
CAN DAILY FANTASY SPORTS OVERCOME THE ODDS?

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I. Introduction

In November of 2015, New York Attorney General Eric Schneiderman ordered the daily fantasy sports (“DFS”) giants, FanDuel and DraftKings, to stop accepting bets from New York residents.¹ This announcement was a significant detriment to the multi-billion dollar industry of DFS, with New York users making up 12.8% of the industry’s market.² Today, the legal status of DFS sports continues remain uncertain.³ This uncertainty is a result, ironically, of an anti-gambling statute passed by Congress in 2006 titled

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¹ See Walt Bogdanich, Joe Drape & Jacqueline Williams, *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), archived at <https://perma.cc/EF3B-NCM4> (describing New York’s legal debate over DFS); see also Eric Schneiderman, *Attorney General Eric Schneiderman: Daily Fantasy Sports Bluff the Law in N.Y.*, NY DAILY NEWS (Nov. 19, 2015), archived at <https://perma.cc/CLM2-HPVX> (arguing that DFS violates New York state law).

² See Tim Marcin, *New York Daily Fantasy Update: No DraftKings, FanDuel Decision Yet, Will Come ‘Very Soon’*, INTERNATIONAL BUSINESS TIMES (Nov. 25, 2015), archived at <https://perma.cc/J7CX-4QF2> (noting the impact New York’s restriction had on the daily fantasy market).

³ See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 142 (2016) (acknowledging the legal challenges of DFS in the United States).

the Unlawful Internet Gambling Prohibition Act (“UIGEA”).⁴ Written into the UIGEA are two clauses of particular importance, both of which have complicated the issue.⁵ The first clause provides an exemption for all fantasy sports from federal regulation, while the second gives states the ability to ban or regulate such games within their borders.⁶ As DFS companies continue to expand, state lawmakers across country will be forced to decide whether such contests are predominately based on chance, rather than skill; an important distinction because, if states determine they are chance-based games they are likely to be deemed illegal gambling.⁷ Massachusetts, home to one of the biggest daily fantasy operators, FanDuel, has spearheaded the problem by enacting regulations as an alternative to a complete ban.⁸

First, this Note will outline the gaming culture in America and its expansion over the years.⁹ Second, this Note will illustrate how that aforementioned culture has evolved into the phenomenon that is fantasy sports.¹⁰ Third, this Note will discuss how regulators have responded to fantasy sports in the Internet age and how federal laws have been applied to DFS specifically.¹¹ This Note will then discuss how and why Massachusetts has regulated DFS in the wake of the federal exemption for fantasy sports.¹² The analysis section will examine how DFS games are played and whether the elements of skill are primarily more material than the elements of chance.¹³ Finally, this Note will conclude that although DFS contests involve some in-

⁴ See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-66 (2006) (defining the prohibitions set upon gambling).

⁵ See Darren Heitner, *Congress Wisely Puts Legal Status of Fantasy Sports Under Review*, FORBES (Sept. 15, 2015), archived at <https://perma.cc/V223-ZEWC> (discussing the ambiguity of the UIGEA).

⁶ See *id.* (articulating the underlying debate that DFS faces).

⁷ See Stephen P. Crosby, et al., *White Paper of Daily Fantasy Sports*, MASSACHUSETTS GAMING COMMISSION 4 (Jan. 11, 2016), archived at <https://perma.cc/FEY3-KAKE> (discussing the national landscape of DFS).

⁸ See *id.* (assuming the effects New York decision will play on other states facing the same dilemma).

⁹ See *infra* Part II.

¹⁰ See *infra* Part II.

¹¹ See *infra* Part II.

¹² See *infra* Part III.

¹³ See *infra* Part IV.

herent element of chance they are predominantly skill-based, therefore, states should take steps, like Massachusetts has done, to regulate DFS rather than ban it.

II. History

A. Lotteries in America

Gambling was first introduced to the United States in the early 19th century in the form of public lotteries.¹⁴ States greatly benefited from the use of the lotteries as a means to raise revenue for civic projects, such as canals, roadways, bridges, and even educational institutions.¹⁵ Lotteries during this time up until concerns over the morality and social impact of gambling spread throughout the local communities.¹⁶ Public opinion rapidly declined once it was revealed that the lottery administrators were growing increasingly wealthy through dishonest means.¹⁷ In 1860, when efforts to regulate the lotteries failed scrutiny reached its peak and all but three states banned lotteries altogether.¹⁸ The ban remained intact for take over a

¹⁴ See Will Hobson, *Sports Gambling in the U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), archived at <https://perma.cc/8CJV-SVUU> (explaining the history of lotteries in America). Most of the early American colonies used lotteries as a major form of revenue. *Id.* In fact, The Continental Congress tried to fund part of revolution through the use of a lotteries, and the tickets were one of the first documents to bear the words “United States.” *Id.*

¹⁵ See ANISHA S. DASGUPTA, PUBLIC FINANCE AND THE FORTUNES OF THE EARLY AMERICAN LOTTERY 2 (Yale Law School Legal Scholarship Repository) (2005) (discussing the use of lotteries to fund a major part of the infrastructure in the U.S.). From 1740 to 1865, states had allowed nearly 686 lotteries in order to fund their infrastructures and schools. *Id.* at 1.

¹⁶ See *id.* at 1 (noting the changes in public opinion regarding the use of lotteries was largely due to moral suspicions). In the early 19th century, the public became concerned over lottery games due to the immense gain of wealth without any hard work involved. *Id.* See also Christine Hurt, *Regulating Public Morals and Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 394 (2006) (introducing the origins of gambling in the U.S.).

¹⁷ See Hurt, *supra* note 16 (suggesting the public opinion of lotteries was declining rapidly in the early 18th century as a result of state officials).

¹⁸ See DASGUPTA, *supra* note 15, at 27 (indicating that lotteries were often subject to corruption and bribery leading to a complete ban). Even as a significant source of public finance, thirty states decided to completely ban lotteries through constitutional or statutory provisions. *Id.* at 24.

century before states began to reintroduce lotteries; New Hampshire being the first.¹⁹ Today, however, lotteries are present and thriving in over forty states.²⁰

B. *The Rise of Sports Gambling*

Once the public began betting on sporting events, the landscape of gambling transformed considerably.²¹ The earliest sports gambling can be traced back to horse racing in the 19th century.²² Sports gambling evolved as sports, such as baseball, became increasingly popular and provided a new and exciting opportunity for gamblers to explore.²³ In 1919, the sports gambling phenomenon received national exposure during the World Series of Professional Baseball between the Chicago White Sox and the Cincinnati Reds, known today as the “Black Sox Scandal.”²⁴ Even today, many consider the White Sox team as the greatest assembled baseball team in American History.²⁵ Although they were favored to win the World Series, powerful and crafty gambling con artists successfully convinced a few players to throw the series in order to rig the odds in their favor.²⁶ The massive scandal caught the world’s attention; and once again the public opinion of gambling plummeted.²⁷ But it wouldn’t take long before the sports gambling craze regained its grip;

¹⁹ See DASGUPTA, *supra* note 15, at 29 (acknowledging New Hampshire as the first state to reintroduce lotteries after nearly one hundred years).

²⁰ See DASGUPTA, *supra* note 15, at 29 (noting that lotteries have been revived throughout the country and are present in many states today).

²¹ See Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L. J. 201, 202 (2014) (noting a rise in sports gambling in America).

²² See Roger Dunstan, *Gambling in California*, CALIFORNIA RESEARCH BUREAU (Jan. 1997), archived at <https://perma.cc/5EWN-NLLP> (explaining that gambling first appeared with horse racing).

²³ See Trippiedi, *supra* note 21, at 202 (mentioning baseball’s popularity as an ideal gambling forum).

²⁴ See ELIOT ASINOF, *EIGHT MEN OUT, THE BLACK SOX AND THE 1919 WORLD SERIES* 133 (Henry Holt & Company New York 2000) (detailing gamblers effect and influence on the 1919 World Series).

²⁵ See *id.* at 45 (concluding that the White Sox is a superior team based on his experience as a sportswriter).

²⁶ See *id.* at 5 (describing the “Black Sox Scandal” and the increased relevance of gambling on a large scale).

