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## Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation

Marc Edelman

Baruch College, Zicklin School of Business, marc@marcedelman.com

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# Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation\*

MARC EDELMAN<sup>†</sup>

*In recent months, the legal status of fantasy sports has undergone intense scrutiny, with the attorneys general of many states contending that certain formats of daily fantasy sports violate state gambling laws. In an effort to save the burgeoning daily fantasy sports industry, legislators in these states have proposed bills to affirmatively legalize and regulate daily fantasy sports. However, these bills often fail to adequately address the underlying consumer protection concerns pertaining to the industry.*

*This Article analyzes how U.S. states currently regulate the fantasy sports marketplace and proposes a framework for future state laws to effectively regulate both traditional fantasy sports and daily fantasy sports. Part I of this Article explores the history of fantasy sports contests in the United States, analyzing separately the origins of traditional fantasy sports and daily fantasy sports. Part II applies state gambling laws to the fantasy sports marketplace, analyzing past court decisions, gaming commission rulings, and attorneys general opinions. Part III analyzes current state laws that specifically regulate the behavior of companies in the fantasy sports industry. Part IV discusses recent bills proposed by state legislators in the 2015 and 2016 sessions that seek to affirmatively legalize and regulate fantasy sports. Finally, Part V proposes a comprehensive framework that would allow for states to effectively regulate both traditional fantasy sports and daily fantasy sports in a meaningful way, in conjunction with existing state gambling laws.*

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<sup>†</sup> Professor Marc Edelman (Marc@MarcEdelman.com) is a Professor of Law at the Zicklin School of Business, Baruch College, City University of New York. He is also an adjunct professor at Fordham University School of Law, and he advises fantasy sports businesses on a wide range of legal issues, including issues pertaining to gaming law and compliance. His previous articles on fantasy sports law have appeared in the *Illinois Law Review* and the *Harvard Journal of Sports and Entertainment Law*.

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## INTRODUCTION

Over the past two years, online gaming operators DraftKings, Inc. (“DraftKings”) and FanDuel, Inc. (“FanDuel”), in conjunction with Major League Baseball (MLB) and the National Basketball Association (NBA), have hired lobbyists to promote and affirmatively legalize daily fantasy sports.<sup>1</sup> Their goal has been to convert these

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1. E.g., Dan Adams & Curt Woodward, *Fantasy Sports Games Get Break at Last Minute*, BOS. GLOBE (Dec. 12, 2015), <https://www.bostonglobe.com/business/2015/12/11/judge-orders-draftkings-shut-down-new-york/p4B99SqAYbaTFzsU2HhZnK/story.html> [<https://perma.cc/3ED7-3GY5>] (explaining that “DraftKings has hired a team of prominent lawyers and lobbyists, including David Boies and former Massachusetts attorney general Martha Coakley”); Liana Baker, *FanDuel, DraftKings Vow To Fight New York’s Halt on Fantasy Sports*, REUTERS (Nov. 12, 2015, 4:31 AM), <http://www.reuters.com/article/us-fantasysports-new-york-idUSKCN0T02C920151112> [<https://perma.cc/HJJ3-SSWJ>] (noting that DraftKings had hired Morgan, Lewis & Bockius—incidentally the same firm where Major League Baseball commissioner Rob Manfred began his career—to lobby on its behalf); Kurt Erickson,

gray-area businesses<sup>2</sup> into huge, profitable companies and then to sell shares of these companies to the public through an initial public offering.<sup>3</sup>

At the outset, DraftKings and FanDuel encountered few challenges to their efforts to legalize daily fantasy sports.<sup>4</sup> But, more recently, their efforts have been stymied

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*Missouri May See Battle over Fantasy Sports Games*, ST. LOUIS-POST DISPATCH, Dec. 26, 2015, 2015 WLNR 38362263 (describing FanDuel and DraftKings as having hired a team of lobbyists “to push forward with business-friendly legislation”); Michael Hiltzik, *Daily Fantasy Sports’ High Stakes*, L.A. TIMES, Nov. 22, 2015, 2015 WLNR 34681569 (quoting gaming law professor I. Nelson Rose explaining that the daily fantasy sports industry is “just beginning to flex its muscle, hiring lobbyists . . . in preparation for what could be bruising battles over its future”); Tia Mitchell, *Fantasy Sports Industry Spends Big on Lobbyists as it Tries To Change State Law*, FLA. TIMES-UNION (Jacksonville, Fla.), Jan. 1, 2016, 2016 WLNR 44832 (discussing the plethora of lobbyists hired by the Fantasy Sports Trade Association and specifically daily fantasy sports websites DraftKings and FanDuel).

