantasy Sports

Joining other gambling activities on the iridescent pedestal of American pecuniary desire is the notion of wagering money on fantasy sports.¹³ In fact, the addition of fantasy sports has exacerbated the popularity of gambling in the United States.¹⁴

Daily fantasy sports are a subset of traditional season-long fantasy sports¹⁵ and are immensely lucrative.¹⁶ The intersection of gambling and

10. *History of Gambling in the United States*, LEGITIMATECASINO.COM, <http://begado.legitimatecasino.com/usa-gaming-history> (last visited May 12, 2016).

11. DUNSTAN, *supra* note 4, at II-7 (contending antigambling sentiment began to change “after the stock market crash of 1929”). In this regard, gambling became a potential means of stimulating the economy. *Id.*; see also *A Short History of Gambling in the United States*, *supra* note 7 (“With the start of the Great Depression in 1929, numerous . . . states were . . . seeking any source of additional revenue.”).

12. See RICHARD A. MCGOWAN, BOSTON COLL. AND HARVARD MED. SCH., *GOVERNMENT AND THE TRANSFORMATION OF THE GAMING INDUSTRY* 3 (2001) (labeling present-day gambling as a form of American entertainment).

13. See Robert M. Crawford & David J. Apfel, *Welcome to Fantasy Island: Betting on the Growth of Fantasy Sports in the U.S., A Gamble with Many Risks*, CASINO INT’L MAG., Oct. 2014, at 62, 62, <http://content.yudu.com/A35tb5/CasinoOct2014/resources/64.htm> (“Sports gambling in the United States is an enormous and lucrative business . . .”). DraftKings, one of the most popular daily fantasy sports websites, “claims its user-base has increased by a factor of 12 since [2014].” Noah Davis, *The Daily Fantasy Sports Takeover*, VICE SPORTS (Oct. 29, 2014), https://sports.vice.com/en_us/article/the-daily-fantasy-sports-takeover.

14. Legal experts have explained the growth of fantasy sports and internet gambling:

While Congress and federal prosecutors have launched aggressive attacks on Internet gambling and sports betting in the United States, more people play the odds through online fantasy sports. What was once a seasonal hobby among friends and co-workers has blossomed into a \$4 billion to \$5 billion per year industry, with nearly 35 million adults in the United States participating in some form of fantasy sports in 2014.

Crawford & Apfel, *supra* note 13; see also Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html (“Embraced by sports leagues, funded by Wall Street, protected by federal law and played by more than 3 million people, daily fantasy sports Web sites such as FanDuel and DraftKings have become the most legitimate way for most sports fans to risk money on sports.”); Hampton Stevens, *The Great American Gambling Boom*, ATLANTIC (Sept. 21, 2014), <http://www.theatlantic.com/entertainment/archive/2014/09/how-daily-fantasy-sports-will-create-an-american-gambling-boom/380382> (recognizing “an estimated 41 million people in the U.S. and Canada” play fantasy sports).

15. “Instead of selecting players for an entire season like traditional fantasy sports, [Daily

daily fantasy sports is a new combination that emerged in 2006.¹⁷ Part of the allure of daily fantasy sports is attributed to its potential to net rapid rewards for participants.¹⁸ The fascination with daily fantasy sports is exemplified by the fact DraftKings and FanDuel, two of the largest daily fantasy sports operators, consistently received more than three million entries apiece during 2015's NFL Sundays.¹⁹ This is all occurring despite some pundits' beliefs that daily fantasy sports are inherently unfair and, in some instances, unscrupulous.²⁰

Fantasy Sport] matches require a person to pick a lineup for a single night (or week, in the case of the NFL), while staying under a salary cap." Davis, *supra* note 13. Additionally, a daily fantasy sports contest "restart[s] constantly and [is] typically played against strangers." Kilgore, *supra* note 14. In contrast to daily fantasy sports, traditional season-long fantasy sports require "players draft a team at the start of the season" and keep up with that same roster all year. Stevens, *supra* note 14.

16. Joshua BrusteIn & Ira Boudway, *You Aren't Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK (Sept. 10, 2015, 7:00 AM), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> (attesting to the lucrative nature of the daily fantasy sports industry by noting that both DraftKings and FanDuel brought in well over \$350 million in investments during the 2015 football offseason). Given these enormous rounds of investment, both DraftKings and FanDuel "are now valued at more than \$1 billion." *Id.*

17. See generally *The Evolution of the Daily Fantasy Sports Industry*, ROTOGRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited May 12, 2016) for a timeline illustrating the emergence of the daily fantasy sports industry.

18. See Stevens, *supra* note 14 ("Users can draft a new lineup whenever there's a new slate of games. The time commitment is small, the results are immediate, and the payoffs can be huge."); see also Drew Harwell, *The Rise of Daily Fantasy Sports, Online Betting's Newest Empire*, WASH. POST (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine> (explaining how daily fantasy sports participants know the results of the contest in which they have entered by the end of the day); Kilgore, *supra* note 14 (observing daily fantasy sports last one day and are, therefore, "faster" than season-long fantasy sports). The immediate rewards provided by daily fantasy sports is best encapsulated by analogy: "If season-long fantasy is a long-term investment, daily fantasy is a slot machine." Harwell, *supra*.

19. See Darren Heitner, *Daily Fantasy Sports Showing Strong Growth Despite Legal Concerns*, FORBES (Oct. 12, 2015, 10:59 AM), <http://www.forbes.com/sites/darrenheitner/2015/10/12/daily-fantasy-sports-showing-strong-growth-despite-legal-concerns> ("DraftKings received 4.14 million entries[,] and FanDuel took in 3.38 million entries . . . for October 11[, 2015] NFL-related contests. The previous Sunday, the operators generated 3.75 million and 3.18 million paid entries respectively.").

20. The following elucidates how potentially unfair daily fantasy sports can be to everyday average contestants who do not have the time, money, or skill to put together various computer programs and algorithms:

Analysis from Rotogrinders conducted for Bloomberg shows that the top 100 ranked players enter 330 winning lineups per day, and the top 10 players combine to win an average of 873 times daily. The remaining field of approximately 20,000 players tracked by Rotogrinders wins just 13 times per day, on average.

BrusteIn & Boudway, *supra* note 16; see also Heitner *supra* note 19 (questioning whether the public is aware or concerned with their slim prospects for success, which is the result of pro-players, also known as "sharks," being more advanced players and spending more time researching their picks). "The theory is that the more casual fantasy sports players (the minnows) will be turned off by the

What is most intriguing regarding the rampant success of daily fantasy sports websites is the absence of federal law prohibiting Americans from engaging in these activities.²¹ Ironically, daily fantasy sports websites are legally protected by the very legislation—the UIGEA—that led to the demise of online poker and online sports betting.²² Undeniably, this

overwhelming success of a select few (the sharks) and eventually choose to spend their money elsewhere when they realize they have little chance of long-term success.” *Id.* The potential daily fantasy sports have for fostering gambling abuse and addiction might stem from the same characteristics that make these games so popular among everyday players. *See* David Whitley, *Fantasy Is a Real Threat to Gambling Addicts*, ORLANDO SENTINEL (Oct. 5, 2015, 6:55 PM), <http://www.orlandosentinel.com/sports/os-fantasy-sports-addiction-david-whitley-1006-20151005-column.html> (characterizing daily fantasy games as addictive, and noting approximately “5 percent of gamblers are prone to addiction and the financial and emotional ruin that it brings”); *see also* Chris Korman, *DraftKings and FanDuel Are Fun, Addictive, and Completely Unfair for Most Fans*, USA TODAY: FOR THE WIN (Sept. 18, 2015, 11:57 AM), <http://ftw.usatoday.com/2015/09/daily-fantasy-sports-football-draftkings-FanDuel-commercials> (noting the potential dangers daily fantasy sports can pose to those who are predisposed to gambling addiction). Competitors “have easy access to a game that gives them quick feedback” and the ability to “quickly re-invest winnings or try to recoup losses . . . as soon as the next day.” Korman, *supra*; *see also* Whitley *supra* (suggesting the popularity of the NFL coupled with the easy access to daily fantasy sports has made daily fantasy sports “arguably the biggest gateway drug to gambling addiction in history”).

21. *See* Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5362–5363 (2012) (prohibiting persons “engaged in the business of betting” from accepting a financial instrument in connection with unlawful internet gambling but exempting “participation in any fantasy . . . sports game” when the contest is a game of skill from the definition of betting); *see also* Ira Boudway & Joshua Brustein, *How Will the Government Change the Game for Daily Fantasy Sports?*, BLOOMBERG, <http://www.bloomberg.com/news/articles/2015-10-15/how-will-the-government-change-the-game-for-daily-fantasy-sports-> (last updated Oct. 15, 2015, 8:00 PM) (“The law explicitly says that fantasy sports games don’t count as betting so long as they have a few key attributes, such as set prize pools, skill-based contests, and not relying on the outcome of any single sports events.”); Harwell, *supra* note 18 (“Daily-fantasy matches are classified as games of skill, not chance, and are thus exempt[] from the Unlawful Internet Gaming Enforcement Act . . .”). However, three United States Attorney’s offices—Tampa, Florida, the Southern District of New York, and Boston, Massachusetts—have initiated grand jury investigations into DraftKings’ and FanDuel’s activities. Paul Kelly, Principal, Jackson Lewis, PC, Keynote Address at the University of New Hampshire’s School of Law Town Hall Discussion on Sports, Gambling, and Online Sports Gambling (Mar. 17, 2016), <http://www.legalsportsreport.com/9053/dfs-federal-issues>. Pundits speculate the Justice Department is investigating whether these companies violated the UIGEA or the Illegal Gambling Business Act (IGBA). *Id.* *See also* 18 U.S.C. § 1955 (2012) (targeting any entity or person who “finances, manages, supervises, directs, or owns” an illegal gambling business).

22. 31 U.S.C. §§ 5361–5367 (banning unlawful internet gambling); *see also* Robert Klemko, *How Daily Fantasy Is Changing the Game*, SPORTS ILLUSTRATED: MMQB (Oct. 8, 2015), <http://mmqb.si.com/mmqb/2015/10/08/FanDuel-draftkings-scandal-daily-fantasy-football-dfs> (The Unlawful Internet Gambling Enforcement Act of 2006 was a death knell to the world of online poker but provided for the continuation of traditional fantasy sports.”). The official eradication of the online poker industry came to a head on April 15, 2011, also known as “Black Friday.” *See generally* Chad Holloway, *The Black Friday Timeline: One Year Without Online Poker*, POKERNEWS (Apr. 15, 2012), <http://www.pokernews.com/news/2012/04/the-black-friday-timeline-one-year-without-online-poker-12445.htm> (presenting a timeline concerning the litigation against prominent online

exodus “left thousands of online gamblers scratching their heads and looking for new places to play and maybe make a quick buck.”²³ This ban on the online poker industry left a vacuum to be filled,²⁴ and daily fantasy sports websites filled, and continue to fill, this void.²⁵

3. Partnerships

The potential for widespread success of daily fantasy sports websites caught the eye of sports leagues and businesses alike.²⁶ Daily fantasy sports found firm footing with the American sports triumvirate composed of the National Football League (NFL), the National Basketball Association (NBA), and Major League Baseball (MLB).²⁷ While the NBA and MLB have partnered with daily fantasy sports companies, the NFL leaves it up to the individual teams to decide which daily fantasy sports company they wish to join forces with.²⁸ Obviously, a driving factor when forming these partnerships is to generate revenue, but the leagues also view daily fantasy sports websites as having the unique ability to foster

poker entities); *Poker Face Off*, ECONOMIST (Apr. 20, 2011), http://www.economist.com/node/18586698?story_id=18586698&CFID=162740365&CFTOKEN=42729011 (speculating as to the future of the online poker industry while legislation was looming). On Black Friday three major poker websites were demolished: PokerStars, Full Tilt Poker, and Absolute Poker. Holloway, *supra*.

23. Evan Grossman, *Will Daily Fantasy End up Like Online Poker? You Bet*, ROLLING STONE (Oct. 29, 2015), <http://www.rollingstone.com/sports/features/will-daily-fantasy-end-up-like-online-poker-you-bet-20151029>.

24. *Cf. id.* (telling the story of a professional gambler who, like many other gamblers, was unexpectedly divested of his main avenue of gambling when online poker was raided during Black Friday).

25. Stevens, *supra* note 14 (“Black Friday, in effect, left a huge pool of money floating around, waiting to be wagered. Single-day fantasy sports created a place for that money to land . . .”).

26. See *DFS Partnership/Sponsorship Tracker*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-sponsorship-tracker> (last visited May 12, 2016) (providing an overview of various partnerships between daily fantasy sports websites and professional athletic associations).

27. *Id.*; see also Geoff Baker, *Major Sports Leagues Not Afraid to Partner with Fantasy Sites FanDuel and DraftKings*, SEATTLE TIMES, <http://www.seattletimes.com/sports/seahawks/major-sports-leagues-not-afraid-to-partner-with-fantasy-sites-FanDuel-and-draftkings> (last updated Nov. 11, 2015, 7:24 PM) (recognizing “FanDuel and DraftKings have investment deals or partnerships with the NBA, MLB, NHL, MLS, and NASCAR and promotional agreements with [several] NFL teams”). In September 2015, the NFL Players Association and DraftKings executed a licensing partnership that “will allow DraftKings to employ active NFL players for in-product and promotional campaigns across broadcast, print, social media, digital[,] and mobile properties.” Kristi Dosh, *NFL Players Association Inks Licensing Deal with DraftKings*, FORBES (Sept. 29, 2015, 9:01 AM), <http://www.forbes.com/sites/kristidosh/2015/09/29/nfl-players-association-inks-licensing-deal-with-draftkings>.