²⁷ See *id.* at 144 (highlighting a decline in public opinion of sports betting in the wake of the 1919 World Series scandal).

viewership in sports such as boxing, college football, basketball, and horseracing peaked in the 1920s and sports gambling made a comeback.²⁸ At this point, the Great Depression was looming and televisions were entering the homes of millions of Americans across the country; the stage was set for another gambling craze.²⁹ Then, when the American economy finally collapsed, people desperately turned to sports gambling, attracted to a glimmer of wealth, hope, and a better life.³⁰

C. *The Birth of Fantasy Sports*

The birth of fantasy sports occurred in the early 1960s and can rightfully be attributed a man named Wilfred Winkenbach.³¹ Winkenbach, an avid sports fan and businessman, is most famous for being the father of fantasy football, and coincidentally creating fantasy sports.³² Winkenbach's first fantasy sport concept began with golf, wherein each fantasy team "owner" would select a group of professional golfers participating in a tournament, and the winner would be the owner whose team had the lowest combined score at the close of the tournament.³³ Shortly thereafter, Winkenbach would create the concept of fantasy football from inside a Manhattan Hotel room.³⁴ After a discussing the idea with his trusted friends, a fantasy football league was developed whereby fans would draft a number of players from professional football teams to ultimately create an imaginary

²⁸ See Allen Moody, *History of Sports Betting*, ABOUT.COM (last visited Nov. 28, 2015), archived at <https://perma.cc/X5SJ-52V2> (pointing to the rise of gambling in the 1920s due to a wider range of sports to bet on, particularly basketball).

²⁹ See Trippiedi, *supra* note 21, at 202 (indicating the introduction of televisions was a major catalyst to increased sports gambling).

³⁰ See Trippiedi, *supra* note 21, at 202 (asserting the influence of the Great Depression on the rise of sports gambling in the U.S.).

³¹ See Corinne Green, 'Wink': Wilfred 'Bill' Winkenbach Invented Fantasy Football Way Back in 1962 with GOPPPL in Oakland, NEWSNET5 CLEVELAND (Sept. 11, 2014), archived at <https://perma.cc/EG4U-3HHD> (outlining the history of fantasy sports).

³² See Trippiedi, *supra* note 21, at 204 (addressing the birth of fantasy sports).

³³ See Green, *supra* note 31 (indicating the rules of Winkenbach's first fantasy golf league).

³⁴ See Green, *supra* note 31 (recalling where the idea was derived for fantasy football).

team to compete in weekly games against each other.³⁵ Shortly after, Winkenbach returned home to Oakland and put his new idea into action by creating the first ever fantasy football league called the Greater Oakland Professional Pigskin Prognosticators League (“GOPPPL”).³⁶ In fact, two of the original members of the GOPPPL, Ron Wolf and Scotty Stirling, went on to become general managers for the National Football League (“NFL”).³⁷ Today, thanks to Winkenbach, fantasy football includes more than twenty million participants.³⁸

The emergence of fantasy football encouraged the development of many more fantasy sports concepts; one, in particular, was Rotisserie Baseball.³⁹ William Gamson, a sociology professor at Boston College, planted the seeds of Rotisserie Baseball through his innovative idea known as the Baseball Seminar.⁴⁰ The Baseball Seminar, which Professor Gamson developed in his apartment with the help of friends, was an auction game whereby each player is given a \$100,000 budget to create a roster of Major League Baseball players.⁴¹ The seminar tracked games and players by four statistics Pro-

³⁵ See Green, *supra* note 31 (observing the steps Winkenbach took in designing the first fantasy football league).

³⁶ See Green, *supra* note 31 (noting the first ever fantasy football league). There was 16 original members of the league with Winkenbach as the commissioner; the first draft, in fact, took place in his basement. *Id.* The “stats” of the player were compiled by Winkenbach and transmitted to the league owners after each week of games. *Id.*

³⁷ See Tim Keown, *50 Years of Fantasy Football*, ESPN (Aug. 31, 2012), archived at <https://perma.cc/4HTF-98KU> (examining the history of the first fantasy football league and its members).

³⁸ See *id.* (noting the tremendous popularity fantasy football has received since its inception).

³⁹ See Trippiedi, *supra* note 21, at 204-05 (discussing the creation of different fantasy sports leagues).

⁴⁰ See Greg Frost, *Extra Credit*, THE BOSTON COLLEGE CHRONICLE (Mar. 30, 2006), archived at <https://perma.cc/7DCE-XAYL> (noting Professor Gamson’s role in the birth of fantasy baseball); see also SAM WALKER, FANTASYLAND: A SPORTSWRITER’S OBSESSIVE BID TO WIN THE WORLD’S MOST RUTHLESS FANTASY BASEBALL 59 (2007) (explaining Professor Gamson’s involvement in creating Rotisserie Baseball).

⁴¹ See R. Emmet Sweeney, *Baseball ProGUESTus: Fantasy Baseball’s Founding Fathers*, BASEBALL PROSPECTUS (Apr. 29, 2011), archived at <https://perma.cc/NKV8-LKDX> (explaining the rules and process of the National Baseball Seminar).

fessor Gamson saw fit: batting average, runs batted in, earned run average, and wins.⁴² Shortly after he created the Baseball Seminar, Professor Gamson moved to the University of Michigan.⁴³ At Michigan, he was introduced to Robert Sklar; the two colleagues soon became very close.⁴⁴ Sklar, who was a faculty advisor to students at Michigan, also had a great fascination for fantasy sports, particularly a game called Strat-o-Matic.⁴⁵ However, once Sklar learned of Professor Gamson's Baseball Seminar, he quickly jumped on board.⁴⁶ One evening, when Sklar was planning his bid for the seminar one day, a student named Daniel Okrent visited him in his office for academic advice and the rest is history; Okrent would later be known as "The Founding Father" of fantasy baseball.⁴⁷

Okrent, an undergraduate student at Michigan, learned about the seminar from Sklar and took the initiative to build his own concept of fantasy sports to more accurately reflect live play on the field.⁴⁸ Okrent used the same auction format used in the seminar, but made the following important changes: the rosters were limited to twenty-three players; every position had to be filled, including the catchers and second basemen; and the statistical analysis was expanded to incorporate stolen bases, innings-pitched ratios, and earned run averages.⁴⁹ Okrent met regularly with friends to discuss baseball at La Rotisserie Francasie, an old French Restaurant in Philadelphia,

⁴² See *id.* (outlining the history of Rotisserie Baseball).

⁴³ See *id.* (noting Professor Gamson's move to Michigan).

⁴⁴ See *id.* (describing how the relationship between Sklar and Professor Gamson would create the path for Rotisserie baseball).

⁴⁵ See Sweeney, *supra* note 41 (noting Sklar's love for sports and his intrigue in fantasy sports). Strat-o-matic was a board game where each player creates a team made up of Major League Baseball players, rolls a dice to determine the outcome of their at-bat or pitching, and the chance of a better roll is based on the player's statistics from the year before. *Id.* For example, if a player owned Babe Ruth who had an amazing batting average and many RBI's the year before, the chances of success when rolling the dice were very high. *Id.*

⁴⁶ See Sweeney, *supra* note 41 (noting Sklar joining the Baseball Seminar).

⁴⁷ See Sweeney, *supra* note 41 (showing Okrent would become the founding father of fantasy baseball).

⁴⁸ See Sweeney, *supra* note 41 (analyzing the first concepts of the Rotisserie league and how it was put into action).

⁴⁹ See Sweeney, *supra* note 41 (outlining the rules and details of the Rotisserie league). Compared to the Seminar, the Rotisserie league forced owners to look beyond the big-name players scoping out rookies and under-the-radar players to structure a well-balanced roster. *Id.*

and it was at this establishment where the first draft took place, subsequently acquiring its name, “The Rotisserie League”.⁵⁰

D. *The Rise of Internet Gambling*

In the 1990s through the early 2000s, the Internet was rapidly advancing and its popularity was soaring.⁵¹ It did not take long before entrepreneurs and pioneers of the Internet industry realized the potential business opportunities in online gambling.⁵² In 1995, the first form of online gambling emerged with free games where players used imaginary money for contests similar to those played at casinos, such as poker.⁵³ Sports gambling online emerged next, with companies such as the World Sports Exchange (“WSE”) operated sites that transmitted odds and allowed consumers to place wagers on sports contests.⁵⁴ By the early 2000s, online gambling was flourishing and state legislatures started to take a closer at the social impacts on their community.⁵⁵ Some states, like New Jersey, conducted extensive studies to investigate the societal impact, while others like Nevada, simply enacted laws requiring that such online operators to secure a gambling license.⁵⁶

⁵⁰ See Sweeney, *supra* note 41 (explaining how the league acquired its name).

⁵¹ See Trippiedi, *supra* note 21, at 203 (describing the correlation between the Internet and the rise of sports gambling).

⁵² See Trippiedi, *supra* note 21, at 206 (noting that fantasy sports websites are a growing industry).

⁵³ See Lisa Boikess, *The Unlawful Internet Gambling Enforcement Act of 2006: The Pitfalls of Prohibition*, 12 N.Y.U. J. LEGIS. & PUB. POL’Y 151, 156 (2008) (setting forth the beginnings of online gambling).