2. See Tim Dahlberg, *Lineup Release Raises Questions About Daily Fantasy Contests*, ASSOCIATED PRESS (Oct. 5, 2015, 10:01 PM), <http://bigstory.ap.org/article/6728a409e2b84542adaacc6d5e01efc5/lineup-release-raises-questions-about-daily-fantasy> [<https://perma.cc/R6V7-CLTK>] (recognizing the “gray areas” as to the legality of daily fantasy sports); Hiltzik, *supra* note 1 (contending that daily fantasy sports “have become ensnared in the web of inconsistent laws and confusing regulations governing gaming”); Mitchell, *supra* note 1 (correctly noting that “[d]espite the prominent stadium branding and the ubiquitous television ads during football games, daily fantasy sports operates in a gray area that has drawn the attention of law enforcement and politicians across the nation”).

3. See Jeff Jeffrey, *DraftKings, FanDuel Sued for Alleged Fraud by Two North Carolina Fantasy Sports Players*, TRIANGLE BUS. J., Nov. 4, 2015, 2015 WLNR 32836947 (explaining that FanDuel CEO Nigel Eccles is “taking an IPO off the table” due to the recent increase in public and private litigation against the company); Jonathan Marino, *DraftKings’ \$1 Billion Fantasy Momentum Could Mean a Big IPO in 2016*, STREET (Dec. 19, 2014, 6:17 AM), <http://www.thestreet.com/story/12990595/1/draftkings-1-billion-fantasy-momentum-could-mean-a-big-ipo-in-2016.html> [<https://perma.cc/5U5L-VZNR>] (explaining that DraftKings CEO Jason Robins “thinks it will take ‘one more mega-round’ of venture financing to bolster his Boston-based brainchild’s operations, and that an IPO could come in as little as two years, in 2016”); Max Miceli, *Betting on the Fantasy World*, U.S. NEWS & WORLD REP. (Oct. 30, 2015, 1:01 PM), <http://www.usnews.com/news/articles/2015/10/30/draftkings-fanduel-and-gambling-on-the-world-of-fantasy-sports> [<https://perma.cc/RB8X-3A3Z>] (noting that both DraftKings and FanDuel seem poised for initial public offerings as soon as 2016); see also Eric Jackson, *As AG’s Probe Extends to Yahoo!, DraftKings and FanDuel Play High Stakes IPO Game*, THE STREET: REAL MONEY (Nov. 19, 2015, 10:00 AM), <http://realmoney.thestreet.com/articles/11/19/2015/ags-probe-extends-yahoo-draftkings-and-fanduel-play-high-stakes-ipo-game> [<https://perma.cc/H25Y-VP8P>] (contending that “the next logical step [for FanDuel and DraftKings] is an [initial public offering] to help cash out earlier investors and raise even more capital for themselves”).

4. Cf. Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KY. L. REV. 443, 443 (2015) (explaining that in a short period of time the United States had transitioned “from an era where these one-day fantasy sports contests had been seen as similar to illegal sports gambling into an era in which one cannot turn on a television set to ESPN without seeing commercials for one-day fantasy sports leagues”). Much of this early support emerged from the belief by states that they could legalize and tax daily fantasy sports, creating a new tax revenue stream. See, e.g., Phil Kadner, *Legalize and Tax Fantasy Sports Gambling*, CHI. TRIB.: DAILY SOUTHTOWN (Dec. 28, 2015, 4:25 PM),

by constituent groups as varied as consumer protectionists and casino protectionists.<sup>5</sup> Citing to concerns about self-regulatory practices, gambling addiction, and the protection of minors, these constituencies have argued that fantasy sports are simply a guise for illegal gambling and that these contests should be treated as ubiquitously illegal.<sup>6</sup>