28. See *DFS Partnership/Sponsorship Tracker*, *supra* note 26 (noting how, with no league-wide partnership agreement in place with a daily fantasy sports company, “[t]he NFL is the biggest prize left for daily fantasy sports sites to partner with”).

fan commitment.²⁹ Along with these sports leagues, large corporations partake in the daily fantasy frenzy.³⁰ For example, Fox Sports owns 11% of DraftKings.³¹

B. *Legal Framework Allowing for the Existence of Daily Fantasy Sports . . . For Now*

1. Overview

Using the phrase “legal framework” in conjunction with daily fantasy sports is problematic because daily fantasy sports websites exhibit little semblance of a jurisprudential structure, being legal because of a UIGEA exception.³² This exception excuses fantasy sports games from being illegal if the game meets the following criteria: (1) prizes and awards are established and made known to participants before the game, and the prizes’ value does not depend on “the number of participants or the amount of any fees paid by those participants”; (2) “[a]ll winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the

29. Kilgore, *supra* note 14 (discussing the substantial revenue stream professional sports leagues receive from their deals with daily fantasy sports and how the leagues tend to view these deals “primarily as a way to drive growth and fan engagement”); *see also* Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 *SPORTS LAW J.* 79, 93 (2015) (stating the professional sports leagues supported the UIGEA’s exception because it would increase revenue and help “maintain[] increased viewership by individuals who played fantasy sports”); I. Nelson Rose, *Are Daily Fantasy Sports Legal?*, CALVINAYRE.COM (Oct. 18, 2015), <http://calvinayre.com/2015/10/18/business/are-daily-fantasy-sports-legal> (reasoning because daily fantasy sports participants will to watch an entire game to assess their individual fantasy team players performance, viewership will increase, thereby increasing advertising revenue).

30. Steve Beauregard, *How Is DraftKings Legal? And What States Don’t Allow It?*, GAMBOOOL, <http://gamboool.com/how-is-draftkings-legal-and-what-states-dont-allow-it> (last updated Apr. 11, 2016) (identifying corporate entities that have taken ownership positions in DraftKings and FanDuel, such as NBC Universal, Comcast, Fox Sports, and Time Warner); *see also* Legal, DAILY FANTASY SPORTS 101, <http://www.dailyfantasysports101.com/legal> (last visited May 12, 2016) (recognizing United States-based companies own and operate the top daily fantasy sports websites).

31. Beauregard, *supra* note 30.

32. *See* Ehrman, *supra* note 29, at 93–95 (explaining the UIGEA’s exception, which was specifically carved out for fantasy sports); *see also* Beauregard, *supra* note 30 (asserting the UIGEA was the “death knell for online poker” but “became the legal foundation for the incredibly popular online fantasy sports market”); Hayden Bird, *Daily Fantasy Was Created by Bizarre Government Legislation*, BOSTINNO (Oct. 20, 2015, 12:07 PM), <http://bostinno.streetwise.co/2015/10/20/explaining-why-daily-fantasy-sports-are-legal-uigea-safe-port-act-of-2006-vote-count> (claiming daily fantasy sports are exempt under the UIGEA); Kilgore, *supra* note 14 (explaining the boom of daily fantasy sports “began somewhere over the Atlantic Ocean in March 2009” when FanDuel’s founder read through a copy of UIGEA and concluded that the legislation did not limit fantasy sports to being played in a season-long format).

performance of individuals . . . in multiple real-world sporting or other events”; and (3) winning outcomes are not based “on the score . . . or any performance . . . of any single real-world team or . . . an individual athlete in any single real-world sporting or other event.”³³ If the realm of legal rules and maxims was a dance, daily fantasy sports and jurisprudential underpinnings would be situated on opposite sides of the dance floor in anxious anticipation. Today, the music is beginning to play, and a painful tango is about to ensue between these two partners. The following discussion examines in greater detail how daily fantasy sports prevail under the current legal framework and explores the types of regulations that might, in the future, govern how these various daily fantasy sports websites operate.

2. Unlawful Internet Gambling Enforcement Act of 2006

When one thinks of daily fantasy sports, it is safe to assume they do not simultaneously think of anti-terrorism legislation.³⁴ However, according to Congress, daily fantasy sports and terrorism have a lot to do with one

33. 31 U.S.C. § 5362(1)(E)(ix)(I)–(III) (2012). Daily fantasy sports satisfies the first prong of the UIGEA because all of the prizes are established in advance of the contest. Justin Fielkow, *From Fantasy to Reality: The Evolution and Legality of Fantasy Sports*, SPORTS ESQUIRES (May 18, 2015), http://thesportsesquires.com/from-fantasy-to-reality-the-evolution-and-legality-of-fantasy-sports/#_edn12. Likewise, daily fantasy sports satisfies the third prong because contestants do not select an entire team or even a single athlete to compete in the contests; rather, contestants are presented with a “list of players, positions and their respective cost” and must fill their roster spots accordingly. Michael Nelson, *How to Make a Killer Daily Fantasy Sports Football Roster on DraftKings and FanDuel*, VENTURE BEAT (Sept. 10, 2015, 1:33 PM), <http://venturebeat.com/2015/09/10/how-to-make-a-killer-daily-fantasy-sports-football-roster-on-draftkings-and-fanduel>. However, daily fantasy sports may fall short of the second prong, which requires winning outcomes be reflective of participants’ relative skill and knowledge. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 38 (2012) (indicating daily fantasy games may not fulfill the second prong because their limited duration may increase the element of luck in these contests); see also Rose, *supra* note 29 (challenging UIGEA’s applicability to daily fantasy sports because some “skill elements of the season-long fantasy leagues are missing” and events such as weather or injury are more likely to occur and ultimately determine which team wins). *But see Legal, supra* note 30 (contending daily fantasy sports contests have been “ruled a game of skill”). The Third Circuit recently upheld the constitutionality of the UIGEA and held it is not unconstitutionally vague. *Interactive Media Ent. & Gaming Ass’n v. Att’y Gen. of the U.S.*, 580 F.3d 113, 116 (3d Cir. 2009) (holding UIGEA “cannot be deemed impermissibly vague in all its applications” even though it “does not itself outlaw any gambling activity but rather incorporates other Federal or State law related to gambling”).

34. Diana Moskovitz, *The Daily Fantasy Nightmare Is here Because the NFL Made It So*, DEADSPIN (Oct. 7, 2015, 7:16 PM), <http://deadspin.com/the-daily-fantasy-nightmare-is-here-because-the-nfl-mad-1734882560> (“The language that gave rise to daily fantasy wasn’t in legislation about gambling, but instead was tacked onto the very bottom of a 2006 bill about, of all things, counterterrorism measures at U.S. ports.”).

another.³⁵ The UIGEA—an act placing restrictions on financial institutions as they relate to the illegal gambling industry—was tacked on to a maritime-centric bill dealing with port security aptly titled the “Security and Accountability for Every Port Act of 2006” (SAFE Port Act).³⁶ Those surprised to learn this fact would not be alone. Many members of Congress who helped overwhelmingly pass this bill were themselves unaware of the anti-gambling legislation contained therein.³⁷ Yet, there lie the provisions of the UIGEA, nestled in at the very end of the bill after the section entitled “Protection of Health and Safety During Disasters”³⁸—not exactly where one would think to look for an act intended to prevent illicit internet gambling businesses from taking advantage of the banking system.³⁹ This is hardly the first instance of congressional chicanery in this country,⁴⁰ but what makes this particular

35. See Anthony Vecchione, Comment, *Fantasy Sports—Has Recent Anti-gambling Legislation ‘Dropped the Ball’ by Providing a Statutory Carve-Out for the Fantasy Sports Industry?*, 61 SMU L. REV. 1689, 1702 (2008) (“The Act is contained in a completely unrelated bill, the [SAFE] Port[] Act, which deals with port security.”); see also Bird, *supra* note 32 (“The simple truth is that daily fantasy was born as a byproduct of government port security legislation.”).

36. Security and Accountability for Every Port Act of 2006, Pub. L. 109-347, 120 Stat. 1884 (2006).

37. See Beauregard, *supra* note 30 (categorizing the UIGEA as a provision that was “snuck into a terrorism-related port bill at the last minute”); see also Ehrman, *supra* note 29, at 93 (pointing out the UIGEA was “forced through Congress in the remaining minutes before an election recess”); Bird, *supra* note 32 (confirming not one congressman read the pertinent provisions of the UIGEA before they passed the Act because it was added in the final hour and buried in the SAFE Port Act); Rose, *supra* note 29 (“Admittedly, the UIGEA was rammed through without any hearings or even proof-reading, so it is sometimes difficult to know what Congress intended.”).

38. Security and Accountability for Every Port Act of 2006 § 802.

39. See Dustin Gouker, *UIGEA Author: ‘No One Ever Conceived’ That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REP. (May 8, 2015, 8:15), <http://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout> (summarizing the UIGEA as a law precluding U.S. financial institutions “from processing transactions related to online gambling”); I. Nelson Rose, *Prohibition 2.0: The Unlawful Internet Gambling Enforcement Act of 2006 Analyzed*, GAMBLING & L. (Dec. 13, 2010), http://www.gamblingandthelaw.com/index.php?option=com_content&view=article&id=286:prohibition-20-the-unlawful-internet-gambling-enforcement-act-of-2006-analyzed&catid=3:recently-published-articles&Itemid=8 (“Findings include the doubtful assertion that Internet gambling is a growing problem for banks and credit card companies.”).

40. There are often subtleties located in pieces of legislation that are not read by members of Congress. Cf. Jim Geraghty, *Chances Are, Your Congressman Didn’t Really Read the Bill*, NAT’L REV. (Mar. 19, 2010, 9:30 AM), <http://www.nationalreview.com/campaign-spot/4776/chances-are-your-congressman-didnt-really-read-bill-jim-geraghty> (recognizing certain healthcare legislation contains provisions unrelated to health insurance and would go unnoticed without reading the legislation in its entirety); Jennifer Bendery & Amanda Terkel, *GOP Sneaks Anti-abortion Language into Bipartisan Human Trafficking Bill*, HUFFPOST POL. (Mar. 10, 2015, 6:38 PM), http://www.huffingtonpost.com/2015/03/10/trafficking-abortion_n_6842880.html (“The fate of what should have been noncontroversial legislation to crack down on human trafficking is uncertain after Democrats discovered that Republicans had slipped anti-abortion language into the bill.”).

instance especially intriguing is when the author of the UIGEA, Jim Leach, acquiesced to the inclusion of an exemption for fantasy sports, he never “conceived of [daily fantasy sports] becoming a large scale activity.”⁴¹ This makes sense given the bill was enacted in 2006, during a time when fantasy contests were season-long and played mainly amongst friends and office cohorts.⁴² In the end, daily fantasy sports can thank their genesis, at least in part, to the Bush Administration’s attempt “[t]o improve maritime and cargo security through enhanced layered defenses.”⁴³

C. *States and Daily Fantasy Sports: A Comparative View*

1. Overview of the Professional and Amateur Sports Prohibition Act of 1992 (PASPA)

To understand the current gambling landscape as it pertains to the states today, it is important to inquire into PASPA.⁴⁴ PASPA, at its core, bans most states from allowing legalized forms of sports betting.⁴⁵ In pertinent part, the legislation states:

It shall be unlawful for [either] . . . a governmental entity . . . or a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a

41. Gouker, *supra* note 39.

42. *See id.* (explaining the UIGEA passed in 2006 when, “season-long fantasy sports [were] already pretty big, but [they were] viewed mostly as an endeavor among friends with [] little money on the line”); *see also* Vecchione, *supra* note 35, at 1698 (“Losses in workplace productivity have been associated with employees constantly logging on to the Internet to track players’ statistics and performances.”). When the UIGEA was passed, daily fantasy sports did not exist. Gouker, *supra* note 39; *see also* Michael McCann, *In Wake of Latest Allegations, a Look at the Legality of Daily Fantasy Sports*, SPORTS ILLUSTRATED, <http://www.si.com/nfl/2015/10/06/daily-fantasy-sports-legality-draftkings-FanDuel-insider-trading> (last updated Oct. 7, 2015) (positing daily fantasy sports were “not in the relevant economic marketplace envisioned by Congress and President Bush” when the UIGEA was enacted in 2006, and thus, questions can be raised about whether or not daily fantasy sports “fall within the scope of the [Act]”).

43. Security and Accountability for Every Port Act of 2006, 120 Stat. at 1884; *see also* Interactive Media Ent. & Gaming Ass’n v. Att’y Gen. of the U.S., 580 F.3d 113, 116 (3d Cir. 2009) (explaining the UIGEA requires regulations to be enacted that mandate “certain financial institutions ‘to identify and block or otherwise prevent or prohibit’” barred transactions (quoting 31 U.S.C. § 5364(b)(1) (2006)); Gouker, *supra* note 39 (stating the UIGEA “prevents financial institutions in the United States from processing transactions related to online gambling”).

44. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2012).

45. *See id.* § 3704 (explaining the applicability of the statute); *see also* Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 287 (2011). While Nevada is fully exempt from the sports gambling prohibition, Oregon, Delaware, and Montana are only partially exempt. *Id.* at 288 (citing 28 U.S.C. § 3704(a)). The remaining “forty-six states are completely prohibited from sanctioning or operating a professional or amateur sports betting scheme.” *Id.* (citing 28 U.S.C. § 3704(a)(1)).

governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.⁴⁶

The growing angst amongst states not exempt from the prohibition on sports gambling is palpable. States and governmental agencies have challenged the legislation as an unconstitutional infringement on intrastate activities.⁴⁷ However, in lieu of PASPA, and the restraints it places on a majority of the states, daily fantasy sports still finds its place in the UIGEA exception.⁴⁸

2. States and Daily Fantasy Sports

While PASPA explicitly forbids (with some exceptions) forty-six states⁴⁹ from sponsoring sports gambling activities, the UIGEA federally exempts daily fantasy sports from being classified as illegal sports gambling, in part, because of the emphasis the statute places on “chance.”⁵⁰ The UIGEA is federal law, and the legislation allows

46. 28 U.S.C. § 3702.

47. See S. REP. NO. 102-248, at 12 (1991), reprinted in 1992 U.S.C.C.A.N. 3553, 3562 (delineating concerns that PASPA is “a substantial intrusion into . . . the fundamental right of [the] [s]tates’ to raise revenue” and “blatantly discriminates between the [s]tates”). The opponents are primarily troubled over a federal monopoly resulting from the states that were grandfathered in as they were the only states able to permit lawful sports wagering. *Id.* at 13. *But cf.* Bill Bradley, *The Professional and Amateur Sports Protection Act—Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORTS L. 5, 15 (1992) (asserting sports gambling has a direct impact on interstate activities and, thus, is permissibly “subject [to] federal regulation under the Commerce Clause”).

48. See 31 U.S.C. § 5362(1)(E)(i)–(ix) (2012) (carving out a qualified exception from wagering for participation in daily fantasy sports). *But see Ex-Rep. Jim Leach: Daily Fantasy Sports Is ‘Cauldron of Daily Betting’*, NEWSMAX (Oct. 12, 2015, 6:32 PM), <http://www.newsmax.com/US/daily-fantasy-sports-betting/2015/10/12/id/695883> (“The U.S. congressman who drafted the 2006 legislation used by DraftKings and FanDuel as proof of their legitimacy says it is ‘sheer chutzpah’ for the daily fantasy sites to pretend the law makes them legal.”). In e-mail correspondence with the Associated Press, former House Representative Jim Leach asserted the so-called “carve out” for daily fantasy sports found in the UIGEA “does not provide [daily fantasy sports websites] with immunity against other federal and state laws that could limit their activities.” *Id.*

49. See 28 U.S.C. § 3704(a); see also McCann, *supra* note 42 (“PASPA . . . bans 46 states’ ability to license, sponsor or authorize sports betting.”).

50. See 31 U.S.C. § 5362(1)(E)(ix) (exempting from the definition of a wager “participation in any fantasy or simulation sports game” where “[a]ll winning outcomes reflect the relative knowledge and skill of the participants”); see also M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J.L. & TECH. 59, 68 (2006) (“The only games that fall under the gambling statutes are those classified as games of chance rather than games of skill.”). *But see* Gerd Alexander, iBrief, *The U.S. on Tilt: Why the Unlawful Internet Gambling Enforcement Act Is a Bad Bet*, 2008 DUKE L. &

individual states to decide the legality of daily fantasy sports.⁵¹ While some states have a narrow definition of what constitutes gambling,⁵² other states have a much more encompassing interpretation,⁵³ and this is where the headache ensues for daily fantasy sports operators.⁵⁴ The crux of the debate centers on whether daily fantasy sports are games of skill or games of chance.⁵⁵ Put simply, if daily fantasy sports are classified as a game of skill—as they are referred to in the UIGEA—then they are legal.⁵⁶ If, on

TECH. REV. 6, ¶ 27 (arguing the UIGEA encompasses games of chance and hybrid games where chance is present).

51. While the UIGEA permits daily fantasy sports, it does not “preempt[] all other federal and state anti-gambling laws.” Rose, *supra* note 29. This is due to the “Rule of construction” provision in the opening of the UIGEA, which states: “No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.” 31 U.S.C. § 5361(b); *see also* Steve Ruddock, *Is Daily Fantasy Sports Really Legal in the United States?*, USPOKER.COM (Sept. 18, 2015, 12:17 PM), <http://www.uspoker.com/blog/dfs-legality-in-u-s/12455> (“The legality of [daily fantasy sports] is decided at the state level, and as such, it’s more or less an unregulated industry, operating in what are essentially gray markets.”); *cf.* Dustin Gouker, *Somehow, DFS Is Managing to Stay off the Radar of Gambling Opponents in Congress*, LEGAL SPORTS REP. (Apr. 21, 2015, 5:00 PDT), <http://www.legalsportsreport.com/1096/dfs-stays-off-u-s-congress-radar> (recognizing either due to a “lack of interest[] or a lack of knowledge,” daily fantasy sports are not a target of proposed legislation entitled “Restoration of America’s Wire Act,” which would seek to rewrite the Wire Act of 1961 to encompass “several forms of online gambling”). *See* Vecchione, *supra* note 35, at 1703–04 for a discussion of how the UIGEA has been interpreted in federal court.

52. *See* LA. STAT. ANN. § 90(A)(1)(a) (2012) (“Gambling is the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit.”); *see also* MD. CODE ANN., CRIM. LAW §§ 12-101–12-103 (West 2002) (defining gambling and gambling events—with specificity—including events such as bazaars, carnivals, and raffles, and such games as “thimbles[,] . . . little joker[,] . . . craps[, and] . . . any other gaming device or fraudulent trick”).

53. *See* 720 ILL. COMP. STAT. ANN. § 5/28-1 (West 2015) (indicating a person gambles when the person “knowingly plays a game of chance or skill for money or other thing of value” with some exceptions such as bingo and the lottery); *see also* IND. CODE ANN. § 35-45-5-3 (West 2014) (including an express prohibition on using the Internet for gambling purposes).

54. *See* McCann, *supra* note 42 (explaining most states allow daily fantasy sports sites to operate without additional restrictions while a handful of states have imposed restrictions on daily fantasy sport companies).

55. *See* Tim Marcin, *Are Daily Fantasy Sports Gambling? DraftKings CEO Compares DFS to Chess, Picking Stocks, Emphasizing Skill*, INT’L BUS. TIMES (Sept. 30, 2015, 1:45 PM), <http://www.ibtimes.com/are-daily-fantasy-sports-gambling-draftkings-ceo-compares-dfs-chess-picking-stocks-2121235> (reporting DraftKings’ CEO’s contention that “daily fantasy sports are skill-based games, comparable to playing chess or picking stocks”). Some categorize daily fantasy sports as a game of chance and a game of skill—the skill being “know[ing] how to play fantasy competitions.” Shirley Leung, *DraftKings and the Power of Luck*, BOS. GLOBE (Oct. 21, 2015), <https://www.bostonglobe.com/business/2015/10/20/fantasy-sports-game-chance-skill/zab5CLxnF5zRxkwRxCuEnI/story.html>.

56. 31 U.S.C. § 5362(1)(E)(ix) (exempting from the definition of a wager “participation in any fantasy or simulation sports game” where “[a]ll winning outcomes reflect the relative knowledge and skill of the participants”); *see also* Holleman, *supra* note 50, at 68 (“The only games that fall under the

the other hand, daily fantasy sports are classified as games of chance, then they are considered illegal gambling.⁵⁷ Further complicating the situation is the definition of “chance,” which fluctuates state-to-state.⁵⁸ Unfortunately, courts have not specifically delved into the issue of whether daily fantasy sports are games of skill or chance.⁵⁹ In 2013, the Northern District of Illinois was presented with the opportunity to address the issue in *Langone v. Kaiser*⁶⁰ but declined to do so.⁶¹ In *Langone*, Plaintiff Christopher Langone argued FanDuel violated the Illinois Loss Recovery Act (ILRA)⁶² because the site sold “pools upon the result of games or contests of skill and chance”⁶³ —an activity defined as “gambling” under

gambling statutes are those classified as games of chance rather than games of skill.”).

57. See 31 U.S.C. § 5362(1) (defining a bet or wager as, among other things, “a game subject to chance”). In most states, “fantasy football contests are [deemed] illegal if they involve three elements: consideration (e.g., an entry fee), reward (e.g., a prize) and chance.” Marc Edelman, *Is It Legal to Play Fantasy Football for Money?*, FORBES (Sept. 3, 2013, 9:32 AM), <http://www.forbes.com/sites/marcedelman/2013/09/03/is-it-legal-to-play-fantasy-football-for-money>. See generally Edelman, *supra* note 33, at 26–29 for a more detailed examination of these elements.

58. See *State v. Gupton*, 30 N.C. (1 Ired.) 271, 273–74 (1848) (defining a “game of chance” [as] such a game, as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill, or adroitness have honestly no office at all, or are thwarted by chance”). In stark contrast, a “game of skill . . . is one, in which nothing is left to chance; but superior knowledge and attention, or superior strength, agility, and practice, gain the victory.” *Id.* at 274. Generally, courts apply one of three tests to decide whether an activity falls within the gambling element of chance. Edelman, *supra* note 33, at 28 (identifying “the ‘predominant purpose test,’ the ‘any chance test,’ or the ‘gambling instinct test’” as the three tests generally applied by courts). As explained by Marc Edelman, the “predominant purpose test”—the majority test—considers an activity a game of chance if more than half of the outcome is a result of chance. *Id.* at 28–29 (quoting Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 392 (2009)). Dissimilarly, the “any chance test” deems a particular activity a game of chance if the outcome is based on any modicum of chance. *Id.* at 29. Finally, the “gambling instinct test,” labels an activity a game of chance if “the nature of an activity . . . appeals to one’s gambling instinct.” *Id.*

59. See Marc Edelman, *FanDuel Secures an Important Victory in Daily Fantasy Sports Lawsuit, However Plaintiff Plans to Appeal*, FORBES (Oct. 9, 2013, 11:16 PM), <http://www.forbes.com/sites/marcedelman/2013/10/09/fanduel-secures-an-important-victory-in-daily-fantasy-sports-lawsuit-however-plaintiff-plans-to-appeal/#35272e955874> (commenting the issue of whether daily fantasy sports are illegal games of chance has yet to be addressed by the courts).

60. *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587 (N.D. Ill. Oct. 9, 2013).

61. *Id.* at *7 (declining to address plaintiff’s argument that FanDuel is engaged in illegal activity because it profited from games of chance); see Edelman, *supra* note 59 (recognizing the *Langone* court sidestepped the question of whether daily fantasy sports are “legal games of skill or illegal games of chance”).

62. 720 ILL. COMP. STAT. ANN. § 5/28-8 (West 2013). The Illinois Loss Recovery Act is a qui tam statute allowing third parties the ability to collect on another’s unclaimed gambling losses. Edelman, *supra* note 59.

63. *Langone*, 2013 WL 5567587, at *1.

the ILRA.⁶⁴ The Court deemed the issue of whether daily fantasy sports are games of skill or chance was irrelevant to the holding of the case.⁶⁵

With a few exceptions, daily fantasy sports sites do not operate in ten states.⁶⁶ Currently there are twelve states with proposed or pending daily fantasy sports legislation,⁶⁷ and both Nevada⁶⁸ and New York⁶⁹ recently

64. 720 ILL. COMP. STAT. § 5/28-1(a)(6) (“A person commits gambling when he or she . . . knowingly sells pools upon the result of any game or contest of skill or chance . . .”).

65. *Langone*, 2013 WL 5567587, at *7.