⁵⁴ See *id.* at 157 (acknowledging online wagering sites were set up in foreign countries to avoid U.S. laws). Online gambling sites appeared in countries all over the world, such as Liechtenstein, Costa Rica, the Isle of Man, and Caribbean nations. *Id.*

⁵⁵ See *id.* at 159 (discussing the increased popularity of live games).

⁵⁶ See David Purdum, *Daily fantasy banned in Nevada for being unlicensed gambling*, ESPN (Oct. 16, 2015), archived at <https://perma.cc/EG66-FRXW> (explaining Nevada’s gaming controls review of the daily fantasy site and concluding that it does meet the definition of gambling in the state). Nevada, in fact, passed a bill to require licenses for online gambling, while New Jersey conducted studies to investigate the social and economic impacts of online gambling. *Id.* See also Kevin Horridge, *New Jersey Online Gaming Study Predicts Huge Growth Trend Will Continue in 2017*, CASINO.ORG (Feb. 5, 2017), achieved at <https://perma.cc/68F2-CQ2F> (explaining that New Jersey’s study related to online gambling).

E. Interstate Wire Act

In 1961, Congress passed the Wire Act in an effort to curb the growth of organized crime and illegal gambling enterprises sprawling throughout the United States.⁵⁷ The statute, which targeted wire communications between gamblers and gambling organizations states:

[w]hoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.⁵⁸

The Wire Act defines a “wire communication” as “any and all instrumentalities, personnel, and services . . . used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission.”⁵⁹ In essence, the Wire Act’s primary

⁵⁷ See Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 659 (2012) (clarifying the incentives behind the Federal Wire Act). The Wire Act was recommended by former U.S. Attorney General Robert Kennedy “to crack down on organized crime members using the telegraph to get results on horse races.” *Id.*

⁵⁸ See 18 U.S.C. § 1084 (1961) (explaining the penalties for the transmission of bets or wagers); see also Christopher Pickens, *Of Books and Brokers: Are Sports Futures Gambling or Investing, and Does it Even Matter?*, 14 GEO. MASON L. REV. 227, 228-29 (2006) (analyzing how the Federal Wire Act regulates sports gambling). Congress found sports betting to be so dangerous because people did not have to travel to a bookie in order to place a bet, but rather could simply make a phone call. *Id.* at 239.

⁵⁹ See 18 U.S.C. § 1081 (1961) (defining wire communication facility under the Wire Act).

purpose was to prohibit organized crime from operating illegal gambling businesses by using the telegraph or telephone to place wagers and retrieve results more quickly and efficiently.⁶⁰

In *Sagansky v. United States*, the First Circuit of Appeals clarified the Wire Act's purpose as a prohibition on *interstate* transmission, and stated the law was "directed at the use of interstate communication facilities in order to transmit bets or wagers; and a person is deemed to transmit a bet or wager if he or she expresses a willingness to make bets or wagers and accepts offers of bets or wagers over interstate telephone facilities."⁶¹ Although the Wire Act was intended to prosecute gambling facilities and organizations, it has been asserted against professional gamblers as well.⁶²

Since the Wire Act was enacted before the advent of the Internet, critics have questioned its applicability to online gambling; although, courts have interpreted transmissions under the Wire Act to include Internet communications.⁶³ As a result, critics argue that fantasy sports companies have been, since their commencement, directly violating the Wire Act by forming interstate businesses of betting and wagering.⁶⁴ Further, opponents have claimed that DFS providers "not only violate the Wire Act, but they also potentially aid and abet

⁶⁰ See Edelman, *supra* note 3, at 142 (outlining the history of the Interstate Wire Act).

⁶¹ See Nicole Davidson, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 205 (2002) (highlighting the Wire Act prohibitions on transmission).

⁶² See *United States v. Donaway*, 447 F.2d 940, 944 (9th Cir. 1971) (contending the original purpose of the Wire Act was to deter "professional gamblers" as opposed to the occasional gambler); see also *Cohen v. United States*, 378 F.2d 751, 756-57 (9th Cir. 1967) (discussing congressional recognition on the existence of lawful sports betting schemes in some states at the time the Wire Act was passed).

⁶³ See *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014) (holding that the Wire Act is applicable to internet communications). The First Circuit noted that although the Wire Act was enacted before the Internet, its definition of wire communications "so accurately describes it." *Id.* See also *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 860 (Sup. Ct. 1999) (noting the New York Supreme Court's extension of the Wire Act's application to the Internet).

⁶⁴ See Davidson, *supra* note 61, at 207 (arguing that DFS companies' business models clearly violate the Wire Act). DFS companies allow players to keep track of their betting and winnings, essentially the same exact thing book keepers do. *Id.*

in the interstate transmission of wagering information for professional gamblers.”⁶⁵ Nonetheless, the Department of Justice has never prosecuted any fantasy sports company for online gambling under the Wire Act to date.⁶⁶

F. The Professional and Amateur Sports Prohibition Act of 1992

In order to discuss the legal status of online sports gambling in the U.S., a review of The Professional and Amateur Sports Protection Act of 1992 (“PASPA”) is indispensable.⁶⁷ With the popularity and proliferation of state lotteries across the nation, state lawmakers began to legalize many different forms of gambling, such as off-track betting, dog races, and casinos.⁶⁸ Concerns grew as state-sponsored lotteries, particularly in Delaware and Oregon, began competing against one another and taking bets on NFL games.⁶⁹ Pressure also increased as U.S. sports leagues lobbied Congress to curb private and state-sponsored sports gambling.⁷⁰ *In National Collegiate Athletic*

⁶⁵ See Davidson, *supra* note 61, at 207-08 (arguing that DFS companies further violate the Wire Act by using the Internet to bring people together, endorse game rules, and provide prizes for winners).

⁶⁶ See *United States v. Corrar*, 512 F. Supp. 2d 1280, 1286 (N.D. Ga. 2007) (illustrating how the Wire Act does not have narrow application to fantasy sports companies).

That the United States has often used the Wire Act to prosecute bookmakers does not stop the Government from bringing charges against other persons whose conduct the Act criminalizes. Neither the text of the Wire Act nor the case law interpreting it requires the narrow reading that the defendant suggests. If Congress sought only to criminalize bookmaking, “being engaged in the business of betting or wagering” would simply read “receives bets or wagers.

Id. See also Edelman, *supra* note 3, at 137-38 (reinforcing the holding of *Corrar* regarding prosecution of online fantasy sports under the Wire Act).

⁶⁷ See Professional and Amateur Sports Protection Act, 28 U.S.C §§ 3701-04 (1992) (defining the terms within the Professional and Amateur Sports Protection Act).

⁶⁸ See Rose & Bolin, *supra* note 57, at 659 (recalling the history and legislative intent of PASPA).

⁶⁹ See Rose & Bolin, *supra* note 57, at 663 (explaining how interstate gambling prompted congressional action).

⁷⁰ See *Nat'l Collegiate Athletic Ass'n. v. Governor of N.J.*, 730 F.3d 208, 216 (3d Cir. 2013) (analyzing sports leagues’ legal action to stop state-licensed gambling).

Association v. Governor of N.J., a Senate Report provided the underlying rationale behind PAPSA stating “its concern for the integrity of, and the public confidence in, amateur and professional sports and its concern that widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think the fix was in whenever their team failed to beat the point-spread.”⁷¹ Congress took action and passed PAPSA in 1992 after acknowledging such potential ramifications of State-sponsored sports gambling.⁷² Passage of PASPA effectively banned all states from allowing any legalized forms of sports betting, with the exception of Nevada, Delaware, Oregon and Montana.⁷³ The section of PASPA most relevant to DFS states the following:

It shall be unlawful for . . . a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a 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.**⁷⁴

⁷¹ See *id.* (illustrating the negative effects of widespread legalization of sports gambling).

⁷² See 28 U.S.C §§ 3701-04 (1992) (illustrating the law governing amateur sports organization); 137 Cong. Rec. S2256-04 (1991) (introducing the bill that would ultimately become PASPA).

⁷³ See 28 U.S.C. § 3701 (2012) (defining the parameters for banning sports betting); see also Crosby, et al., *supra* note 7, at iv (explaining the aftermath of PASPA and which states were exempted from its enforcement). “In simple layman’s terms, PASPA makes illegal (except in a few grandfathered states) essentially any state action that makes sports or sports-related betting legal. Thus, at first glance, PASPA may constrain the Legislature from any legislation that directly or indirectly permits or regulates DFS.” *Id.*

⁷⁴ See 28 U.S.C. § 3702 (2012) (emphasis added) (defining what is unlawful in sports gambling).