This Article analyzes how U.S. states currently regulate the fantasy sports marketplace and proposes a framework for future state laws to effectively regulate both traditional fantasy sports and daily fantasy sports. Part I of this Article explores the history of fantasy sports in the United States, analyzing separately the origins of traditional fantasy sports and daily fantasy sports. Part II applies state gambling laws to the fantasy sports marketplace, analyzing past court decisions, gaming commission rulings, and attorneys general opinions. Part III analyzes current state laws that specifically regulate the behavior of companies in the fantasy sports industry. Part IV discusses recent bills proposed by state legislators in the 2015 and 2016 sessions that seek to affirmatively legalize and regulate fantasy sports. Finally, Part V proposes a comprehensive framework that would allow for states to effectively regulate both traditional fantasy sports and daily fantasy sports in a meaningful way, in conjunction with existing state gambling laws.

## I. THE HISTORY OF FANTASY SPORTS

### A. *Origins of Traditional Fantasy Sports*

The term “fantasy sports,” in the vernacular, describes a wide range of contests in which participants construct virtual teams to compete against other participants’ teams, using statistics generated by real-life athletes in individual and team-based sporting events.<sup>7</sup> Traditional fantasy sports contests extend for the duration of a

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<http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-kadner-madigan-sports-gambling-st-1229-20151228-column.html> [<https://perma.cc/9XMS-EZMM>] (arguing that “Illinois ought to make [daily fantasy sports] legal, tax the heck out of it and share in the windfall that millions of our fellow residents are cheerfully generating for the people operating these enterprise”).

5. *E.g.*, Carl Campanile, *Casino Biz Wins After Betting on Schneid*, N.Y. POST, Nov. 16, 2015, at 10 (discussing the interests of casino lobbyists to keep daily fantasy sports operators DraftKings and FanDuel from operating in New York); John W. Kindt, Letter to the Editor, *Daily Fantasy Sports Offers No Consumer Protection*, HERALD-WHIG (May 11, 2016), <http://www.whig.com/article/20160511/ARTICLE/305119823#> [<https://perma.cc/AAW9-8VS7>].

6. *E.g.*, Hiltzik, *supra* note 1 (quoting gaming law professor I. Nelson Rose as describing opponents to daily fantasy sports, much like online poker, pointing out its potential for “victimizing underage and irresponsible players”).

7. WASH. STATE GAMBLING COMM’N, FANTASY SPORTS: A BRIEF LOOK AT FANTASY SPORTS AND DAILY FANTASY SPORTS 3 (2015), <http://www.wsgc.wa.gov/agenda/2015/nov-fantasy-sports-report.pdf> [<https://perma.cc/H3LQ-MD67>]; *see also* Memorandum from J. Brin Gibson, Bureau Chief of Gaming & Gov’t Affairs & Ketan D. Bhirud, Head of Complex Litig., to A.G. Burnett, Chairman, 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> [<https://perma.cc/E5YF-4X6U>] [hereinafter Nev. Att’y Gen. Memorandum] (“Fantasy sports are

single professional sports season, if not longer.<sup>8</sup> Some contests are played entirely among friends for bragging rights.<sup>9</sup> Meanwhile, others charge participants an entry fee and pay out cash prizes to the winners.<sup>10</sup>

The origins of fantasy sports date back to the early 1960s when Professor Bill Gamson, a psychology professor at Harvard University and the University of Michigan, created “The Baseball Seminar”—a contest among esteemed college professors who “paid a ten-dollar entry fee to ‘draft’ a team of baseball players.”<sup>11</sup> Gamson declared the winner of his “seminar” to be “the participant who, over the course of an actual Major League Baseball season, selected players who earned the most points in a pre-determined set of statistical categories.”<sup>12</sup>

While America’s earliest fantasy sports contests were played primarily among friends, the advent of the Internet transformed fantasy sports from an in-home hobby into a global enterprise with a commercial dimension.<sup>13</sup> Not only did the Internet link

games where the participants, as ‘owners,’ assemble ‘simulated teams’ with rosters and/or lineups of actual players of a professional sport. These games are generally played over the Internet using computer or mobile software applications.”)

8. 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, 15–16 (2012) (discussing the traditional lengths of fantasy sports seasons).

9. *Id.* at 15–19 (discussing “family friendly” or “educational” fantasy sports leagues where participants are “generally unconcerned with league entry fees and prize money”).

10. *Id.* at 17 (describing high-stakes leagues that include entry fees of upwards of \$1000 per team and large cash prizes for the league winners).