66. *What Are the States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states> (last updated May 2, 2016) (noting daily fantasy sports do not operate in Alabama, Arizona, Hawaii, Idaho, Iowa, Louisiana, Mississippi, Montana, Nevada, New York, or Washington). Indeed, daily fantasy sports allow a given user to wager money on the “statistical performances of sporting events,” which certainly sounds like gambling. Dustin Gouker, *Daily Fantasy Sports Sites Say Their Users Aren't Gambling. They're Wrong*, WASH. POST (Oct. 13, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/10/13/daily-fantasy-sports-sites-say-their-users-arent-gambling-theyre-wrong>. At least some of the states that have imposed stricter laws might be concerned about the relationship between sports gambling and “gambling addictions, human hardships[,] and the fixing of games.” McCann, *supra* note 42; see also Steve Petrella, *DFS Player: How Daily Fantasy Ruined My Life*, SPORTING NEWS (Oct. 8, 2015), <http://www.sportingnews.com/fantasy-nfl-news/4657565-daily-fantasy-sports-dfs-gambling-addiction-regulation-lawsuit-industry-nfl> (highlighting the difficulties faced by those who deal with gambling addiction, especially in the context of the easily accessible world of daily fantasy sports). Some say daily fantasy sports possess all of the same attributes that are inherent in other forms of gambling because “[i]t's fast[,] [i]t's anonymous, [i]t's accessible, [and] [y]ou can lose and spend unlimited amounts of money on it.” *Id.*

67. See S.B. 2722, 28th Leg., Reg. Sess. (Haw. 2016) (declaring daily fantasy sports to be a game of skill); S.B. 2193, 99th Gen. Assemb. (Ill. 2016) (providing participants in fantasy contests “shall not be convicted of gambling”); H.R. 4323, 99th Gen. Assemb., Reg. Sess. (Ill. 2016) (establishing certain regulations pertaining to the operation of fantasy sports contests); H.B. 676, Reg. Sess. (La. 2016) (removing participation in fantasy sports contests from the purview of the state's gambling laws); S. 191, 189th Gen. Ct. of the Commw. Mass., Reg. Sess. (Mass. 2016) (allowing the state's lottery commission to operate online daily fantasy sports contests, defining them as games of skill); S.B. 459, 2015–2016 Leg. Sess. (Mich. 2016) (classifying fantasy sports as a game of skill); H.F. 2426, 89th Leg. (Minn. 2016) (legalizing daily fantasy sports); S.B. 2541, Reg. Sess. (Miss. 2016) (regulating and legalizing daily fantasy sports); H.B. 1941, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016) (regulating and legalizing daily fantasy sports); S.B. 1927, 217th Leg., 1st Ann. Sess. (N.J. 2016) (requiring the Department of Law and Public Safety to regulate daily fantasy sports); H. Res. 663, 199th Gen. Assemb., 2015 Sess. (Pa. 2016) (requiring a study to be done on fantasy sports' legality, the ability of the state to regulate fantasy sports, and fantasy sports' potential impact on the state); H. 7075, 2016 Gen. Assemb., Jan. Sess. (R.I. 2016) (allowing the Division of Racing and Athletics to conduct fantasy sports as games of skill); S. 1093, 2015–2016 Gen. Assemb., 121st Sess. (S.C. 2016) (legalizing and regulating fantasy sports); Assemb. 1437, 2015–2016 Leg., Reg. Sess. (Cal. 2015) (regulating daily fantasy sports websites and requiring operators of such websites to obtain licenses); see also Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports, Sports Betting*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker> (last visited May 12, 2016) (tracking updates pertaining to daily fantasy sports and individual state legislation). Much of the proposed state legislation incorporates UIGEA language. Chris Grove, *Cutting and Pasting UIGEA May Not Be the Best Policy Approach for States Considering Daily Fantasy Sports*, LEGAL SPORTS REP. (Nov. 23, 2015, 6:13 PDT), <http://www.legalsportsreport.com/5864/state-dfs-regulation-uigea-language-issues>. Industry

deemed daily fantasy sports a form of illegal gambling. Nevada's decision to consider daily fantasy sports synonymous with illicit gambling is particularly telling given its status as "the most prominent gaming jurisdiction in the [United States]."⁷⁰ This decision is more than likely

commentators contest this approach and argue, today, states are better suited to deal with this issue than "their federal counterparts acting a decade ago." *Id.*

68. NEV. GAMING CONTROL BD., NOTICE NO. 2015-99, LEGALITY OF OFFERING DAILY FANTASY SPORTS IN NEVADA (2015), <http://gaming.nv.gov/modules/showdocument.aspx?documentid=10481>; *see also* David Purdum, *Daily Fantasy Banned in Nevada for Being Unlicensed Gambling*, ABC NEWS (Oct. 16, 2015, 1:37 AM), <http://abcnews.go.com/Sports/daily-fantasy-banned-nevada-unlicensed-gambling/story?id=34512479> (relaying the news that Nevada deemed daily fantasy sports a form of gambling and, to operate in Nevada, daily fantasy sports operators will now need a license).

69. Press Release, Eric T. Schneiderman, N.Y. Att'y Gen., A.G. Schneiderman Issues Cease-and-Desist Letters to FanDuel and DraftKings, Demanding that Companies Stop Accepting Illegal Wagers in New York State (Nov. 11, 2015), <http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cease-and-desist-letters-fanduel-and-draftkings-demanding>; *see also* 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> (noting New York Attorney General, Eric Schneiderman, filed a cease and desist order against DraftKings and FanDuel ordering them to stop accepting money from New York residents); Dustin Gouker, *New York AG to DraftKings, FanDuel: DFS Is Illegal Gambling, Cease and Desist in NY*, LEGAL SPORTS REP. (Nov. 10, 2015, 16:29 PDT), <http://www.legalsportsreport.com/6075/new-york-says-dfs-is-illegal> (discussing New York's Attorney General's cease-and-desist order to DraftKings and FanDuel issued in response to his office's determination that daily fantasy sports sites are illegal gambling operations according to New York law). A month later, the New York's Attorney General's request for a temporary injunction was granted, which barred DraftKings and FanDuel from conducting business in New York. *People v. FanDuel, Inc.*, No. 435056/15, 2015 WL 8490461, at *1 (N.Y. Sup. Ct. Dec. 11, 2015) (granting a preliminary injunction). As of this Comment's submission, FanDuel and DraftKings appealed the injunction, but a date for the appeal hearing has not been announced. David Purdum, *DraftKings, FanDuel Will Stop in NY, but Appeal, Legislation Pending*, ESPN (Mar. 22, 2016), http://espn.go.com/chalk/story/_/id/15033073/draftkings-fanduel-stop-ny-appeal-legislation-pending. In the meantime, the New York Attorney General's Office reached an agreement with DraftKings and FanDuel in which each of the websites will cease operations in the state pending a hearing before the state appellate court. Settlement Agreement, Preliminary Settlement Agreement Between New York Attorney General and FanDuel, Inc. (Mar. 21, 2016), <http://www.ag.ny.gov/pdfs/NYAG-FanDuel-3.21.2016%20Agreement-Final-Executed.pdf> (laying out the various conditions that are applicable to the daily fantasy sports site as part of the provisional settlement agreement between FanDuel and the New York's Attorney General's Office). Some speculate the hearing may not commence as New York may legalize daily fantasy sports during the June legislative session. Purdum, *supra*.

70. Jacob Pramuk, *Nevada Daily Fantasy Ruling Creates Legal 'Flashpoint'*, CNBC (Oct. 16, 2015, 1:06 PM), <http://www.cnbc.com/2015/10/16/nevada-daily-fantasy-ruling-creates-legal-flashpoint.html>. Nevada's decision may create a "flashpoint" or have a domino effect in which "states are likely to begin characterizing and classifying daily fantasy sports as gambling." *Id.*; *see also* Joe Drape, *Nevada Says It Will Treat Daily Fantasy Sports Sites as Gambling*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html> (labeling Nevada's classification of daily fantasy sports as illegal gambling as "the most significant setback yet for a booming, unregulated industry").

motivated in part by the daily fantasy sports industry's burgeoning infringement into the realm of legal sports gambling that Nevada offers.⁷¹ This is a classic case of everybody wanting a piece of the proverbial pie. Nevada's Office of the Attorney General offered some interesting insight into the legal landscape for daily fantasy sports as it relates to the state: "In short, daily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court. As a result, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure."⁷²

The Nevada Office of the Attorney General based this conclusion on two main points. First, the Chief Executive Officer of DraftKings, Jason Robbins, once referred to his company's concept as being "almost identical to a casino."⁷³ Second, DraftKings was the recipient of a United Kingdom gaming license, which classified the company's operations in the same way Nevada elected.⁷⁴

71. Cf. Chris Isidore, *Nevada Goes After Fantasy Sports*, CNN MONEY (Oct. 16, 2015, 12:45 PM), <http://money.cnn.com/2015/10/16/news/companies/nevada-fantasy-sports/index.html?iid=EL> (recognizing the emergence of daily fantasy sports might be hampering Nevada's legal sports gambling business as football betting in Nevada fell sixteen percent during the 2014 season).

72. Memorandum from J. Brin Gibson, Bureau Chief of Gaming & Gov't Affairs, Nev. Office of the Att'y Gen. & Ketan D. Bhirud, Head of Complex Litig., Nev. Office of the Att'y Gen., to A.G. Burnett, Nev. Gaming Control Bd., Terry Johnson, Member, Nev. Gaming Control Bd. & Shawn Reid, Member, Nev. Gaming Control Bd. 2 (Oct. 16, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>.

73. *Id.* at 2 n.1. See generally Chris Grove, *Nevada Gaming Says Daily Fantasy Sports Is Gambling Under State Law, Illegal to Offer Without State License*, LEGAL SPORTS REP. (Oct. 15, 2015, 15:30 PDT), <http://www.legalsportsreport.com/5173/nevada-says-dfs-is-gambling> (providing a succinct overview of the attorney general's legal analysis of daily fantasy sports and their relation to Nevada law). *Id.*; see also *DraftKings Announces International Expansion*, PR NEWSWIRE (Aug. 17, 2015, 9:00 ET), <http://www.prnewswire.com/news-releases/draftkings-announces-international-expansion-300129047.html> (indicating DraftKings was granted a license permitting its operation in the United Kingdom).

74. Memorandum from Gibson & Bhirud to Burnett, Johnson & Reid, *supra* note 72, at 2 n.1. Specifically, the memorandum stated:

Although there is no question that the gambling laws of the United Kingdom and Nevada are fundamentally different, it is still noteworthy that the licenses in question are for 'pool betting' and 'gambling software,' and that DraftKings does not include either of those terms in its press release. Instead, DraftKings simply states that 'the company has been granted a license to operate in the United Kingdom,' without identifying the licenses at issue. It appears that DraftKings recognizes the appearance of inconsistency between its position that it should be unregulated in the United States and its decision to submit to gaming regulation in the United Kingdom.

Id.; see also *DraftKings Announces International Expansion*, PR NEWSWIRE (Aug. 17, 2015, 9:00 ET), <http://www.prnewswire.com/news-releases/draftkings-announces-international-expansion-300129047.html> (indicating DraftKings was granted a license permitting its operation in the United Kingdom).

New York's current efforts to stymie the growth of daily fantasy sports within its borders⁷⁵ could present a different scenario for daily fantasy sports operators than Nevada's efforts. Because of Nevada's exemption status under PASPA,⁷⁶ daily fantasy sports websites wanting to operate in Nevada could still do so, as long as the daily fantasy sports website pays a licensing fee.⁷⁷ On the other hand, if a daily fantasy sports website was deemed illegal gambling in a state, such as New York, which is not exempt under PASPA, then a daily fantasy sports entity would be barred from operating in the state without the recourse of obtaining a license and paying the fee.⁷⁸ If barred in New York, it is likely daily fantasy sports

75. New York is home to the most daily fantasy sport participants of any state. Matthew Rothstein, *What New York's Ban on FanDuel and DraftKings Means for Daily Fantasy*, UPROXX (Nov. 11, 2015), <http://uproxx.com/sports/2015/11/daily-fantasy-legal-future>; see also Howard Stutz, *Let's Call Daily Fantasy Sports What It Is—Gambling*, LAS VEGAS REV. J. (Nov. 17, 2015, 11:22 AM), <http://www.reviewjournal.com/opinion/columns-blogs/inside-gaming/lets-call-daily-fantasy-sports-what-it-gambling> (“New York constitutes nearly 13 percent of all daily fantasy sports users . . .”). Even more telling of New York's importance to the daily fantasy sports scene is the fact that the state is home of FanDuel's headquarters. David Purdum & Darren Rovell, *N.Y. AG Declares DraftKings, FanDuel Are Illegal Gambling, Not Fantasy*, ESPN (Nov. 11, 2015), http://espn.go.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling. Additionally, partnerships between daily fantasy sports websites, such as FanDuel and DraftKings, and the New York Giants and New York Yankees are prevalent in the “Big Apple.” Chris Grove, *New York Attorney General Says DraftKings, FanDuel Must Cease and Desist: Questions and Answers*, LEGAL SPORTS REP. (Nov. 10, 2015, 18:58 PDT), <http://www.legalsportsreport.com/6081/ny-ag-daily-fantasy-sports-faq>. In addition, the NBA's Brooklyn Nets have FanDuel's logo plastered throughout the arena. Purdum & Rovell, *supra*. A New York devoid of daily fantasy football would also drastically affect companies, such as CBS and Fox, that are in the business of advertising daily fantasy sports. Robert Silverman, *The Daily Fantasy Sports Legal Battle Could Cost Sports Media Millions*, VOCATIV (Dec. 23, 2015, 12:23 PM), <http://www.vocativ.com/news/264227/the-daily-fantasy-sports-legal-battle-could-cost-sports-media-millions>. Revenue generated by CBS and Fox from making advertising space available for daily fantasy firms accounted for approximately three percent of these broadcast companies' third quarter advertising revenue in 2015, which totals for \$29 million and \$18 million, respectively. David Lieberman, *Fantasy Sports Accounted for Most of Q3's TV Ad Growth: Analysts*, DEADLINE HOLLYWOOD (Nov. 18, 2015, 10:16 AM), <http://deadline.com/2015/11/fantasy-sports-ads-most-q3-tv-growth-1201628796>.

76. Meer, *supra* note 45, at 288 (identifying Nevada as fully exempt from the sports gambling prohibition, while Oregon, Delaware, and Montana are partially exempted).

77. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–3704 (1992); see Grove, *supra* note 73 (explaining how daily fantasy sports are not per se illegal in Nevada but rather their illegality stems from them operating without a license from Nevada regulators). This is due to the fact the Nevada Gaming Control Board has deemed daily fantasy sports to be gambling under state law. *Id.*

78. Compare Purdum & Rovell, *supra* note 75 (recounting New York's Attorney General's conclusion that operation of daily fantasy sports websites are illegal gambling according to New York law), with Darren Heitner, *Why Has the N.Y. Attorney General Targeted Daily Fantasy Sports?*, FORBES (Nov. 12, 2015, 11:12 AM), <http://www.forbes.com/sites/darrenheitner/2015/11/12/why-has-the-n-y-attorney-general-targeted-daily-fantasy-sports> (noting while Nevada has a system in place for “sites like FanDuel and DraftKings to apply for gaming licenses and be deemed legal if registered, no

sites would need to rely on the New York legislature to clarify their legal status to permit operations within the state.⁷⁹

3. Daily Fantasy Sports in Texas

Texas was one of the earliest states to introduce legislation—Texas House Bill 4040⁸⁰—regulating daily fantasy sports.⁸¹ However, the momentum for legislation has ceded at the moment,⁸² and the next opportunity for the legislature to take up the issue will be in 2017, when the body reconvenes.⁸³ Like most of the other states' legislation concerning daily fantasy sports, Texas's proposed legislation sought to amend its gambling statutes to allow daily fantasy sports to operate within the purview of state law by requiring “sports betting websites” to obtain a license to operate in the state.⁸⁴

Interestingly, Texas House Bill 4040 defined a sports betting website as “an internet website that allows a user to make through use of the website a bet on the outcome of a sporting event or *participation in a competition based on the performance of the players in a sporting event or series of sporting events.*”⁸⁵

This language suggests daily fantasy sports would have been included in the definition of a sports betting website, namely because daily fantasy sports' (and fantasy sports in general) inherent reliance on the performances of individual players in a given sporting event.⁸⁶

such option exists for daily fantasy sports websites in the State of New York, where sports betting remains illegal under the Professional and Amateur Sports Protection Act of 1992”).

79. See Michael Erman & Suzanne Barlyn, *What Are the Odds? Daily Fantasy Sports Win Reprieve in N.Y.* REUTERS (Dec. 11, 2015, 5:23 PM), http://www.reuters.com/article/us-fantasysports-new-york-idUSKBN0TU1UA20151211?feedType=RSS&feedName=topNews&utm_source=twitter#08kLYdUXOXzSRPHD.97 (explaining DraftKings and FanDuel might be saved by the New York legislature considering the number of legislative proposals pertaining to daily fantasy sports websites).

80. H.R. 4040, 84th Leg., Reg. Sess. (Tex. 2015).

81. See Dustin Gouker, *FanDuel Leaving Texas in May; DraftKings to Fight AG Paxton in Court*, LEGAL SPORTS REP. (Mar. 4, 2016, 14:27 PDT), <http://www.legalsportsreport.com/8825/fanduel-leaving-texas> (“Interestingly, Texas had been [one] of the first states to float a DFS regulatory bill in the spring of 2015.”).

82. See *id.* (noting how the bill never managed to gain traction in Texas's capitol).

83. See *Texas Legislative Sessions and Years*, LEGIS. REFERENCE LIBR. TEX., <http://www.lrl.state.tx.us/sessions/sessionYears.cfm> (last visited May 12, 2016) (listing the date for the beginning of the 85th legislative session of the Texas Legislature as January 10, 2017).

84. See H.R. 4040, 84th Leg., Reg. Sess. (Tex. 2015), which attempted to amend Section 2502.002(a) of the Texas Occupations Code. The proposed amendment read: “A person or entity must obtain a license issued by the department annually, if the person or entity operates a sports betting website.” *Id.*

85. *Id.* (emphasis added).

86. See Louis Bien, *Everything You Ever Wanted to Know About Daily Fantasy Sports and Why They're*

While the bill did not survive session, recent developments in the Lone Star State might make legislative efforts to craft prudent daily fantasy sports legislation all the more pressing.⁸⁷ Recently, Texas Attorney General Ken Paxton released a non-binding advisory opinion in which he deemed daily fantasy sports to be illegal gambling under the current Texas Penal Code, namely because there is an element of chance involved.⁸⁸ The advisory opinion, which suggests to Texas courts how to handle daily fantasy sports litigation, matches the tenor of several other states' attorneys general.⁸⁹ Losing Texas would be a tremendous blow to daily fantasy sports operators as it is home to over two million fantasy sports players.⁹⁰ In conjunction with disparaging attorney general advisory

Getting Sued, SB NATION (Nov. 24, 2015, 11:58 AM), <http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling> (describing the process of daily fantasy sports as “[u]sers select[ing] a lineup of players each week and scor[ing] points based on how well [the players] perform”).

87. See Ken Paxton, Att’y Gen. of Tex., Opinion Letter on the Legality of Fantasy Sports Leagues Under Texas Law (Jan. 19, 2016) [hereinafter Paxton Opinion Letter] (indicating daily fantasy sports is illegal gambling in Texas).

88. According to Attorney General Ken Paxton,

Under section 47.02 of the Penal Code, a person commits an offense if he or she makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest. Because the outcome of games in daily fantasy sports leagues depends partially on chance, an individual's payment of a fee to participate in such activities is a bet. Accordingly, a court would likely determine that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.

Id. at 9; see also TEX. PENAL CODE ANN. § 47.01(1) (West 2014) (defining betting under Texas law as “an agreement to win or lose something of value solely or *partially* by chance”). Under the “any chance test,” Texas would be considered an “any chance” state because betting is defined as involving a modicum of chance. Edelman, *supra* note 33, at 29 (explaining the “any chance test”). This is especially pertinent in regard to the highly volatile nature of sports where events such as “injury, weather, condition of the equipment, and officiating all play into the outcome.” Chris Morran, *Texas Attorney General Thinks DraftKings, FanDuel Are Illegal in Lone Star State*, CONSUMERIST (Jan. 19, 2016), <https://consumerist.com/2016/01/19/texas-attorney-general-thinks-draftkings-fanduel-are-illegal-in-lone-star-state>.

89. See Lisa Madigan, Att’y Gen. of Ill., Sports and Gaming: Daily Fantasy Sports Contests as Gambling 13 (Dec. 23, 2015) (“It is my opinion that . . . FanDuel and DraftKings clearly constitute [illegal] gambling.”); see also Memorandum from Gibson & Bhirud to Burnett, Johnson & Reid, *supra* note 72, at 2 (“[D]aily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court.”). See generally *Attorney General Opinions on Daily Fantasy Sports*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/state-legality-of-dfs> (last visited May 12, 2016) for a list of states where attorney generals have issued opinions, statements, and cease and desist letters on the legality of daily fantasy sports.

90. See Nick Statt, *Texas Attorney General Says Daily Fantasy Sports Are Prohibited Gambling*, VERGE (Jan. 19, 2016, 2:13 PM), <http://www.theverge.com/2016/1/19/10791654/daily-fantasy-sports-texas-attorney-general-draftkings-fanduel> (“There are more than 2 million fantasy sports players in Texas, according to the Fantasy Sports Trade Association.”).

opinions in New York and Illinois, the daily fantasy duopoly, DraftKings and FanDuel, are at risk of losing up to a quarter of their customer base.⁹¹ The immediate impact of the advisory opinion from Paxton created different decisions by DraftKings and FanDuel, the most notable of these being FanDuel's subsequent settlement and exit from the state.⁹² All in all, it appears the fate of both operators in Texas largely hinges on how (or if) the legislature addresses the issue in 2017.⁹³

As more states begin to push for statutory revisions allowing daily fantasy sports to operate, an interesting situation emerges. In pertinent part, PASPA prohibits the sponsoring, licensing, or authorization by law of a "betting, gambling, or wagering scheme" by a governmental entity that involves "one or more performances of" amateur and professional athletes.⁹⁴ Most state bills propose allowing daily fantasy sports to conduct business, so long as the daily fantasy sports website operators pay licensing fees.⁹⁵ The language of the statute suggests the prohibition of

91. See Joe Drape, *Texas Attorney General Deems Daily Fantasy Sports Illegal*, N.Y. TIMES (Jan. 19, 2016), http://www.nytimes.com/2016/01/20/sports/texas-attorney-general-deems-daily-fantasy-sports-illegal.html?_r=0 (asserting "the companies are at risk of losing more than [twenty-five] percent of their customers" due to the negative legal climate for daily fantasy sports in New York, Illinois, and Texas). Texas alone accounts for over five percent of players of DraftKings and FanDuel. *Id.* Additionally, research from Ellers & Krejcek Gaming estimates Texas is "a top 5 market in terms of revenue for both FanDuel and DraftKings." Chris Grove, *Texas Attorney General Concludes Daily Fantasy Sports Is Gambling: Answers and Analysis*, LEGAL SPORTS REP. (Jan. 19, 2016, 10:44 PDT), <http://www.legalsportsreport.com/7426/texas-says-dfs-is-gambling>.

92. Compare *Texas Attorney General Paxton Announces FanDuel Settlement*, TEX. INSIDER (Mar. 10, 2016, 12:59 PM), <http://www.texasinsider.org/texas-attorney-general-paxton-fanduel-announce-settlement> (describing FanDuel's settlement with the Texas Attorney General in which the company will effectively cease operations in the state by May 2, 2016, to avoid any legal recourse taken by the attorney general's office), with Brian M. Rosenthal, *FanDuel to Leave Texas; DraftKings Files Motion to Continue Operating*, HOUS. CHRON. (Mar. 4, 2016, 5:38 PM), <http://www.chron.com/news/politics/texas/article/FanDuel-to-stop-operating-in-Texas-Paxton-says-6871061.php> (describing how DraftKings filed a petition in Texas seeking declaratory judgment as to the legal status of daily fantasy sports under Texas law). See also Peggy Fikac, *DraftKings Sues Texas; FanDuel Throws in the Towel*, SAN ANTONIO EXPRESS NEWS (Mar. 4, 2016, 8:19 PM), <http://www.expressnews.com/news/local/article/DraftKings-sues-Texas-FanDuel-throws-in-the-towel-6871539.php> (quoting Gerald Reamey, professor at St Mary's University School of Law, in which he remarks, "Thanks to DraftKings, FanDuel will receive any benefit from [DraftKings'] legal action without incurring the expense or downside risk, assuming they are not sharing litigation costs with their competitor.").

93. See Morran, *supra* note 88 (recognizing daily fantasy sports operators in Texas may still have a remedy to the attorney general's advisory opinion because "state legislators could try to adapt Texas law to include [daily fantasy sports web]sites as explicitly legal operations").

94. 28 U.S.C. § 3702 (2012).

95. See S.B. 832, 2016 Leg., Reg. Sess. (Fla. 2016) (placing certain consumer protection provisions on applicable websites as they relate to daily fantasy sports and requiring a licensing fee be paid by the operators of daily fantasy sports websites); Assemb. B. 1437, 2015–2016 Leg., Reg. Sess. (Cal. 2015) (requiring the operators of daily fantasy sports websites to pay a fee to obtain licenses);

state-sponsored gambling would apply to daily fantasy sports, given players receive points solely from the individual performances of “one or more” athletes.⁹⁶ The question then emerges: Is a state that requires daily fantasy sports sites to pay a licensing fee to operate in the state in violation of PASPA?⁹⁷ The next logical thought is to construe a state’s statutory legalization of daily fantasy sports as a remedy to this apparent malady. PASPA appears, though, to contemplate this situation in § 3702(2), which renders it unlawful for “a person⁹⁸ to sponsor, operate, advertise, or promote [a wagering scheme based on the performances of one or more amateur or professional athletes in competitive games] *pursuant to the law or compact of a governmental entity.*”⁹⁹ Again, a plain reading of the statute suggests even if daily fantasy sports are made legal by an individual state,¹⁰⁰ the propagation of such activities would still run countercurrent to PASPA.¹⁰¹ As states continue to put forth legislation allowing daily

H.R. 4019, 84th Leg., Reg. Sess. (Tex. 2015) (making it a crime to operate or use an sports betting website, including a daily fantasy sports website, to operate in the state); H.R. 4040, 84th Leg., Reg. Sess. (Tex. 2015) (proposing the requirement of a license to operate daily fantasy sports websites and other sports betting websites within the state).

96. 28 U.S.C. § 3702.

97. See Daniel Wallach, *Fantasy Sports Legislation by States May Run Afoul of PASPA*, SPORTS L. BLOG (Mar. 14, 2015), <http://sports-law.blogspot.com/2015/03/fantasy-sports-legislation-by-states.html> (asking whether an individual state’s express legalization of daily fantasy sports is in “direct and express conflict with the Professional and Amateur Sports Protection Act of 1992”).

98. *Id.* (explaining how the word “person” may connote not only the operators of fantasy sports, but also various “professional sports leagues . . . and teams that have lucrative sponsorship arrangements with daily fantasy sports operators”).

99. 28 U.S.C. § 3702(2) (emphasis added); see also *Nat’l Collegiate Athletic Ass’n v. Governor of N.J.*, 799 F.3d 259, 268 (3d Cir. 2015) (holding a New Jersey law, which served to partially repeal the state’s prohibitions against sports wagering, violated PASPA because the law had the effect of authorizing by law sports gambling by certain entities), *reh’g en banc granted, opinion vacated* (Oct. 14, 2015); cf. Wallach, *supra* note 97 (noting the problem that might emerge with various sports leagues enforcing PASPA against state laws in which there is no explicit authorization of sports betting, compared with the apparent reluctance of leagues to equally enforce PASPA in the states that have actually “expressly legalized wagering based on the individual performance of athletes”).