Nonetheless, the question remains as to whether DFS is subject to PASPA, an answer that will likely depend on whether DFS constitutes a “scheme” based on athletic performance.⁷⁵ Experts and analysts believe that the answer is clear—that DFS does fall within the language of PASPA because the contests are based on athletic performances.⁷⁶

Further, PASPA provides limited rights of enforcement only belonging to the United States Attorney General, professional sports organizations, or amateur sports organizations.⁷⁷ Thus, the legal risks to DFS companies under PASPA are relatively minimal and dependent largely on professional sports league ownership.⁷⁸ Since DFS companies have established relationships and partnerships with U.S. sports leagues such as the National Basketball Association and the NFL, it is unlikely they will face any legal challenge.⁷⁹ Companies that may be vulnerable to a challenge under PASPA are those that label themselves as “daily fantasy sports,” but do not maintain a relationship with U.S. sports leagues or those that allow users to bet on games results, rather than individual players.⁸⁰

⁷⁵ See 28 U.S.C. § 3704 (2012) (clarifying that § 3702 does not apply to wagering schemes); see also Crosby, et al., *supra* note 7, at 14 (addressing the issue of whether DFS qualifies as a lottery, sweepstakes, betting, gambling, or wagering scheme).

⁷⁶ See Crosby, et al., *supra* note 7, at 14 (concluding that DFS is a part of PASPA). There is a strong argument that DFS will be subject to PASPA because “while the contests are not based on actual results of any specific games, they are based on the performances of athletes.” *Id.*

⁷⁷ See 28 U.S.C. § 3703 (2012) (stating the appropriate authorities to enforce PASPA).

⁷⁸ See Claude Brodesser-Akner, *Christie's move to legalize sports betting may be a longshot, experts say*, NJ.COM (Sept. 8, 2014), archived at <https://perma.cc/CXJ8-WAVG> (describing the legal challenges associated with business relationships between professional leagues and DFS); see also Crosby, et al., *supra* note 7, at ii (using Massachusetts as an example with large DFS companies); Edelman, *supra* note 3, at 141 (noting that legal challenges correlate to DFS companies not partnering with any U.S. league).

⁷⁹ See Brodesser-Akner, *supra* note 78 (stating that gambling on professional sports and athletes undermines the character and integrity of sports).

⁸⁰ See Crosby, et al., *supra* note 7, at ii. (distinguishing between which relationships are more vulnerable under PASPA).

G. *The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA)*

Ironically, the DFS industry owes its existence to an anti-gambling law.⁸¹ In 2006, Congress passed the UIGEA in an effort to supplement “traditional gambling law enforcement mechanism and to simplify the enforcement of gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”⁸² To date, the UIGEA is the most comprehensive piece of legislation currently covering Internet gambling.⁸³ The UIGEA did not significantly affect the Wire Act or PASPA as it instead took another route by criminalizing the processing of payments for Internet gambling by targeting the companies who authorize the payments between the consumers and the websites operators.⁸⁴ Most importantly, a clause in the UIGEA exempts fantasy sports, games of skill, free games, and any wager made under the Interstate Horseracing Act of 1978 from criminal liability.⁸⁵

When the UIGEA was enacted, its authors lacked any knowledge of DFS and certainly did not anticipate the tremendous success of the DFS industry.⁸⁶ The UIGEA was designed to prohibit off-shore internet gambling by restricting financial intermediaries such as banks and credit card companies from authorizing transactions between companies and consumers if the activity is deemed illegal gambling as defined by the UIGEA.⁸⁷ In a rare, and quite controversial manner, the UIGEA was tacked onto the SAFE Port Act at the

⁸¹ See Brant M. Leonard, Note, *Highlighting the Drawbacks of the UIGEA: Proposed Rules Reveal Heavy Burdens*, 57 DRAKE L. REV. 515, 526 (2009) (analyzing the pros and cons of the UIGEA).

⁸² See Edelman *supra* note 3, at 142 (discussing the purpose of the UIGEA).

⁸³ See 31 U.S.C. § 5362 (2006) (defining bet and wager and the scope of participation).

⁸⁴ See 31 U.S.C. §§ 5361–66 (2006) (stating the new law passed to prohibit online gambling). The UIGEA was passed to fix the ineffective Wire Act and modernize prohibitions of interstate and online gambling. *Id.*

⁸⁵ See Leonard, *supra* note 81 (criticizing UIGEA’s enforceability, impact on foreign relations, and failure to take advantage of needed tax revenues).

⁸⁶ See Sacha Feinman & Josh Israel, *The Hot New Form of Fantasy Sports Is Probably Addictive, Potentially Illegal and Completely Unregulated*, THINKPROGRESS (May 7, 2015), archived at <https://perma.cc/6HTG-TH2L> (explaining how Congress did not account for DFS in the UIGEA).

⁸⁷ See *id.* (prohibiting the use of credit cards and bank accounts).

final minutes of the legislative session just before an election recess.⁸⁸ The SAFE Port Act was an important defense bill that gained bipartisan support and was unlikely to be voted down.⁸⁹ However, aside from the controversial passage of the bill, was the fantasy sport exemption also known as the “fantasy sports carve-out.”⁹⁰

The “fantasy sports exemption,” also referred to as the “fantasy sports carve-out” states:

Any fantasy or simulation sports game or educational game or contest in which . . . no fantasy or simulation sports team is based on the current membership of an actual team, so long as the following three criteria are met:

(1) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(2) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(3) No winning outcome is based—(aa) on the score, point- spread, or any performance or performances of any single real- world team or any combination of such

⁸⁸ See Geoff Earle, *NFL Makes Fantasy Pass*, N.Y. POST (Oct. 10, 2006), archived at <https://perma.cc/QWR5-LWFS> (arguing that the UIGEA was unlawfully pushed through by high paid lobbyists and perfect timing). The NFL runs its own fantasy site and collects royalties from other sites, generating immense revenues. *Id.* The UIGEA was fast-tracked through Congress at the final minutes of a legislative session and did not get a vote in the Senate. *Id.* In a suspect maneuver, the gambling bill was tacked onto final defense legislation that could not be amended. *Id.*

⁸⁹ See *id.* (noting the undisputed support).

⁹⁰ See Dustin Gouker, *UIGEA Author: “No One Ever Conceived” That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REPORT (May 8, 2015), archived at <https://perma.cc/4Z34-WKQ6> (explaining the fantasy sport exemption).

teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.⁹¹

Looming questions remain as to whether the UIGEA's "fantasy sports carve-out" does protect these new DFS contests, or whether the exemption only covers season long versions of fantasy sports.⁹² Nonetheless, even if it was not intended that DFS be covered through the "fantasy sports carve-out," such contests may still conform to the UIGEA if the contests are deemed a bona fide contest of skill.⁹³

Representative Jim Leach (R-IA), the author of the bill, explained afterwards, that the fantasy sports exception was not originally intended to be a part of the bill.⁹⁴ At the time, fantasy sports was only conducted in season long contests, not the daily format.⁹⁵ Clearly, Representative Leach did not foresee the fantasy sports exemption to provide fertile ground for a massive DFS industry to emerge.⁹⁶ In fact, Representative Leach and the founding members

⁹¹ 31 U.S.C. § 5362(1)(E)(i)–(ix) (2006) (detailing what is not included as a bet or a wager).

⁹² See Edelman *supra* note 3, at 144 (alleging the legal risks associated with operating DFS).

⁹³ See 31 U.S.C. § 5362(10)(A) (2006) (noting that under the UIGEA, a violation simply could exist if the contest was one of bona fide skill).

⁹⁴ See Feinman & Israel, *supra* note 86 (providing Representative Leach's reasoning for the legislative intent behind the bill). Representative Leach stated:

My intent in initiating the law was to constrain a growing gambling ethos in America that could bring the casino to the home, the work station, college dorm, even the treadmill. My concern was that a savings and investing country could too easily become a country where too many would bet wantonly on unrealistic hopes of obtaining a big payoff, he recalled. After a number of Members indicated they couldn't support it if it didn't make a minor exception for fantasy sports...[t]he assumption was that while unconstrained Internet gambling could change the nature of America's savings and investment patterns, fantasy sports would be a 'de minimus' footnote. No one ever conceived of it becoming a large scale activity or that it could transition into one-day contests.

Id.

⁹⁵ See Earle, *supra* note 88 (discussing how major league sports teams now have their own fantasy leagues).