11. *Id.* at 5–6. For more on Professor Bill Gamson’s “Baseball Seminar,” see also Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317, 323–24 (2009); Sam Allis, *Lord of the Games: Fantasy Baseball Indebted to Two Innovators*, BOS. GLOBE, Mar. 12, 2006, 2006 WLNR 4160544. For a different historical account for the development of fantasy sports during this same era, see WASH. STATE GAMBLING COMM’N, *supra* note 7, at 4 (tracing the origins of fantasy sports instead to a group of Oakland Raiders fans who started a private league in the 1960s and a public fantasy sports league that operated out of an Oakland bar in 1969); Letter from Kathryn M. Rowe, Md. Assistant Att’y Gen., & Adam D. Snyder, Chief Counsel, Ops. & Advice, to Thomas V. Mike Miller, Jr., President, Md. State Senate 2 (Jan. 15, 2016) [hereinafter Md. Att’y Gen. Letter], [https://www.oag.state.md.us/Press/Miller\\_Advise\\_01\\_15\\_16.pdf#search=january 15 2016](https://www.oag.state.md.us/Press/Miller_Advise_01_15_16.pdf#search=january%2015%202016) [https://perma.cc/SN3K-F63S] (generally, same).

12. Edelman, *supra* note 8, at 6 & n.21 (mentioning the use of the term “Seminar” to reduce any association with organized gambling).

13. See Justin Tasch, *Fantasy Boom: With Daily Leagues for Big Bucks, Tournaments Paying Out Millions and Its Own Network; Fantasy Sports Is Blowing Up*, N.Y. DAILY NEWS, Nov. 9, 2014, at 68 (quoting Fantasy Sports Trade Association president Paul Charchian explaining that the Internet helped grow fantasy sports from a hobby with less than five million participants to one with more than forty-one million participants); see also WASH. STATE GAMBLING COMM’N, *supra* note 7, at 4 (“In the 1990’s fantasy sports started to really grow among the masses, led by football. A big factor in this was the transition of fantasy sports to the internet.”); Nicholas Bamman, Note, *Is the Deck Stacked Against Internet Gambling?: A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL’Y 231, 231–32 (2010) (describing Internet gambling as a \$24 billion annual industry in 2010); Risa J. Weaver, Note, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010

together fantasy sports enthusiasts from around the world, but it also made available “‘instantaneously’ downloadable statistics” and third-party services for collecting entry fees and paying out prize money.<sup>14</sup>

The commercialization of fantasy sports began in earnest in the mid-1990s when ESPN, Inc. (ESPN) became the first major company to provide fantasy sports games to consumers on the Internet.<sup>15</sup> Many of ESPN’s contests charged users an operating fee for management of team data, although ESPN’s fantasy sports contests never paid cash prizes to their winners.<sup>16</sup>

In March of 1997, CBS Corporation (CBS) emerged as a second major host site for full-season fantasy sports contests when it purchased the online startup SportsLine USA, Inc. and began offering similar services.<sup>17</sup> Meanwhile, by the year 2000, the search engine Yahoo! Inc. (“Yahoo!”) emerged as a third major provider of fantasy sports contests.<sup>18</sup> For Yahoo!, a strong fantasy sports presence helped to increase the search engine’s page hits and in turn improved its ability to sell click-through advertising.<sup>19</sup>

Today, many different companies provide some form of traditional fantasy sports contests on the Internet, with many of these companies not only managing team data but also collecting entry fees and paying cash prizes to winners.<sup>20</sup> Some of the more established companies that now compete in the play-for-cash segment of the fantasy sports marketplace include CBS Sports, Yahoo!, Fantrax, the National Fantasy

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DUKE L. & TECH. REV., no. 2, 2010, at ¶ 1 (crediting the Internet for the tremendous growth in fantasy sports).

14. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports*, 2016 ILL. L. REV. 117, 121 (2016); see also WASH. STATE GAMBLING COMM’N, *supra* note 7, at 4 (discussing how new Internet technologies made it easier to quickly compile fantasy sports statistics).

15. See Regis Behe, *Fantasy Sports Leagues Put Armchair Quarterbacks in the Game*, PITTSBURGH TRIB. REV., Dec. 14, 2002, 2002 WLNR 12019633.