100. 2016 Va. Acts (to be codified at Va. Code Ann. §§ 59.1-556 to -570) (legalizing fantasy contest operations in Virginia).

101. Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. §§ 3701–3704; see also S. REP. NO. 102-248, *reprinted in* 1992 U.S.C.A.N. 3553 (noting the legislative history of PASPA). The Senate committee also remarked on the Section 3702 prohibitions:

The prohibition of [S]ection 3702 *applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual performance or performances therein, including schemes utilizing geographical references rather than formal team names (e.g., Washington vs. Philadelphia), or nicknames rather than formal names of players.*

Id. (emphasis added); MASS. GAMING COMM’N, WHITE PAPER ON DAILY FANTASY SPORTS 13 (2016), <http://massgaming.com/wp-content/uploads/MGC-White-Paper-on-Daily-Fantasy-Sports->

fantasy sports sites to operate within the purview of state law, it will be interesting to see if states encounter resistance from the federal government, courts, or Congress regarding the permissible level of state-sponsorship of daily fantasy sports under PASPA, or if the state statutes themselves can be construed in a way to preclude such activity.¹⁰²

D. *Potential Legal Problems with Daily Fantasy Sports and Proposed Regulatory Measures*

1. Overview

Daily fantasy sports websites are a fairly fresh, yet fierce, establishment.¹⁰³ As with any other system where people or customers are susceptible to financial harm, regulatory measures and transparency are essential in securing consumer protection.¹⁰⁴ The following discussion addresses concerns stemming from an unregulated daily fantasy sports structure, proposed regulatory measures that might be imposed on companies that conduct these types of businesses, and the potential impact such measures might have on daily fantasy sports websites.

1-11-16.pdf (referring to the PASPA as the “greatest constraint to state action to address [daily fantasy sports]” and noting how “PASPA may constrain the Legislature from any legislation that directly or indirectly permits or regulates [daily fantasy sports]”).

102. Cf. Paxton, Opinion Letter, *supra* note 87, at 6 n.29 (“Likewise, entities that promote daily fantasy sports league gambling could possibly violate [S]ection 47.03 of the Penal Code by operating a gambling place or becoming a custodian of a bet.”). Section 47.03 of the Texas Penal Code makes it a Class A misdemeanor to, among other things, intentionally or knowingly operate a gambling place or to be “a custodian of anything of value bet or offered to be bet.” TEX. PENAL CODE ANN. § 47.03(a)(1), (3) (West 2014).

103. Compare Eric Chemi, *Online Poker vs. Daily Fantasy: Which Creates More Winners?*, CNBC (Oct. 2, 2015, 9:47 AM), <http://www.cnbc.com/2015/10/02/online-poker-vs-daily-fantasy-which-creates-more-winners.html> (explaining how many daily fantasy tournaments involve an overlay, which is money added to prize pool not within player entries, as an advantage because “prize guarantees often exceed the total funds collected”), with Harrison Weber, *The Ride Share War Continues: Lyft Offers \$5 Rides in Manhattan*, VENTURE BEAT (July 10, 2015, 4:35 PM), <http://venturebeat.com/2015/07/10/the-ride-share-war-continues-lyft-offers-5-rides-in-manhattan> (announcing the “ride-hailing startup” company, Lyft, will offer \$5 rides to those who choose to carpool with a second passenger). The corresponding use of overlays amongst daily fantasy sports websites and various ride-hailing companies bolsters the comparison amongst these “start-ups focused on gaining market share over profitability” because the industries are willing to lose money now to see a cash surplus later. Chemi, *supra*.

104. See generally *Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act*, SEC, <http://www.sec.gov/spotlight/dodd-frank.shtml> (last visited May 12, 2016) (examining the rules the SEC has adopted to comply with the “[sixty-one] mandatory rulemaking provisions of the Dodd-Frank Act”).

2. Insider Trading and Anti-competitive Conduct

Concerns over insider trading have recently plagued the daily fantasy sports landscape.¹⁰⁵ These concerns stem from an incident occurring on September 27, 2015, when a DraftKings employee released the ownership rates of particular players for the “Millionaire Maker” contest.¹⁰⁶ The employee allegedly used the information when he entered into a similar contest on a competitor daily fantasy website, FanDuel.¹⁰⁷ The DraftKings employee went on to win \$350,000 on FanDuel the same week of the data leak.¹⁰⁸ This is disconcerting because such knowledge potentially gives a daily fantasy sports contest participant an edge over the competition.¹⁰⁹ Daily fantasy participants act like real-life general managers of a sports franchise because for each daily contest, participants are afforded a salary cap in which they cannot exceed.¹¹⁰ Each player they select for their team for that particular day’s contest will have a dollar value attached.¹¹¹ The more likely a player is to have success in that day’s contest, the higher the dollar value will be.¹¹² Thus, there is often a fair

105. See Steve Petrella, *Insider Trading’ Controversy Shakes Foundation of Daily Fantasy Sports*, SPORTING NEWS (Oct. 7, 2015), <http://www.sportingnews.com/fantasy-nfl-news/4657461-daily-fantasy-sports-dfs-draftkings-fanduel-legal-regulation-scandal-controversy> (explicating how a DraftKings employee leaking information about the ownership percentage of certain players can be considered the daily fantasy sports “industry’s version of insider trading”).

106. See Brandon Schlager, *DraftKings Data Leak Causes Insider-Trading Debate in Fantasy Sports*, SPORTING NEWS, <http://www.sportingnews.com/fantasy/football/news/daily-fantasy-sports-scandal-fanduel-draftkings-insider-trading/efynfg9079ni1ean0w5gygzhd> (Oct. 6, 2015) (summarizing the controversy where “a DraftKings employee who . . . won \$350,000 on a competing website” creates a concern in the industry over insider trading). See *Week 3 Millionaire Maker Percentage Owned*, DRAFTKINGS PLAYBOOK, <http://playbook.draftkings.com/nfl/millionaire-maker-percent-owned-week-3> (last visited May 12, 2016) (providing an example of what ownership percentages look like in the DraftKings Millionaire Maker contest).

107. See Stephen Bainbridge, *“Insider Trading” in Daily Fantasy Football? Or Just Agency Law Breach of Duty?*, PROFESSORBRAINBRIDGE.COM (Oct. 5, 2015), <http://www.professorbainbridge.com/professorbainbridge.com/2015/10/insider-trading-in-daily-fantasy-football-or-just-agency-law-breach-of-duty.html> (“The [DraftKings] employee—a midlevel content manager—won \$350,000 at a rival site, FanDuel . . .”).

108. See McCann, *supra* note 42 (“This concern is made more problematic because DFS is mainly controlled by only two companies, DraftKings and FanDuel, and both companies employ similar DFS games.”).

109. See Callum Borchers, *DraftKings, FanDuel Team up to Defend Integrity of Games*, BOS. GLOBE (Oct. 6, 2015), <https://www.bostonglobe.com/business/2015/10/05/draftkings-bans-employees-from-competitors-sites/s36ig5e0eV0OR9C55R8hwL/story.html> (recognizing the release of proprietary statistics give late entrants an advantage over those who had already submitted rosters).

110. See McCann, *supra* note 42 (“DFS participants typically operate within a salary cap . . . like real-life general managers . . .”).

111. See *id.* (explaining each player is assigned a varying salary).

112. See Daniel Steinberg, *How Fantasy Football Pricing Algorithms Work*, FANTASY WINNERS, <https://dailyfantasywinners.com/fantasy-categories/featured/daily-fantasy-football-pricing->

amount of time that can potentially be spent by owners in which they fret over which players are likely to perform well on a given day.¹¹³ Ownership rates of players are often posted once a given contest has been closed.¹¹⁴ Knowing the ownership rates of players that have been chosen by other daily fantasy sports participants beforehand allows a user to gather “insider”¹¹⁵ knowledge as it pertains to “which players [have] been overlooked at relatively high statistical rates.”¹¹⁶ Therefore, a player with insider knowledge is able to spot “market inefficiencies”¹¹⁷ and obtain a marked advantage over the competition. For example, if Tony Romo¹¹⁸ is owned by 7% of all participants in a given daily fantasy contest and a fantasy sports player can see this information beforehand, it would be advantageous for the participant to select Tony Romo, given 93% of participants have not selected him. Having a player with a moderate to low ownership rate on a team means, if that player performs well, the owner will be part of the minority who reap the benefits of such a performance, allowing the contestant to separate oneself from the majority of other participants in the contest.¹¹⁹ Though the DraftKings employee

algorithms-work (last visited May 12, 2016) (“[Ninety-nine percent] of player prices are based on an algorithm or equation the daily fantasy site uses.”). There are two main factors used to determine the prices of given players. *Id.* The first factor “is average fantasy points scored” over the given season. *Id.* The second main factor is demand. *Id.* The more an athlete is played, the higher the price goes; conversely, “if a player is not being used his price is adjusted downward.” *Id.*

113. *See* McCann, *supra* note 42 (“For many DFS participants, this data analysis is ongoing, requiring a substantial amount of time on a daily or near-daily basis.”). Because participants of daily fantasy sports contests expend a myriad of time and energy researching and strategizing, daily fantasy sports can be seen as akin to investing in stocks. *Id.*

114. *See* Borchers, *supra* note 109 (acknowledging DraftKings released statistics too early by releasing proprietary information that may give other players an edge).

115. Petrella, *supra* note 105. *But see* McCann, *supra* note 42 (indicating the use of the term “insider trading” to refer to daily fantasy sports is a bit of a misnomer). Under federal securities law, the term “insider trading” often refers specifically to the trading of a security. *Id.* There is currently no precedent in which a court has interpreted a daily fantasy sports game as a “security instrument.” *Id.*; *cf.* 15 U.S.C. § 77b (2012) (defining “security” as “any note, stock, treasury stock, security future, security-based swap”). There is no mention of daily fantasy sports in the definition. *Id.* However, even if not “insider trading” per se, the access to proprietary ownership information by daily fantasy sports employees could potentially signal a form of anti-competitive conduct “[t]o the extent [companies such as DraftKings and FanDuel] knowingly fail to police their own employees from profiting off [this] knowledge.” McCann, *supra* note 42.

116. *Id.*

117. *Id.*

118. *See generally* Tony Romo Player Profile, ESPN, http://espn.go.com/nfl/player/_/id/5209/tony-romo (last visited May 12, 2016) (providing a brief description of the athlete’s appearance as well as an archive of statistics accrued while playing in the NFL).

119. *See generally* THEODORE L. TUROCY & BERNHARD VON STENGEL, LONDON SCH. OF ECON., GAME THEORY (2001), <http://www.cdam.lse.ac.uk/Reports/Files/cdam-2001-09.pdf>

was cleared of any wrongdoing,¹²⁰ the incident nevertheless spurred a push for more regulatory measures.¹²¹ Following the incident, both DraftKings and FanDuel placed new restrictions on their employees, barring them from playing on their own websites and the websites of any other daily fantasy sports operator, as well as prohibiting employees from other daily fantasy websites from participating in contests on DraftKings and FanDuel.¹²² In an apparent effort to save itself from what appears to be the losing end of the public image battle, DraftKings even went so far as to sever its ties with the World Series of Poker, an event where DraftKings previously maintained a notable advertising presence.¹²³

(explaining how game theory works). Game theory is

[t]he process of formally modeling a situation as a game requires the decision-maker to enumerate explicitly the players and their strategic options, and to consider their preferences and reactions. The discipline involved in constructing such a model already has the potential of providing the decision-maker with a clearer and broader view of the situation. This is a “prescriptive” application of game theory, with the goal of improved strategic decision making.

Id. at 5.

120. See Claire Atkinson, *DraftKings Employee Cleared of Wrongdoing in DraftKings’ Probe*, N.Y. POST (Oct. 19, 2015, 5:56 PM), <http://nypost.com/2015/10/19/draftkings-employee-cleared-of-wrongdoing-in-draftkings-probe> (recognizing an investigation conducted by a third-party law firm determined the DraftKings employee “hadn’t accessed any non-public information” in placing his bet).

121. See John Brennan, *Harry Reid in Wake of DraftKings Kerfuffle: “Online Gaming Is a Real Scary Thing”*, NORTHJERSEY.COM (Oct. 6, 2015, 3:21 PM), <http://blog.northjersey.com/meadowlandsmatters/12206/harry-reid-in-wake-of-draftkings-fanduel-online-gaming-is-a-real-scary-thing> (calling for a heightened level of congressional scrutiny in regards to online gaming and daily fantasy sports); see also Joe Drape, *New York Attorney General Opens Inquiry into Fantasy Sports Sites*, N.Y. TIMES (Oct. 6, 2015), <http://www.nytimes.com/2015/10/07/sports/draftkings-fanduel-inquiry-new-york-attorney-general.html> (noting New York’s Attorney General’s “inquiry” into the prospect of insider trading occurring within the daily fantasy sports landscape).