⁹⁶ See Earle, *supra* note 88 (recalling the intentions of the drafters of the UIGEA with regards to the fantasy sports carve-out); see also Darren Heitner, *Congress*

of the bill were hoping to prevent the exact thing that has occurred.⁹⁷ Leach, an anti-gambling believer, explained, “never has it been so easy to lose so much so quickly . . . internet gambling serves no social purpose . . . [equating it to] crack cocaine for gamblers.”⁹⁸ In his criticism, Leach highlights the fact that daily fantasy sites allow players to bet money whenever and wherever without any real limitation.⁹⁹

The fantasy sports carve-out provides DFS companies with a strong argument for their legality despite the legislative history of the UIGEA providing a clear indication that the DFS evolution was never intended to be a part of the fantasy exemption.¹⁰⁰ The fantasy exemption was intended to cover weeklong or season long games, those that existed at the time the bill passage.¹⁰¹

Wisely Puts Legal Status of Fantasy Sports Under Review, FORBES (Sept. 15, 2015), archived at <https://perma.cc/Z65T-92RR> (analyzing the specific provisions within the UIGEA and how they affect the legality of fantasy sports companies).

⁹⁷ See Earle, *supra* note 88 (inferring the authors’ true intention was contrary to the DFS industry).

⁹⁸ See Walt Bogdanich, et al., *The Fantasy Sports Gamble*, FRONTLINE (last visited Apr. 7, 2017), archived at <https://perma.cc/9LHG-QSZZ> (interviewing Leach, who expressed anti-gambling opinions by comparing gambling to rampant drug use).

⁹⁹ See Heitner, *supra* note 96 (explaining the convenience DFS sites provide to users).

¹⁰⁰ See Heitner, *supra* note 96 (discussing the UIGEA fantasy exemption); see also Crosby, et al., *supra* note 7, at 12-13 n.20 (indicating the need for discussion concerning whether there is a difference between sports betting and DFS).

At the Commission’s December 10th DFS forum, three national gambling law experts on a panel were asked to comment as to the difference, if any, between “sports betting” and DFS. Their responses varied, however there was consensus that while DFS is significantly more complex than conventional sports betting and that DFS is a “head-to-head” contest as opposed to a competition against “the house,” the “connective tissue” binding the two were: (a) the payment of something of value, (b) with the payment made in the hope of winning a prize, and (c) the dependence of the award on the outcome of a sporting event or of the performance of athletes at such a sporting event over which the player had no control.

Id.

¹⁰¹ See Edelman, *supra* note 3, at 143 (acknowledging that the only fantasy sports contests available to consumers at the time of the UIGEA were season-long leagues). DFS companies emerged in 2007, one year after the UIGEA was passed. *Id.* at 137. Before 2007, fantasy sports contests were only played in week-long or season-long formats. *Id.*

DraftKings and FanDuel consistently cite to the UIGEA fantasy exemption in defending the legality of their business, however, the UIGEA provides no explicit guidelines for fantasy sports; in fact, the ultimate question of whether these operations are a form of illegal gambling is left up to the states to decide.¹⁰² In Article I Section 8 of the U.S. Constitution, as well as the Tenth Amendment, the power to regulate intrastate gambling and wagering are “reserved to the states,” not the federal government.¹⁰³ Recognizing state sovereignty, the UIGEA explicitly states “[n]o 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.”¹⁰⁴ Thus, the States, not the federal government, wield the power to regulate, define, and prosecute gambling in their respective borders. To date, five states have formally declared DFS illegal in violation of their gambling statutes.¹⁰⁵ Massachusetts, however, has refused to take such a stance.¹⁰⁶

Since UIGEA explicitly states that it does not affect individual state law, companies like DraftKings and FanDuel must comply with both the federal UIGEA and the individual States laws.¹⁰⁷ Many describe the language of the carve-out as vague, overbroad, and only complicating the issue, however, the UIGEA still provides just

¹⁰² See Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1202 (2007) (acknowledging states’ authority in regulating gambling); see also Jon Boswell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1263 (2008) (analyzing the state and federal gambling laws and how they pertain to fantasy sports).

¹⁰³ See *Marbury v. Madison*, 5 U.S. 137, 137 (1803) (declaring the states sovereign powers).

¹⁰⁴ See 31 U.S.C. § 5361(b) (2006) (quoting the statute regarding gambling within the United States).

¹⁰⁵ See Jon Herskovitz, *Texas Attorney General Says Daily Fantasy Sports Illegal in State*, REUTERS (Jan. 19, 2016), archived at <https://perma.cc/TU82-S3FT> (noting the different states that have made DFS illegal). The states that have declared DFS illegal are: Arizona, Iowa, Louisiana, Montana, and Washington. *Id.*

¹⁰⁶ See Eugene Kim, *Billion-dollar sports-gambling startups Draft Kings and FanDuel are legal because of a loophole in the law*, BUSINESSINSIDER.COM (Sept. 11, 2015), archived at <https://perma.cc/44GY-XJPW> (comparing daily fantasy to other games of chance, such as hole-in-one golf).

¹⁰⁷ See *id.* (examining UIGEA’s effects on fantasy sports).

enough for DraftKings and FanDuel to rely on it for federal immunity.¹⁰⁸

Certain language in the fantasy sports carve-out may be problematic to DFS with regards to the law's applicability.¹⁰⁹ For instance, the law states that "[a]ll winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals in *multiple* real-world sporting or other events."¹¹⁰ In other words, the exemption requires that the winning outcomes be based on *multiple* real-world sporting events, however some fantasy sports do not have multiple events.¹¹¹ For example, golf does not occur in multiple sporting events, but rather in one tournament or one event.¹¹² DraftKings, however, insists that its DFS contests in golf comply with the carve-out by arguing that golf consists of multiple separate events throughout one tournament.¹¹³ This is a clear example of how the vague and ambiguous language of the UIGEA fantasy carve-out can be used to the advantage of DFS companies with regards to the law's applicability.

III. Facts

DFS is a billion-dollar industry, and up until just recently, it has been essentially unregulated.¹¹⁴ From its inception, the only concrete regulation or rule for DFS companies to rely on or concern themselves with has been a voluntary "code of conduct" developed

¹⁰⁸ See David Purdum, *Daily Fantasy Banned in Nevada for Being Unlicensed Gambling*, ESPN (Oct. 16, 2015), archived at <https://perma.cc/FFX4-WSUN> (explaining Nevada's gaming controls the review of the daily fantasy site and concluding that it does meet the definition of gambling within the state).

¹⁰⁹ See *id.* (analyzing how the law impacts DFS).

¹¹⁰ See Heitner, *supra* note 96 (discussing the implication of UIGEA on DFS and how the companies defend their legality).

¹¹¹ See Heitner, *supra* note 96 (examining a confusing provision within the UIGEA).

¹¹² See Heitner, *supra* note 96 (arguing that sports such as golf in online fantasy sports do not conform to the specification of the UIGEA).

¹¹³ See Heitner, *supra* note 96 (reiterating how a specific provision of the UIGEA may conflict with particular formats DFS offer).

¹¹⁴ See Feinman & Israel, *supra* note 86 (discussing the regulations on DFS both federally and in certain states).

by the Fantasy Sports Trade Association (“FSTA”).¹¹⁵ The FSTA is an organization that serves as the voice of the fantasy sports industry, bridging the gap between fantasy sports companies and the player associations over the rights to player’s profiles and statistics.¹¹⁶ The FSTA is a relatively important organization with over 300 members, including companies like DraftKings and FanDuel.¹¹⁷ However, the FSTA’s future is largely dependent on the expansion and continued success of the industry; such a conflict of interest provides little incentive to impose strict rules on DFS operators or even hold them accountable.¹¹⁸ Still, most of the DFS companies do typically adhere to the guidelines set by the FSTA, likely out of courtesy and respect for the association as its only real enforcement power is its ability to relinquish membership.¹¹⁹

Massachusetts has enacted numerous laws to regulate gambling and lotteries, however, no law exists that specifically bans online gambling.¹²⁰ Massachusetts adheres to the common law definition of “gambling,” which requires the payment of a price to be paid, a prize, and most importantly, some element of chance.¹²¹ In

¹¹⁵ See Feinman & Israel, *supra* note 86 (highlighting the federal and state regulations of DFS).

¹¹⁶ See *About*, FANTASY SPORTS TRADE ASSOCIATION (last visited Feb. 7, 2017), archived at <https://perma.cc/B3EM-AAKM> (describing the FSTA’s role in the fantasy sports industry).

¹¹⁷ See *id.* (describing the notable members of the FSTA); see also *How to Play*, DRAFTKINGS.COM (last visited Mar. 9, 2017), archived at <https://perma.cc/U59Z-AGM7> (explaining the rules of DFS); *This is How You FanDuel*, FANDUEL.COM (last visited Mar. 9, 2017), archived at <https://perma.cc/9TKX-2JWN> (explaining the rules of FanDuel); *Frequently Asked Questions: The Basics*, DRAFTKINGS.COM (last visited Mar. 9, 2017), archived at <https://perma.cc/N39E-9ZK9> (further explaining how to play DraftKings).