16. See Edelman, *supra* note 8, at 19 (explaining that ESPN does not offer play-for-cash leagues with entry fees).

17. See *Sports Briefs*, STUART NEWS (Fla.), Mar. 6, 1997, at C3; see also Ben Fischer, *FanDuel Prepares for Life Without ESPN*, N.Y. BUS. J., Apr. 8, 2015, 2015 WLNR 10282641 (listing Yahoo! and CBS Sports as the current leaders in hosting full-season fantasy sports contests).

18. See Vindu Goel & Joe Drape, *Yahoo Will Enter Daily Fantasy Sports Market*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/technology/yahoo-will-enter-daily-fantasy-sports-market.html> [<https://perma.cc/76BJ-MGZF>] (noting that “Yahoo has been hosting fantasy sports for over 16 years, and it operates a leading sports news site”).

19. See Marc Edelman, *Yahoo!, CBS, ESPN and the NFL Are Using Pay-To-Play Fantasy Football To Drive Website Traffic in Fall 2014*, FORBES (Aug. 13, 2014, 9:30 AM), <http://www.forbes.com/sites/marcedelman/2014/08/13/yahoo-cbs-espn-and-the-nfl-adopt-pay-to-play-fantasy-football-contests-in-2014-to-drive-user-traffic/> (noting that Yahoo offers the highest payout rate among the four major full-season fantasy football operators, likely as a means to drive user traffic).

20. See Tasch, *supra* note 13. The Fantasy Sports Trade Association currently estimates the number of fantasy sports participants in the United States even higher, at fifty-seven million. Josh Hicks, *Legality of Fantasy-Sports Operations Under Review by State Officials*, WASH. POST, Dec. 18, 2015, at B2 (estimating that nearly fifty-seven million Americans currently play fantasy sports).

Baseball Championship (owned by STATS LLC), and Star Fantasy Leagues.<sup>21</sup> Meanwhile, ESPN has generally refrained from entering this segment of the market, either based on brand image concerns or perception of some, albeit manageable, legal risk.<sup>22</sup>

### B. Origins of Daily Fantasy Sports

Much like traditional fantasy sports, daily fantasy sports contests allow participants to “compete against other fantasy sports participants based upon the actual performance of those [athletes] in key statistical categories.”<sup>23</sup> However, unlike traditional fantasy sports, daily fantasy sports are played over a far shorter duration, such as a single day or a week.<sup>24</sup> Most daily fantasy sports contests entail participants competing against a huge pool of entrants, rather than a small group of friends.<sup>25</sup> In

21. *Fantasy Baseball*, NAT’L FANTASY BASEBALL CHAMPIONSHIP, <http://nfbc.stats.com/baseball/home/nfbc/index.asp> [<https://perma.cc/CSA5-QJXR>]; *Fantasy Basketball*, YAHOO! FANTASY, <https://basketball.fantasysports.yahoo.com/nba/proleagues> [<https://perma.cc/K9WC-BC78>]; *Fantasy Basketball Prize Leagues*, CBS SPORTS, [http://www.cbssports.com/fantasy/basketball/games/prize-leagues?ttag=FBKP15\\_new\\_spo\\_e\\_games\\_basketball](http://www.cbssports.com/fantasy/basketball/games/prize-leagues?ttag=FBKP15_new_spo_e_games_basketball) [<https://perma.cc/85V2-VTHN>]; *Fantasy Games List*, FANTRAX, [http://www.fantrax.com/viewAllGames.go?sport=MLB&type=SALARY\\_CAP](http://www.fantrax.com/viewAllGames.go?sport=MLB&type=SALARY_CAP) [<https://perma.cc/UCP6-XHNY>]; *Star Fantasy Leagues*, STAR FANTASY LEAGUES, <https://www.starfantasyleagues.com/Home/Landing> [<https://perma.cc/3FPA-8G7L>].

22. See Marc Edelman, *Yahoo!, CBS Sports, and ESPN Adopt Diverging Business Strategies for 2014 Fantasy Baseball*, FORBES (Feb. 7, 2014, 8:26 AM), <http://www.forbes.com/sites/marcedelman/2014/02/07/yahoo-cbs-sports-and-espn-adopt-diverging-2014-fantasy-baseball-strategies/#2b8a246b41a5> (explaining that ESPN now offers a fantasy sports contest with an entry fee but prizes have limited value, such as Best Buy gift certificates, and they are not a meaningful percentage of contest entry fees).