122. See *DraftKings Statement*, DRAFTKINGS PLAYBOOK (Oct. 7, 2015), <http://playbook.draftkings.com/press/draftkings-statement-1072015> (prohibiting DraftKings employees from participating “in any public daily fantasy games for money” and also prohibiting “employees from any Daily Fantasy Sports contest operator” from entering into contests on DraftKings); see also *Statement to Our Users*, FANDUEL (Oct. 7, 2015), <https://newsroom.fanduel.com/2015/10/07/statement-to-the-press> (banning FanDuel “employees from playing any daily fantasy games for money, on any site” and prohibiting employees of third-party fantasy websites from participating in FanDuel daily fantasy contests).

123. See Jacqueline Williams, *DraftKings Cuts Its Ties with Top Poker Series*, N.Y. TIMES (Oct. 23, 2015), <http://www.nytimes.com/2015/10/24/sports/draftkings-cut-its-ties-with-poker.html> (discussing how DraftKings, a company with a “prominent advertising presence at [the] World Series of Poker,” has ended its partnership with the world-renowned poker tournament). Additionally, DraftKings no longer offers its daily fantasy contest winners complimentary entries to the poker tournament. *Id.*

3. Deceptive Trade Practices

In addition to insider trading, there are other potential concerns, such as allegations of deceptive trade practices, which can stem from the current regulatory measures, or lack thereof, within the daily fantasy sports industry. Recently, class action suits have been filed alleging DraftKings and FanDuel use deceptive trade practices.¹²⁴ Specifically, the allegations focus on the way in which DraftKings and FanDuel market themselves—a notion referenced in one of the suits as a “deceptive promotion program.”¹²⁵ These accusations are driven by the fact that in a seemingly monopolistic fashion, only a small number of “experts”¹²⁶ tend to rake in the winnings from daily fantasy sports contests.¹²⁷ It is a proverbial sharks (experts) versus fish (non-experts) scenario in which the fish are often left to fend for themselves.¹²⁸ As if wading through the shark-infested¹²⁹ daily fantasy domain was not bad enough, in what appears to be the paragon example of macabre irony, casual players often actively partake in their own demise without knowing it.¹³⁰ This is because daily

124. See Class Action Complaint at 21, *Genchanok v. FanDuel, Inc. & DraftKings, Inc.*, No. 15CV05127, 2015 WL 9487980 (E.D. La. Oct. 13, 2015) [hereinafter *Genchanok Class Action Complaint*] (accusing DraftKings and FanDuel of “unfairly, unconscionably, and deceptively advertis[ing]”); Class Action Complaint at 1–2, *Johnson v. FanDuel, Inc. & DraftKings, Inc.*, No. 1:15-cv-07963-GHW (S.D.N.Y. Oct. 8, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Class-Action-DFS.pdf> (alleging the daily fantasy sports companies are engaged in material misrepresentations that turn countercurrent to New York, Massachusetts, and Kentucky law).

125. *Genchanok Class Action Complaint*, *supra* note 124, at 21.

126. *DraftKings and FanDuel Headed to Court?*, O’CONNOR’S ANNOTATIONS (Nov. 9, 2015), <http://annotations.jonesmclure.com/2015/11/09/draftkings-and-fan-duel-headed-to-court/#sthash.9SkH5Rjj.dpbs>.

127. Reports state, “experts win almost all the money” in daily fantasy sports contests. *Id.*; see also Drew Harwell, *All the Reasons You (Probably) Won’t Win Money Playing Daily Fantasy Sports*, WASH. POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports> (relaying research looking at a sample of bettors from the first half of the 2015 MLB season in which the top one percent of players “paid [only] 40 percent of the entry fees [yet] reaped 91percent of the profits”).

128. See Brusteine & Boudway, *supra* note 16 (“As in poker, the top fantasy players who make off with most of the prize money are known as ‘sharks’ . . .”); see also Drake Baer, *Fantasy Football Has Been Infiltrated by a ‘Shark and Fish’ System That Crushes Most People’s Chances*, TECH INSIDER (Sept. 16, 2015, 12:09 PM), <http://www.techinsider.io/fantasy-football-favors-the-sharks-heavily-over-the-fish-2015-9> (characterizing a mass majority of people who engage in daily fantasy sports contests as “fish” or casual, non-expert players).

129. See Renee Miller, *Daily Fantasy Football: The DFS Dictionary*, ESPN (Aug. 12, 2015) http://espn.go.com/fantasy/football/story/_/id/13415326/daily-fantasy-sports-dictionary-keys-nfl-dfs-success (labeling daily fantasy football contests as “shark-infested” contests).

130. See, e.g., Baer, *supra* note 128 (finding the overall majority of players “lost \$25 on entry fees of \$49 on average”).

fantasy sports companies rely on the entry fees paid by these casual players to keep the sites afloat and profitable.¹³¹ With this understanding, one's perception of daily fantasy sports is in stark contrast to the world of modest men winning giant checks as advertised by DraftKings and FanDuel.¹³²

4. Proposed Regulatory Measures and How They May Affect the Industry

Contrary to what some proponents argue, regulatory measures do not always place an irreparable burden on the businesses they affect.¹³³ There are certain instances in which regulations can be imposed without shattering the very tenets of a free market system.¹³⁴ In the undulating ebb and flow of legislation in the United States, the regulatory pendulum has begun to swing in favor of establishing a semblance of infrastructure for daily fantasy sports. In addition to calls for regulation from legislators, some of the daily fantasy sports websites, perhaps seeing the writing on

131. See Ed Miller & Daniel Singer, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, SPORTS BUS. J. (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx?hl=for%20daily%20fantasy-sports%20operators%2C%20the%20curse%20of%20too%20much&sc=0> (noting the discrepancy in the entry fees and corresponding profits amongst expert, or skilled, players and casual players). During “the first half of the 2015 MLB season, . . . the top 1.3 percent of players [(the sharks)] paid on an average \$9,100 in entry fees and profited \$2,400 each for a 27 percent [return on their investment].” *Id.* Conversely, 5 percent of the players considered “big fish,” another term for casual players who lose a lot of money, experienced a loss of “\$1,100 on entry fees of \$3,600.” *Id.* The big fish “accounted for 75 percent of all losses.” *Id.* Thus, because each “big fish” can lose upwards of \$4,000 a year, they are an integral part of the daily fantasy sports companies being able to garner enough money to make the payouts to the winners while remaining profitable and, during that time, keeping the “sharks” coming back for more. *Id.*

132. Compare *DraftKings Commercial*, YOUTUBE (Oct. 10, 2015), <https://www.youtube.com/watch?v=TPBqsEByuu0> (depicting a group of guys at a sports bar announcing their “millionaire” winnings), and *2015 FanDuel One-Week Fantasy Football Commercial*, YOUTUBE (Aug. 18, 2015), <https://www.youtube.com/watch?v=pnvTXsqLxoE> (presenting various individuals who discuss the immediate cash payouts they have received from FanDuel), with Baer, *supra* note 128 (“[T]he top players in DFS aren’t the guys you’ll find hollering at the TV at the nearest sports bar; they’re more likely to be MIT math grads with a huge bankroll behind them.”), and *John Oliver Last Week Tonight Daily Fantasy Sports Commercial*, YOUTUBE (Nov. 15, 2015), <https://www.youtube.com/watch?v=Xh-jygzmmK4> (parodying a FanDuel commercial and highlighting the apparent skewed and deceptive marketing techniques used in the daily fantasy sports industry).

133. See David Macaray, *We Need More Government Regulation of Businesses . . . Not Less*, HUFFINGTON POST (June 19, 2013, 12:49 PM), http://www.huffingtonpost.com/david-macaray/we-need-more-government-r_b_3456640.html (relaying various arguments against government regulation, such as regulations being “cumbersome, confusing, expensive, inefficient, . . . and, ultimately, counter-productive”).

134. The notion of no regulation and “self-policing” would not be an effective way of keeping, for example, our roads and highways safe for use. *Id.*

the wall, are also jumping on board in favor of being regulated.¹³⁵

According to correspondence between two New Jersey legislators and Federal Trade Commission (FTC) Chair, Edith Ramirez, the FTC might prove to be in the best position to provide oversight to the daily fantasy sports industry.¹³⁶ This authority would likely derive from what is colloquially referred to as the FTC's "Section 5 authority,"¹³⁷ which allows the agency to defend against deceptive conduct.¹³⁸ What is more likely, however, are efforts by the individual states to police the conduct of daily fantasy websites operating within their borders.¹³⁹ Efforts like the

135. See Dustin Gouker, *New Daily Fantasy Sports Consumer Protection Initiatives Proposed by DraftDay*, NCPG, LEGAL SPORTS REP. (Dec. 9, 2015, 9:53 PST), <http://www.legalsportsreport.com/6759/dfs-consumer-protection> (analyzing a release from daily fantasy sports company DraftDay in which the site has partnered with the National Council on Problem Gambling to self-impose consumer protection guidelines); see also *DraftDay Releases Daily Fantasy Sports Consumer Protection Initiatives*, PRNEWswire (Dec. 8, 2015), <http://www.prnewswire.com/news-releases/draftday-releases-daily-fantasy-sports-consumer-protection-initiatives-300189541.html> (announcing "the implementation of an industry-defining consumer protection initiative that will differentiate DraftDay from other operators within the daily fantasy sports industry"); Zachary Zagger, *FanDuel CEO Calls for Regulation of Daily Fantasy Industry*, LAW360 (Oct. 29, 2015, 3:15 PM), <http://www.law360.com/articles/720660/fanduel-ceo-calls-for-regulation-of-daily-fantasy-industry> (noting how FanDuel CEO Nigel Eccles has "called for 'formal, industrywide' regulation of" daily fantasy sports). See generally NAT'L COUNCIL ON PROBLEM GAMBLING, FANTASY SPORTS CONSUMER PROTECTION GUIDELINES (2015), <http://www.ncpgambling.org/wp-content/uploads/2014/04/Fantasy-Sports-Consumer-Protection-Guidelines-Final-December-4-2015.pdf> (displaying a statement from the National Council on Problem Gambling calling for enhanced consumer protection initiatives for daily fantasy sports companies).

136. See Travis Waldron, *New Jersey Congressman Wants Review of Daily Fantasy Sports*, HUFFINGTON POST (Sept. 14, 2015, 5:48 PM), http://www.huffingtonpost.com/entry/congress-pallone-daily-fantasy-sports-hearings_55f734b5e4b00e2cd5e7a03b (relaying the efforts by Frank Pallone to have the Energy and Commerce Committee review daily fantasy sports); see also Jonathan Salant, *Feds Should Set Rules for Fantasy Sports, N.J. Lawmakers Say*, NJ.COM (Oct. 6, 2015, 7:04 PM), http://www.nj.com/politics/index.ssf/2015/10/njs_menendez_and_pallone_seek_us_probe_of_fantasy.html ("U.S. Sen. Robert Menendez (D-N.J.) and U.S. Rep. Frank Pallone Jr. (D-6th Dist.) asked FTC Chairwoman Edith Ramirez whether the commission could regulate daily fantasy sports, and if so, to begin establishing rules for their operation.").

137. 15 U.S.C. § 45(a)(2) (2012). The FTC's authority under Section 5 declares unlawful "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce." *Id.* § 45(a)(1).

138. See David McCabe, *NJ Dems Want FTC to Regulate Daily Fantasy Sports*, HILL (Nov. 10, 2015, 7:14 PM), <http://thehill.com/policy/technology/259754-nj-dems-say-ftc-in-best-position-to-regulate-daily-fantasy-sports> (reporting Edith Ramirez, the current chairwoman of the Federal Trade Commission, told Sen. Menendez and Rep. Pallone "that the commission was able to investigate the industry under its authority to police deceptive behavior"). See generally 15 U.S.C. § 45 (describing the authority of the FTC to prohibit unfair or deceptive trade practices).

139. See John Mehaffey, *What a Regulated Daily Fantasy Sports Industry Might Look Like*, LEGAL SPORTS REP. (Oct. 1, 2015, 7:58 PST), <http://www.legalsportsreport.com/4393/regulating-daily-fantasy-sports> (describing how Delaware, Nevada and New Jersey can provide models for regulation of online gambling by the states); see also Brustein & Boudway, *supra* note 21 ("The main front [of

regulatory measures in Massachusetts shed light on what a regulated daily fantasy industry might look like.¹⁴⁰ In addition to setting an age restriction¹⁴¹ to play in any daily fantasy contest, the Massachusetts legislation also limits the advertising efforts of daily fantasy sports companies¹⁴² and restricts how much money a player can deposit per month.¹⁴³ Perhaps more importantly, however, the proposed regulations prevent certain players—the aforementioned experts—from entering games strictly created for less experienced players.¹⁴⁴ Massachusetts’s proposed regulatory measures, however tenuous, have received preliminary praise from members of the daily fantasy sports industry.¹⁴⁵

The Fantasy Contests Act,¹⁴⁶ a law recently passed in Virginia, provides an alternative view of what a regulated daily fantasy sports industry might look like. The bill makes Virginia the first state to officially regulate fantasy sports.¹⁴⁷ Virginia’s law puts the licensing of daily fantasy sports

regulation] is probably going to be state governments, not Washington . . .’). *But see* Darren Heitner, *Daily Fantasy’s Days of No Regulation Are Done*, FORBES (Oct. 7, 2015, 7:32 AM), <http://www.forbes.com/sites/darrenheitner/2015/10/07/daily-fantasys-days-of-no-regulation-are-done> (conveying the FTC is responsible for enforcing the “Sports Agent Responsibility and Trust Act,” or SPARTA). SPARTA attempts to regulate and police various unfair or deceptive happenings between sports agents and their potential student-athlete recruits. 15 U.S.C. § 7802 (2012).