¹¹⁸ See Feinman & Israel, *supra* note 86 (arguing that the FSTA’s role in regulation is minimal).

¹¹⁹ See Feinman & Israel, *supra* note 86 (indicating that a cancelled membership is the penalty for violating the FSTA rules).

¹²⁰ See MASS. GEN. LAWS ch. 271, § 1 (noting the laws on gaming and lotteries in Massachusetts); see also Eric C. Surette, *Bets, Betting and Wagers*, 38 AM. JUR. 2D, GAMBLING § 3 (defining “betting” in a general context); Daniel Wallach, *Massachusetts AG Review May Spell Trouble for Daily Fantasy Sports*, BECKER & POLIAKOFF (last visited Sept. 21, 2015), archived at <https://perma.cc/CF23-NCRY> (analyzing the Massachusetts Attorney General’s approach to the DFS industry).

¹²¹ See *Commonwealth v. Sullivan*, 105 N.E. 895, 896 (Mass. 1914) (providing the definition for betting); see also Davidson, *supra* note 61, at 251 (declaring the common law definition of gambling in Massachusetts).

Commonwealth v. Plissner, the Massachusetts Supreme Judicial Court examined whether a machine where a player operated a toy crane in an attempt to pick scattered prizes required more chance than skill.¹²² The court held the game was predominately based on chance as the player's only real control over the game and machine was the ability to pick where the crane descended, however the player had no influence over the manner or strength by which the crane closed its claw on the potential prize.¹²³ The court also noted that skill-based games were not illegal gambling.¹²⁴ If a game involved the elements of chance and skill, then the court should apply the predominant purpose test.¹²⁵ In *Commonwealth v. Lake*, the court applied the predominant purpose test explaining, "[w]here a game contains elements both of chance and of skill . . . a game is now considered [gambling] if the element of chance predominates and not [gambling] if the element of skill predominates."¹²⁶ In determining whether chance or

¹²² See *Commonwealth v. Plissner*, 4 N.E.2d 241, 244 (Mass. 1936) (considering whether a machine with a grasping device qualifies as gambling).

¹²³ See *id.* (stating that operating a toy crane game is based more on chance than skill).

¹²⁴ See *id.* (explaining that skill-based games do not constitute gambling).

¹²⁵ See MASS. GEN. LAWS ch. 271, § 7 (2016) (describing the predominant purpose test). Lotteries are defined under Massachusetts law as:

whoever sets up or promotes a lottery for money or other property of value, or by way of lottery disposes of any property of value, or under the pretext of a sale, gift or delivery of other property or of any right, privilege or thing whatever disposes of or offers or attempts to dispose of any property, with intent to make the disposal thereof dependent upon or connected with *chance* by lot, dice, numbers, game, hazard or other gambling device . . . shall be punished by a fine . . . or by imprisonment . . .

Id. (emphasis added); see also *Commonwealth v. Lake*, 57 N.E.2d 923, 925 (Mass. 1944) (explaining Massachusetts' predominant factor test).

¹²⁶ See *Lake*, 57 N.E.2d at 925 (demonstrating the explanation of the predominant purpose test); see also *Mobile Oil Corp. v. Attorney General*, 280 N.E.2d 406, 411 (Mass. 1972) (listing the elements that Massachusetts uses to analyze whether an activity should be considered gambling under the law). "This court has consistently held that three elements must exist in order for any scheme to constitute a lottery. The three elements are payment of a price, a prize, and some element of chance." *Id.* See, e.g., *Lake*, 57 N.E.2d at 924 (highlighting the requirements of price, prize, and chance for a game to be considered a lottery); *Commonwealth v.*

skill is a more material element of the game, Massachusetts, like other states, will analyze whether the participants must rely more than 50% on chance.¹²⁷

In Massachusetts, Attorney General Maura Healy, has developed and proposed a set of regulations and guidelines for DFS companies to abide by when conducting business in the state.¹²⁸ Healy did not explicitly indicate whether she believed DFS games involved more skill than chance, but rather stated that her decision to allow DFS companies to continue to operate in the state was “based on a strict reading of Massachusetts law.”¹²⁹ The DFS regulations are largely tailored to consumer protection concepts, similar to rules laid

Rivers, 82 N.E.2d 216, 218 (Mass. 1948) (reiterating elements of a lottery); Commonwealth v. Wall, 3 N.E.2d 28, 29-30 (Mass. 1936) (describing price as a required element without which there is no lottery).

¹²⁷ See *Lake*, 57 N.E.2d at 924 (holding that the rotary merchandiser machine did constitute a lottery); see, e.g., Dep't of Corr. v. Worker's Comp. Appeals Bd., 90 Cal. Rptr. 2d 716, 719-20 (Cal. Ct. App. 1999) (defining the term “predominant” as “greater than 50 percent”); Berckefeldt v. Hammer 616 P.2d 183, 185 (Colo. App. 1980) (maintaining that golf is a game of skill); Rouse v. Sisson, 199 So. 777, 780 (Miss. 1941) (holding that an electronic I.Q. game was not a prohibited gambling device); see also *Plissner*, 4 N.E.2d at 245 (stating how the elements of the gambling statute may conflict with each other). “[I]f the element of chance is present in such a manner as to thwart the exercise of skill or judgment in a game, then there may be a lottery.” *Id.*

¹²⁸ See 940 MASS. CODE REGS. § 34.00 (2016) (stating the proposed regulations for DFS operators in the state of Massachusetts); see also Press Release, Massachusetts Attorney General, *AG Healy Proposed Strong Consumer Protection Regulations for DFS Operations in Massachusetts* (Nov. 19, 2015) (highlighting the financial protections that the proposed legislation would provide).

Operators must provide options for players to exclude themselves from all contests, set self-imposed deposit or loss limits, or limit the amount of contest entered per week. DFS companies cannot extend credit to players. The draft regulations also detail entry limits, reinforce the obligation to comply with tax laws and to disclose tax liabilities for players, provide protection from unauthorized withdrawals, and layout a complaint procedure for consumers. Violations of any of these regulations will be actionable under the state’s consumer protection laws.

Id.

¹²⁹ See Jason Schwartz, *How the DraftKings-Boston love affair may have saved fantasy*, ESPN (Apr. 12, 2016), archived at <https://perma.cc/4GB2-62U2> (arguing that the power of political connections may have triggered a favorable decision for fantasy sports in Massachusetts).

out in the state's comprehensive Chapter 93A Consumer Protection Act.¹³⁰ For instance, § 34.00 of the regulation states that the regulation is designed to protect Massachusetts' consumers who play DFS contests from unfair and deceptive acts and practices that may arise in the gaming process.¹³¹ The Attorney General also recognized the harm that excessive losses as a result of unfair and deceptive practices can have on families.¹³² Focusing on the underlying problems of DFS, the regulations do things such as: prohibit minors from participation, require truthful advertising, increase the overall transparency

¹³⁰ See 940 MASS. CODE REGS. § 34.00 (2016) (outlining the scope of the regulation and its relation to Daily Fantasy Sports); see also Press Release, Massachusetts Attorney General, *supra* note 128 (summarizing the most significant concepts of the regulations governing DFS):

Protecting minors: Minors under the age of 21 will not be able to participate in any DFS contest. DFS operators cannot advertise or run promotional activities at schools or on college campuses. DFS operators cannot advertise or run promotional activities at amateur, school or college sporting venues. DFS operators cannot offer contests that are based on the performance of college or high school athletes. Advertisements cannot portray minors or market endorsements from colleges or college athletes.

Leveling the playing field: Professional athletes, agents, employees or others connected to a particular sport will not be allowed to enter DFS contests in their sport. Company employees and others with access to insider information will not be allowed to participate in DFS contests. Less than two percent of all players win 90 percent of all prizes. These professional and other highly-experienced players will be easily identifiable to other players. Games limited to beginners will exclude experienced players from participating.

Advertising and marketing: Advertisements must include information on available assistance to problem gamblers or direct consumers to a reputable source. Advertisements mentioning average individual winnings must also disclose average net winnings of all players.

Financial protections: Deposits will be limited to no more than \$1,000 each month, unless the DFS operator obtains verification from the player that establishes the player's ability to sustain losses at a higher limit.

Id.

¹³¹ See 940 MASS. CODE REGS. § 34.00 (2016) (describing the purpose of the Daily Fantasy Sports Contest Operators in Massachusetts).