23. *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587, at \*1 (N.D. Ill. Oct. 9, 2013) (citations omitted); see also Memorandum of Law in Opposition to Defendant’s Motion for an Interim Stay at 6, *Schneiderman v. FanDuel, Inc., & DraftKings, Inc.*, No. 453056/15 (N.Y. App. Div. Dec. 22, 2015) (“In [daily fantasy sports] games, each player creates a ‘fantasy’ team of professional athletes in a particular sport, with the goal of selecting the athletes who the player predicts will have the best performances in an upcoming game.”).

24. Letter from Lisa Madigan, Ill. Attorney General, to Representative Elgie R. Sims, Jr., & Representative Scott R. Drury, Ill. State Judiciary Comm’n (Dec. 23, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/12/Illinois-DFS.pdf> [<https://perma.cc/V7UW-5LEW>] [hereinafter Ill. Att’y Gen. Letter] (“Unlike traditional fantasy sports contests, which operate on a season-long timetable, daily fantasy sports contests are conducted over short-term periods, such as a week or a single day of competition.”). See generally Nev. Att’y Gen. Memorandum, *supra* note 7, at 2 (“Fantasy sports can be divided into two types: (1) traditional fantasy sports, which track player performance over the majority of a season, and (2) daily fantasy sports, which track player performance over a single game.”).

25. Dan McQuade, *\$1M Prizes and NFL Lobbying: The Irresistible Rise of Daily Fantasy Leagues*, GUARDIAN (May 19, 2015), <https://www.theguardian.com/sport/blog/2015/may/19/1m-prizes-and-nfl-lobbying-the-irresistible-rise-of-daily-fantasy-leagues> [<https://perma.cc/WE3Z-2X3A>] (discussing how daily fantasy sports games are similar and different from traditional fantasy sports); see also Md. Att’y Gen. Letter, *supra* note 11, at 3 (explaining that “[w]hereas the archetypal [traditional fantasy sports] game is a contest among

addition, most daily fantasy sports contests “do[] not allow for the forms of roster management that simulate what a real-life team manager does.”<sup>26</sup>

The underlying concept behind daily fantasy sports is a hybrid between mainstream fantasy sports and sports betting.<sup>27</sup> These contests originally targeted online gamers who sought a new form of entertainment after Congress’s Unlawful Internet Gambling Enforcement Act (UIGEA) shut down U.S. access to most online sportsbooks and poker rooms.<sup>28</sup> Because the UIGEA included an explicit exception that allowed for payment processors to collect money from companies offering “fantasy . . . sports,” the entrepreneurs who created the concept of daily fantasy sports used this exception as their initial argument to purport contest legality.<sup>29</sup>

friends, [daily fantasy sports] contests include leagues, tournaments, head-to-heads, and multipliers, which can involve hundreds of thousands of people who compete more or less anonymously over the internet”).

26. Md. Att’y Gen. Letter, *supra* note 11, at 16–17 (citing Edelman, *supra* note 8, at 30 for the proposition that daily fantasy sports contests do not entail “negotiating trades with other owners, or engaging in other ‘team management’ activities, such as adding or dropping players”).

27. See Edelman, *supra* note 14, at 123 (citing Paul Moran, *Law Could Put Dent in Offshore Bookmakers’ Windfall*, NEWSDAY, Feb. 4, 2007, 2007 WLNR 2150975); Amy Dardashtian, *Why Daily Fantasy Sports Is Redefining Gambling*, HUFFINGTON POST (Dec. 1, 2015), [http://www.huffingtonpost.com/amy-dardashtian/why-daily-fantasy-sports-\\_b\\_8685402.html](http://www.huffingtonpost.com/amy-dardashtian/why-daily-fantasy-sports-_b_8685402.html) [<https://perma.cc/8URS-PFMH>].

28. See WASH. STATE GAMBLING COMM’N, *supra* note 7, at 4 (discussing how the UIGEA “was the end of most online gambling, including poker, in the U.S.”).