140. Daily Fantasy Sports Contest Operators in Massachusetts, 940 MASS. CODE REGS. 34.00 (2016).

141. *Id.* at 34.03–34.04 (prohibiting individuals under the age of twenty-one from participating in a daily fantasy sports contest).

142. *Id.* at 34.07–34.09 (restricting advertising and promotional methods by daily fantasy sports operators).

143. *Id.* at 34.10(6) (limiting daily fantasy sports participants’ deposits to a maximum of \$1,000.00 per month).

144. *Id.* at 34.12(6) (requiring daily fantasy sports operators to create contests where participation is limited to amateur participants).

145. *AG Healey Proposes Strong Consumer Protection Regulations for Daily Fantasy Sports Operations in Massachusetts*, MASS.GOV (Nov. 19, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-11-19-daily-fantasy-sports.html> (displaying statements from both DraftKings and FanDuel commending the actions of the Massachusetts’s Attorney General). This praise is likely due to the fact that in stark contrast to the actions taken by New York’s Attorney General—rather than deeming daily fantasy sports as illegal gambling—Massachusetts’s proposition would still allow daily fantasy to survive in the state, albeit in a regulated fashion. Daniel Roberts, *Massachusetts Will Restrict Daily Fantasy Sports to Ages 21 and up*, FORTUNE (Nov. 20, 2015, 9:02 AM), <http://fortune.com/2015/11/20/healey-fantasy-sports-regulation>.

146. Fantasy Contests Act, 2016 Va. Acts (to be codified at VA. CODE ANN. §§ 59.1-556 to -570).

147. *Id.* (laying out certain parameters for daily fantasy sports to operate within the state, including payment of a \$50,000 licensing fee); *see also* Kimberly Pierceall, *Virginia is First State to Regulate Fantasy Sports*, GOV’T TECH. (Mar. 11, 2016), <http://www.govtech.com/state/Virginia-is-First-State-to-Regulate-Fantasy-Sports.html> (reporting the same). In addition to the licensing fee, the law also requires operators to verify participants are of the appropriate age to play, as well as requiring the funds deposited by daily fantasy sports participants to be separated from the

operators under the purview of the Department of Agriculture and Consumer Services.¹⁴⁸ In addition to a \$50,000 registration fee,¹⁴⁹ the law implements certain age verification policies and mandates funds from contestants be “segregated from a company’s operating funds.”¹⁵⁰ Furthermore, the Virginia law does not distinguish between season-long fantasy sports and daily fantasy sports,¹⁵¹ a fact that has understandably drawn the ire of many season-long fantasy sports operators¹⁵² and added to the nuanced complexities and difficulties that will likely be prevalent in future daily fantasy sports legislation.¹⁵³ Going forward, a blueprint for a more prudent approach to licensing fees can be found in Tennessee’s daily

operational funds of the daily fantasy company. Maury Brown, *How Virginia May Have Saved the Daily Fantasy Sports Industry*, FORBES (Mar. 8, 2016, 3:11 PM), <http://www.forbes.com/sites/maurybrown/2016/03/08/how-virginia-may-have-saved-the-daily-fantasy-sports-industry/#99722d26946b>.

148. Dustin Gouker, *Virginia Governor Signs Fantasy Sports Bill; VA First State to Pass DFS Regulation*, LEGAL SPORTS REP. (Mar. 7, 2016, 15:13 PDT), <http://www.legalsportsreport.com/8873/virginia-governor-signs-dfs-bill> (explaining how Virginia’s Department of Agriculture and Consumer Services is “tasked with overseeing the [daily fantasy sports] industry”). The Virginia law also gives the Department of Agriculture and Consumer Services the power to investigate and enforce violations of the act. *Id.*

149. While Virginia’s Fantasy Contests Act is generally consistent with regulatory measures introduced in other states, smaller operators outside the dominant duopoly of DraftKings and FanDuel are likely hoping the \$50,000 registration fee introduced in Virginia, does not continue in other states. *See* Dustin Gouker, *Fantasy Sports Industry ‘Deeply Concerned’ with \$50K Fee in Virginia Law*, LEGAL SPORTS REP. (Mar. 8, 2018, 8:04 PDT), <http://www.legalsportsreport.com/8915/fsta-pushes-back-on-dfs-fees> (recognizing Virginia’s \$50,000 licensing fee will more than likely serve to hurt smaller daily fantasy sports companies, with only a “handful” of such companies being able to afford the fee). The Fantasy Sports Trade Association, which has been pushing for sensible daily fantasy sports legislation, is now desperately trying to stop “the momentum behind higher fees.” *Id.* It truly is a case of being careful what you wish for and as more and more states begin to model their licensing fees after Virginia one has to wonder if it is too late now to put the proverbial genie back in the bottle. *Id.*

150. Fitz Tepper, *Virginia’s Governor Just Signed the Nation’s First Daily Fantasy Sports Law*, TECH CRUNCH (Mar. 7, 2016), <http://techcrunch.com/2016/03/07/virginias-governor-just-signed-the-nations-first-daily-fantasy-sports-law>.

151. *See* Kimberly Piercell, *Bill Could Sideline Season-Long Fantasy Football in Virginia, Open up State to Online Gambling*, VIRGINIAN-PILOT (Mar. 6, 2016), http://pilotonline.com/business/consumer/bill-could-sideline-season-long-fantasy-football-in-virginia-open/article_e73ad76c-03ca-5552-ab9e-ab06019a4704.html (“The bill doesn’t mention the word ‘daily’ and refers to ‘fantasy contests,’ without singling out sports.”).

152. *See generally* Dustin Gouker, *Conflict over Virginia Fantasy Sports Bill Points to Fissure Between DFS and Season-Long Operators*, LEGAL SPORTS REP. (Mar. 2, 2016, 15:56 PDT), <http://www.legalsportsreport.com/8751/virginia-fantasy-sports-bill-conflict> (providing a letter from season-long fantasy sports operators addressed to the governor of Virginia).

153. *See generally* Chris Grove, *States Passing Daily Fantasy Sports Bills May Be Authorizing Far More Sports Betting Than They Realize*, LEGAL SPORTS REP. (Feb. 19, 2016, 14:37 PDT), <http://www.legalsportsreport.com/8421/dfs-bills-authorize-sports-betting> (explaining a concern over the broad definition of “fantasy contests” being used in the bills of several states).

fantasy sports bill that will take effect July 1, 2016.¹⁵⁴ Rather than assessing a flat licensing fee of \$50,000, Tennessee's law "charges a 6% tax on revenue generated by Tennessee residents."¹⁵⁵ Tennessee's model of charging a percentage tax on revenue could provide a more favorable framework for smaller-scale daily fantasy sports operators.¹⁵⁶

As legislation begins to creep into the once safeguard-devoid sphere of the daily fantasy sports industry, it will be interesting to see how exactly the industry will be affected. At the very minimum, the industry will likely be taxed by the states.¹⁵⁷ What might be more concerning for the industry, however, is the state-centric way in which these regulations will probably take place. Each state having its own unique and specific regulatory guidelines could exacerbate the burden on the daily fantasy sports industry.¹⁵⁸ In addition, it is possible that regulation and its associated costs would hamper the development of new daily fantasy sports companies, preserving DraftKings' and FanDuel's position as the

154. See Dustin Gouker, *Tennessee Governor Signs Daily Fantasy Sports Bill; Third State to Enact DFS Law*, LEGAL SPORTS REP. (Apr. 28, 2016, 09:18 PDT), <http://www.legalsportsreport.com/9774/tennessee-governor-signs-daily-fantasy-sports-bill-law-third-state-regulate-dfs> (recognizing on Wednesday, April 27, 2016 Tennessee became "the third state to regulate the daily fantasy sports industry"). See generally *Bill History*, TENN. GEN. ASSEMBLY, <http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2105> (last visited May 12, 2016) (showing the date in which the Tennessee Governor signed the bill concerning daily fantasy sports regulation into law).

155. Gouker, *supra* note 154. The equation for calculating the amount of revenue generated by Tennessee residents is "entry fees minus prizes awarded equals revenue." *Id.*

156. *Id.* ("Tennessee has the chance to be much more friendly in terms of allowing smaller operators into the state.")

157. See Brustein & Boudway, *supra* note 21 (explaining individual states will likely want to "heavily" tax daily fantasy companies in similar fashion to the way in which the states tax casinos). It is also important to note that when it comes to taxing a gambling entity, the taxes are charged on gross gaming revenue rather than profit. *2015 Casino Tax and Expenditures*, NAT'L CONF. ST. LEGISLATURES (Sept. 28, 2015), <http://www.ncsl.org/research/financial-services-and-commerce/casino-tax-and-expenditures-2013.aspx>. Indeed, "gambling taxes are levied against gross gaming revenue, not profit, at rates of up to 70 percent in some states." *Id.* See generally *id.* (listing the states with state-operated casinos as well as noting the tax rate and where the money goes after it is taxed).

158. See Dustin Gouker, *Illinois Update: State Representative Reveals Plans for 'Daily Fantasy Sports Regulation Act'*, LEGAL SPORTS REP. (Apr. 17, 2015, 9:33 PDT), <http://www.legalsportsreport.com/1049/worrying-trend-for-daily-fantasy-sports-illinois-becomes-second-state-to-attempt-regulation-of-dfs> (indicating the states requiring daily fantasy sports sites to "segregate their player pools" could hamper the offering of large guaranteed prize pools by the companies). Cf. Robert DellaFave, *New Jersey's Online Poker Sites; A Poker Player's Review*, ONLINE POKER REP., <http://www.onlinepokerreport.com/9981/nj-online-poker-room-reviews> (last updated Apr. 8, 2016) (recognizing New Jersey's limitation on who may play for revenue to those "located within the borders of New Jersey (as verified by the site's geolocation software)"). On top of these "splintered" player pools, another problem that daily fantasy sports operators could face with pending regulation and licensing is the continuing trend to equate daily fantasy sports with gambling since "licensing is something that is done for casinos, online gaming sites, etc." Gouker, *supra* note 158.

leading fantasy sites.¹⁵⁹ Regardless of the regulatory reach that takes hold of the industry, there is no doubt that change is coming; the only question is to what degree.

II. CONCLUSION

Daily fantasy sports have simply become too successful to fly under the regulatory radar any longer.¹⁶⁰ While the daily fantasy sports industry is unlikely to stem the tide of pending regulations, there is another fact that makes the Icarian¹⁶¹ journey of the industry even more difficult: daily fantasy sports take most legislators out of their comfort zones because most of them simply do not understand it.¹⁶²

It is not likely a wholesale federally mandated regulatory scheme will take hold of the daily fantasy sports industry, but a scenario in which each state concocts its own regulatory framework; thus, any damage to the industry would not come from a single, fatal regulatory blow. Rather, the industry would be the victim of “death by a thousand cuts”¹⁶³ as each state potentially crafts a different and unique regulatory hoop for the daily fantasy sports industry to jump through.¹⁶⁴

Now the music that once began to play has faded and given way to the discordant calls for a regulatory framework. The deafening cacophony forces daily fantasy sports to leave the dance floor where they find themselves forced through a dimly lit hallway and into a small, bleak room. A shrouded figure sits in the shadowy corners of the smoke-filled room with his feet plopped firmly on a large wooden desk. In a foreboding

159. *See id.* (“Clearly, taxes and fees aren’t going to stop FanDuel and DraftKings from being in a market. But depending on how much it costs to operate in a state it could push other sites out of regulated jurisdictions.”).

160. *See generally* Heitner *supra* note 19 (highlighting the increasing popularity of daily fantasy sports).

161. *See Icarian*, DICTIONARY.COM, <http://www.dictionary.com/browse/icarian?s=t> (last visited May 12, 2016) (defining Icarian as “of, or like Icarus”); *see also Icarus*, DICTIONARY.COM, <http://dictionary.reference.com/browse/Icarus> (last visited May 12, 2016) (defining Icarus “a youth who attempted to escape from Crete with wings of wax and feathers but flew so high that his wings melted from the heat of the sun, and he plunged to his death in the sea”).

162. *See generally* Daniel Roberts, *N.Y. Politicians Struggle to Understand Daily Fantasy Sports*, FORTUNE (Dec. 9, 2015, 11:36 AM), <http://fortune.com/2015/12/09/new-york-assembly-fantasy-sports-hearing> (articulating the difficulties in analyzing the daily fantasy sports industry with limited knowledge).

163. Brustein & Boudway, *supra* note 21.

164. *See id.* (“A regulated fantasy market in the U.S. could force sites to deal with a different set of rules in each state. In one gloomy scenario, the operators might have to split themselves into dozens of state chapters that don’t share entry fees and prize pools, a consequence that would make it nearly impossible for a company such as DraftKings to offer single games with \$2 million prizes.”).

fashion, the figure takes a puff from his cigar and with a penetrating gaze looks at the industry: “It’s not personal,” he says, “it’s strictly business.”¹⁶⁵

165. See generally *It's Strictly Business*, YOUTUBE (Nov. 7, 2011), <https://youtu.be/Bo7zkd0kRS4> for a clip from the film “The Godfather” in which Michael Corleone says to Sonny: “It’s not personal Sonny, it’s strictly business.”