¹³² See *id.* (setting out the purpose of the regulations to protect consumers).

of the sites, prohibit highly-experienced players from targeting vulnerable beginners, and place limits on problem gamers.¹³³

Massachusetts DFS regulations are one of the first of concrete standards for a largely unregulated industry.¹³⁴ Healy recognizes the regulations are “a first of their kind for the DFS industry, and they focus on protecting minors, ensuring truthful advertising, bringing more transparency to the industry, and leveling the playing field for all consumers,” and noting that “this is a first step, but an important step, as we continue to evaluate this new industry and make sure our laws keep up with these evolving technologies.”¹³⁵

Twenty other states have almost identical gambling laws as that of Massachusetts, all relying on the predominant purpose test set out in the Plissner case to determine whether a game is predominantly chance or skill, thus Massachusetts DFS regulations may serve as a starting point for such states.¹³⁶ DraftKings has consistently maintained that DFS contests are not gambling, arguing that the contests are predominantly games of skill.¹³⁷ Legal counsel of DraftKings further argues “[i]n poker, you play the hand that you are dealt, what you can't do is change your cards. In fantasy sports, you

¹³³ See 940 MASS. CODE REGS. § 34.04 (illustrating how minors are prohibited from game play by DFS Operators); see also Seth Stevenson, *Think of the Children! The moral panic over fantasy sports betting is misguided.*, (Sept. 29, 2015), archived at <https://perma.cc/X7BE-XZBL> (articulating a reason for imposing the restrictions for minors).

The broader critique of daily fantasy betting is an older and more traditional one: that fantasy sports play is gambling, and gambling is bad. But the fact that some players consistently win demonstrates that if anything can be considered a game of skill – the technical loophole under which these forms of betting are considered legal—it’s fantasy sports.

Id.

¹³⁴ See Press Release, Massachusetts Attorney General, *supra* note 128 (explaining the focus and purpose of the proposed regulations of the AG).

¹³⁵ See Press Release, Massachusetts Attorney General, *supra* note 128 (noting statements made by Maura Healy regarding the proposed regulations).

¹³⁶ See Press Release, Massachusetts Attorney General, *supra* note 128 (stating the proposed Massachusetts regulations).

¹³⁷ See Jake Pearson, *Judge hears arguments over gambling in New York attorney general’s daily fantasy sports case*, U.S. NEWS (Nov. 25, 2015), archived at <https://perma.cc/C6MH-EFYH> (observing the stance of the DFS executives and legal counsel).

don't get dealt a hand, you get to pick your own team, and that's something you have complete control over."¹³⁸ DraftKings takes the position that formulating a fantasy football team requires more than simply guessing—participants must account for a large number of different variables, such as the weather conditions, favorable or unfavorable match-ups, injuries, and home field advantage.¹³⁹ Participants must then use their research, analytical skills, and judgment to select the right combination of players.¹⁴⁰ Constructing a winning roster requires much more than simply guessing, as players must: (1) compare a player's value to their price; recognize trends of players and game based on past performances, (2) evaluate the risks versus the reward, and (3) identify the undervalued players on any given week.¹⁴¹ Some even describe the type of skills required to “change players, interact, negotiate, make trades” as being similar to that of trading stocks and bonds.¹⁴² Despite these compelling arguments, any state is free to ban DFS games if it decides that the games are predominately chance-based.¹⁴³

¹³⁸ See Darren Rovell, *DFS companies argue in court games are of skill, not chance*, ESPN (Nov. 25, 2015), archived at <https://perma.cc/LF7C-2PDR> (discussing the legal argument for and against DFS); see also M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?*, 8 N.C. J. L. & TECH. 59, 62 (2006) (explaining how fantasy football drafts work).

¹³⁹ See Nathaniel J. Ehrman, *Out of Bounds: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 SPORTS LAW. J. 79, 97 (2015) (analyzing how much skill is involved with DFS); see also Joe Kaiser, *How to build a winning lineup in NBA DFS*, ESPN (Sept. 22, 2015) archived at <https://perma.cc/N58Z-KNHU> (explaining the effective strategies for success in DFS)

¹⁴⁰ See Kaiser, *supra* note 139 (recognizing the factors involved with choosing a roster).

¹⁴¹ See Ehrman, *supra* note 139, at 102 (stating the particular set of skills required in forming a fantasy football team).

¹⁴² See Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, 29 LOY. L.A. ENT. L. REV. 53, 86 (2008) (quantifying the level of skill needed to participate in fantasy sports); see also Curt Nickisch, *What Daily Fantasy Sports Can Learn from a Golf Contest and The Pinball Industry*, WBUR (Oct. 22, 2015), archived at <https://perma.cc/MCU6-HBU4> (comparing daily fantasy sports to other games of chance such as hole-in-one golf).

¹⁴³ See 18 U.S.C. § 1084 (1961) (acknowledging state's ability to outlaw gambling industries); see also 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, 10 (2012) (summarizing the applicable federal and state gambling statutes).

IV. Analysis

A. *DFS Involves Chance and Skill, but which is a Material Element of the Game?*

DFS contests must comply with both state and federal laws, thus, although DFS companies rely on the UIGEA for legality, the states are reserved the right to ban DFS contests within its own borders.¹⁴⁴ Similar to Massachusetts, mostly every state's gambling statutes rely on the game of chance or skill analysis to determine whether the contest constitutes gambling.¹⁴⁵ Therefore, the legality of DFS contests will ultimately depend on whether states consider such contests as a game of skill or a game of chance.¹⁴⁶

New York Attorney General Eric Schneiderman concluded that DFS contests are considered gambling and a violation of New York gambling laws.¹⁴⁷ DraftKings and FanDuel received cease-and-desist letters from Schneiderman arguing that fantasy players bet money on a future event outside of the gamblers control, therefore regardless of the skill involved chance is the dominating factor.¹⁴⁸ A

¹⁴⁴ See 18 U.S.C. § 1084 (1961) (noting the ability for states' to place criminal sanctions for violation of state gambling laws); 31 U.S.C § 5363 (2006) (outlawing the knowing acceptance of funds in connection with the participation of unlawful internet gambling); see also Edelman, *supra* note 143 (highlighting the relevant federal and state statutes that regulate gambling in America). The bottom line is that each individual state's gambling statutes will provide the answer to the question of DFS legality. *Id.*

¹⁴⁵ See Davidson, *supra* note 61, at 230-67 (listing numerous different states and explaining their gambling statutes).

¹⁴⁶ See 18 U.S.C § 1084 (1961) (defining what constitutes the illicit transmission of wagering information and the penalties associated with such a violation); 31 U.S.C § 5361 (2006) (re-emphasizing the standards for whether states adopt a rule); see also Lee, *supra* note 142, at 76, 80-81 (summarizing The Wire Act and the Uniform Internet Gambling Act).

¹⁴⁷ See Pearson, *supra* note 137 (setting forth New York's ban on the daily fantasy sites).

¹⁴⁸ See Schneiderman, *supra* note 1 (arguing DFS games heavily rely on chance, regardless of skill involved).

Consider the final moments of a football game where the outcome has been decided and the winning quarterback takes a knee to run out the clock and assure victory. Let's say it's Eli Manning, and the Giants are defeating the Eagles or the Cowboys. Statistically, this play would cost the quarterback one yard – a yard that could

spokesman for Schneiderman further stated “[i]f chance is a material element of these games it doesn’t matter how much ‘skill’ is involved.”¹⁴⁹

Although New York is correct in stating that a combination of both chance and skill is involved when playing DFS games, it is incorrect in concluding that a material element of these games is chance rather than skill.¹⁵⁰ Fundamentally, DFS contests must involve some inherent element of chance.¹⁵¹ For instance, there are many unpredictable variables that make DFS appear as a game of chance, such as injuries to players during the game, unexpected illness, coaching strategies, and changes in the weather.¹⁵² Despite these unpredictable variables, skill is arguably the more material element in DFS games because participants must use a variety of skills to build a winning team, such as through in-depth research, calculating statistics, and risk-based valuation of player performance.¹⁵³

A closer analysis at how DFS games are played supports the argument that skill is the material element, not chance.¹⁵⁴ In daily fantasy football, participants must first select a contest they want to enter into.¹⁵⁵ DraftKings offers a variety of different contests, one of which is called “Multipliers”—a contest in which participants pay a small entry fee, and the top finishers can win up to ten times that

make the difference between someone on DraftKings or FanDuel winning or losing tens of thousands of dollars.

Id.

¹⁴⁹ See Pearson, *supra* note 137 (articulating the arguments to be made by the New York attorney general regarding the legal status of daily fantasy sports).

¹⁵⁰ See Schneiderman, *supra* note 1 (noting the inherent existence of some form of skill in a game of chance).

¹⁵¹ See Ehrman, *supra* note 139, at 101-02 (questioning how much “chance” is involved with DFS by distinguishing the chance variables of DFS from those of skill).

¹⁵² See Ehrman, *supra* note 139, at 101-02 (elaborating on the types of factors that make up a DFS player’s decision to place a certain player in his or her roster).