29. See Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(1)(E)(ix).

[A bet or wager does not include] participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization . . . and that meets the following conditions:

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

*Id.*; cf. Nev. Att’y Gen. Memorandum, *supra* note 7, at 7 (“[A] point of clarification is in order because there are some operators and commentators who have taken the position that the [UIGEA] legalized fantasy sports within the United States. Given the explicit language of UIGEA, that position is simply untenable, and often at odds with what those same operators and commentators have said in the past.”); *id.* at 7–8 (explaining that former representative Jim Leach, who drafted the UIGEA, recently denied that the statute was intended to create any

Today, there are four different formats of daily fantasy sports that proliferate on the Internet.<sup>30</sup> The most established format involves single-day or weekly contests in which participants select a roster of real-world players from draft lists based on a salary cap.<sup>31</sup> A second, simpler format of daily fantasy sports allows participants to select players from several lists of purportedly similar-caliber players without using a salary cap.<sup>32</sup> A third format allows participants to compete directly against the host site, rather than against other contestants, for the chance to win prizes.<sup>33</sup> Finally, a fourth format of daily fantasy sports has “altogether dropped the lineup generation aspect from its games and [has] moved toward an event-based betting model.”<sup>34</sup>

The dominant format of daily fantasy sports in the United States is the first format.<sup>35</sup> Among the largest companies operating contests under this format include FanDuel and DraftKings—both companies with substantial ties to the professional sports industry.<sup>36</sup> In 2013, MLB emerged as the first U.S. professional sports league to align itself with daily fantasy sports when it secured an equity stake in DraftKings, albeit MLB executives kept their investment secret from fans for more than one year.<sup>37</sup> Then, in November 2014, the NBA became an investor in FanDuel—a decision that coincided with the league commissioner Adam Silver publishing a *New York Times* editorial expressing the league’s changing views on sports gambling.<sup>38</sup>

per se legality for daily fantasy sports, and described it as “sheer chutzpah” for a fantasy sports company to site the law as evidencing the contest’s legality, irrespective of format, and under all relevant state laws).

30. See *infra* text accompanying notes 31–34; see also Edelman, *supra* note 14, at 127–29 (describing, in detail, the four formats of daily fantasy sports).

31. Edelman, *supra* note 14, at 127–28; see also Memorandum of Law in Opposition to Defendant’s Motion for an Interim Stay, *supra* note 23, at 7 (explaining that most daily fantasy sports games “use a salary-cap draft to limit players’ choice of athletes for their roster. In such a draft, the [daily fantasy sports] operator assigns every athlete a fictional ‘salary’ that reflects the odds he will perform well in a sporting event.”).

32. See Edelman, *supra* note 14, at 128–29.

33. *Id.* at 128.

34. *Id.* at 129.

35. See *id.* at 127–28 (describing this format of daily fantasy sports as the “most established”).

36. See *id.*

37. See Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html) [<https://perma.cc/3YAJ-2R78>] (stating that “[i]n 2013, with no fanfare, Major League Baseball purchased a financial stake in DraftKings”); see also Marc Edelman, *Could an FBI Investigation of DraftKings Implicate Major League Baseball?*, FORBES (Oct. 19, 2015, 10:30 AM), <http://www.forbes.com/sites/marcedelman/2015/10/19/could-an-fbi-investigation-of-draftkings-implicate-major-league-baseball/#549682526348> (“Although rarely discussed, the story behind DraftKings’ rapid rise to prominence is inextricably intertwined with its financial relationship with Major League Baseball. Indeed, DraftKings was a relatively small company with only \$1.4 million in seed capital when 34-year-old C.E.O. Jason Robins was able to land a meeting through a mutual contact with Robert Bowman and Kenny Gersh from MLB Advanced Media. After that April 2013 meeting, everything changed for both enterprises.”).