¹⁵³ See Ehrman, *supra* note 139, at 101-02 (listing important elements of chance in DFS contests).

¹⁵⁴ See *How to Play*, *supra* note 117 (describing the rules of DraftKings).

¹⁵⁵ See *Frequently Asked Questions*, *supra* note 117 (describing the range of contests players can pick from). The contests offered by DraftKings consist of: head-to-head, in which players take on another individual’s team, 50/50 contests paying out teams that finish in the top-half of the field no matter what the amount of entries are, among others. *Id.*

amount.¹⁵⁶ After selecting the contest, the participant team owner then drafts a team from the player's pool.¹⁵⁷ The player pool is a list of all the current professional football players that a participant team owner can choose from.¹⁵⁸ Each participant holds a salary cap of \$50,000 to spend towards choosing players from the player pool.¹⁵⁹

The more talented players cost more than the lesser talented players; therefore in order to form a well-balanced team, a participant must allocate his or her funds wisely.¹⁶⁰ Participants must account for a number different variables such as: a players minutes per game or snap count; the usage rate of the player; opponents defense versus position; paying more at the right position; and ownership percentage.¹⁶¹ Scoring is then calculated by each player's statistics (with regards to rushing, receiving, passing yards, receptions, and touchdowns scored) and the final the total score is based on the team's performance as a whole.¹⁶² Thus, although bets are made in a world of "fantasy," research and strategic skills are material elements of DFS contests because a total score is based on a participant's ability to work within the limits of their salary cap when selecting certain players over others.¹⁶³

¹⁵⁶ See *Frequently Asked Questions*, *supra* note 117 (providing a summary and description of the different contests offered).

¹⁵⁷ See *How to Play*, *supra* note 117 (outlining the process of players drafting a team). Participants start with a salary cap of \$50,000 made up of illusionary funds which the participant uses to draft players. *Id.* The players are organized in a player pool in which each player has a specific price; the price is determined based on projections for that game. *Id.* For example, those players that are projected to do very well will effectively cost more. *Id.*

¹⁵⁸ See *How to Play*, *supra* note 117 (explaining the player pool structure in DFS).

¹⁵⁹ See *How to Play*, *supra* note 117 (discussing how participants draft a team on the daily fantasy site).

¹⁶⁰ See Holleman, *supra* note 138, at 59-60 (articulating that there are strategy and skill components of online fantasy sports). It is consistently argued by the DFS companies that the aspect of drafting a team relies heavily on skill because of the analysis required in allocating funds for certain players. *Id.* at 79. For example, splurging on one expensive, highly sought after player will force you to draft a less expensive, lower projected player as well. *Id.* at 62.

¹⁶¹ See Kaiser, *supra* note 139 (listing the variable involved in creating DFS roster).

¹⁶² See Holleman, *supra* note 138, at 63 (explaining the scoring categories and calculations used by fantasy sites).

¹⁶³ See Davidson, *supra* note 61, at 218 (emphasizing how skill and knowledge of the sport allows fantasy players to win within the context of the rules).

B. *Massachusetts Approach to Regulating DFS Games*

Although Massachusetts never explicitly stated that DFS games involve more skill than chance and thus its gambling laws do not outlaw the games, this was likely the underlying reason for its decision to regulate and not ban DFS games.¹⁶⁴ Massachusetts relies on three elements in determining whether a contest constitutes lottery or gambling per se: a payment of price, a prize, and some element of chance.¹⁶⁵ DFS games clearly meet the first two elements of price and a prize, but arguably not the final element of chance due to the Massachusetts predominant purpose test.¹⁶⁶ If the likelihood of winning is primarily determined by a contestant's skills, and Massachusetts considers these skills to be not only physical but also mental—like strategizing what players to select for your team by conducting in-depth research, calculating statistics, and risk-based valuation of player performance—then the game is predominately based on skill, not chance.¹⁶⁷

A majority of states follow a similar predominant purpose test like Massachusetts, thus it is possible these states will decide to regulate and not ban DFS, although the approaches in doing so might differ.¹⁶⁸ The most effective approach to provide safety for consumers,

¹⁶⁴ See Schwartz, *supra* note 129 (arguing that the power of political connections may have triggered a favorable decision for fantasy sports in Massachusetts).

¹⁶⁵ See *Mobile Oil Corp.*, 280 N.E.2d at 406 (stating the elements that constitute gambling in Massachusetts). For gambling to actually occur, each party must have a chance of gain and stand a risk of loss. *Id.* Basically, the parties involved must risk losing something of value. *Id.* When there is no consideration or value risked, it is commonly referred to as a no-purchase necessary contest. *Id.* at 404.

¹⁶⁶ See *id.* at 406 (indicating the elements of a lottery).

¹⁶⁷ See *Berckefeldt*, 616 P.2d at 185 (maintaining that hitting a golf ball is a game of skill); Wallach, *supra* note 120 (acknowledging, “[w]ith regard to DFS, the primary question is whether DFS contest participants’ application of their knowledge and judgment in analyzing and predicting the results of real-world athletes in sports competitions is such that the DFS contests are determined to be ‘games of skill’”); see also *Rouse*, 199 So. at 780 (holding that an electronic I.Q. game was not a prohibited gambling device).

¹⁶⁸ See Crosby, et al., *supra* note 7, at 38 (noting the different approaches states can take in regulating DFS). The Chapter 23 approach would put regulations on DFS operators similar to those of casino gambling. *Id.* However, this regulating an online business like one with table games will be difficult and may prove ineffective. *Id.* Another approach for the legislature would be to simply leave it alone and let the certain regulatory agencies that have the authority to adapt rules and guidance for DFS operators. *Id.*

in addition to clear guidance and predictability for DFS operators, would be legislation aimed specifically at DFS in creating a regulatory body for online gaming focusing on public policy objectives, as Massachusetts did with regards to consumer protection.¹⁶⁹ First, it is vitally important that participants as consumers of DFS games be protected against unfair and deceptive practices.¹⁷⁰ Second, the regulatory body must have jurisdiction over all Internet-based economic activity in which participants risk losing something of value by participating in the games.¹⁷¹ Further, because the Internet gaming industry is always evolving, the regulatory agency should develop or maintain data to track new dangers and activity that may pose a threat to the consumer public.¹⁷² Lastly, legislative oversight will be necessary to ensure the agency is conducting business effectively, quarterly reports must be issued to update legislators on the progress and challenges the agency is facing as well as the activity and trends of the industry.¹⁷³ Massachusetts has taken the right steps to regulate DFS by first considering the risks the games pose to the consumer public, and by granting jurisdiction to a regulatory body, like the Attorney General Office, to oversee such business activities within the state.¹⁷⁴

Moreover, DFS operators are pushing for such regulations as FanDuel's Chief Executive Officer explained, "now is the time to memorialize regulations into law."¹⁷⁵ Banning DFS operations altogether is not the proper approach, especially because such operations can serve as a legitimate form of economic activity, entertainment,

¹⁶⁹ See Crosby, et al., *supra* note 7, at 39 (explaining the Omnibus regulatory approach).

¹⁷⁰ See Crosby, et al., *supra* note 7, at 39 (delineating how regulations protect DFS participants).

¹⁷¹ See Crosby, et al., *supra* note 7, at 8 (discussing the basic functionality of the predominant factor test).

¹⁷² See Crosby, et al., *supra* note 7, at 39 (stating that legislation aims to protect against adverse consequences to the consumer public).

¹⁷³ See Crosby, et al., *supra* note 7, at 40 (ensuring DFS agencies are running efficiently).

¹⁷⁴ See Crosby, et al., *supra* note 7, at ii (explaining the Attorney General's role in regulating DFS).

¹⁷⁵ See Crosby, et al., *supra* note 7, at 18 (arguing that DFS regulation is necessary and beneficial to all parties).

and public or philanthropic revenue under the right regulatory conditions.¹⁷⁶ Thus, DFS operators should be allowed to continue operation, but under clear and effective regulation.¹⁷⁷

V. Conclusion

DFS companies must rely and abide by both federal and state law to legally operate in the United States. While federal law does not ban DFS contests, it is uncertain whether states will choose to do the same. Given this uncertainty, states will likely be left to interpret whether DFS games are predominantly skill-based or chance-based. In most states, this analysis of chance versus skill will dictate whether DFS is considered illegal gambling. Due to the dominating elements of skill required for success in these games, states should look first to regulate rather than ban these contests, an approach similar to the one Massachusetts has taken.

¹⁷⁶ See Crosby, et al., *supra* note 7, at 18 (noting that gambling does in fact provide benefits to the community).

¹⁷⁷ See Crosby, et al., *supra* note 7, at 17 (proposing that concept of regulation for DFS as an alternative to banning the games entirely).