38. McQuade, *supra* note 25 (“DraftKings, founded in 2011, is the ‘official daily fantasy

With the backing of powerful, professional sports leagues, FanDuel and DraftKings in recent years have obtained upwards of \$1 billion in capital from large corporations such as NBC Sports, the Kraft Group, and Madison Square Garden, as well as from private equity groups including Comcast Ventures, KKR, and Piton Capital.<sup>39</sup> These early investors stand to profit handsomely if the U.S. states ultimately permit daily fantasy sports contests within their borders.<sup>40</sup> Consequently, they are willing to invest heavily in lawyers and lobbyists to argue in favor of legalizing daily fantasy sports, even though, at present, the legal status of daily fantasy sports remains murky at best.<sup>41</sup>

## II. APPLYING STATE GAMBLING LAWS TO FANTASY SPORTS

Unless separately regulated, fantasy sports contests of all formats and durations must comply with the general gambling laws of all states in which they operate, as well as with all applicable federal laws.<sup>42</sup> In most states, a plaintiff can make a prima facie claim of illegal gambling only if it can show that the underlying activity entails three elements: “consideration” (generally an entry fee), “reward,” and “chance.”<sup>43</sup> Because most fantasy sports contests “meet the legal definitions of both ‘consideration’ and ‘reward’ (the exception, of course, being ‘free to enter’

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sports partner of Major League Baseball’. [sic] FanDuel, the other major site for daily fantasy sports, has a strategic partnership with the NBA. As part of that deal, which gave the NBA an equity stake in FanDuel, the league promotes FanDuel’s daily contests on NBA.com, NBA TV, and its other digital properties.”); *see also* Kilgore, *supra* note 37 (noting the arrangement that gave the NBA more than a 2.5 percent stake in FanDuel); Adam Silver, Opinion, *Legalize Sports Betting*, N.Y. TIMES, Nov. 14, 2014, at A27 (openly discussing the NBA’s new view in favor of legalized but regulated sports betting).

39. WASH. STATE GAMBLING COMM’N, *supra* note 7, at 6, 33; McQuade, *supra* note 25.

40. *See* Curt Woodward, *DraftKings, FanDuel Raking in Millions as Yahoo Jumps in the Game*, BOS. GLOBE: BETA BOS. (July 14, 2015), <http://www.betaboston.com/news/2015/07/14/draftkings-fanduel-raking-in-millions-as-yahoo-jumps-in-the-game> [<https://perma.cc/2X6T-AZRB>] (quoting Adam Krejcik, a partner at analyst firm Eilers Research, for the proposition that one way for the private equity companies to profit from daily fantasy sports would involve an initial public offering of either FanDuel or DraftKings).

41. For far greater detail on the legal status of daily fantasy sports and how it varies by both state and game format, *see generally* Edelman, *supra* note 14, at 129–44 (analyzing the legal risk of daily fantasy sports under both federal and state law).

42. A discussion of the four primary federal laws that apply to the fantasy sports marketplace is beyond the scope of this Article. For an understanding of how the Illegal Gambling Business Act, Interstate Wire Act, Professional and Amateur Sports Protection Act, and Unlawful Internet Gambling Enforcement Act apply to fantasy sports contests, *see* Edelman, *supra* note 14, at 135–44, and Edelman, *supra* note 8, at 34–38.

43. Edelman, *supra* note 14, at 129–30; *see also* I. NELSON ROSE & MARTIN D. OWENS, JR., *INTERNET GAMING LAW* 1 (2d ed. 2009) (“The definition of ‘gambling,’ unless changed by statute, consists of any activity with three elements: consideration, chance, and prize.”); Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Economic Value, Equal Dignity, and the Future of Sweepstakes*, 1 U. NEV. LAS VEGAS GAMING L.J. 1, 2 (2010) (“If you take away any one of the three elements of gambling—consideration, prize, or chance—you have an activity that is legal in most states.”).

contests),<sup>44</sup> the legal status of fantasy sports often comes down to whether a court finds the particular contest to involve skill (which is legal) or chance (which is not).<sup>45</sup>

#### A. General State Gambling Laws

The requisite level of skill needed for a fantasy sports contest to be deemed a game of skill (rather than chance) varies by state, and it often requires a review of both underlying statutes and common law.<sup>46</sup> In a majority of states, courts will determine whether a fantasy sports contest complies with existing law simply by determining whether the contest entails more skill than chance (“predominant purpose test”).<sup>47</sup> Some U.S. states that apply the predominant purpose test include California, Kansas, and Massachusetts.<sup>48</sup>

44. Edelman, *supra* note 14, at 130; *see also* ROSE & OWENS, *supra* note 43, at 9 (explaining that “[g]ames that are completely free, like many online bingo games giving small prizes, are almost universally legal”).

45. Edelman, *supra* note 14, at 130; *see also* Valentin v. El Diario La Prensa, 427 N.Y.S.2d 185, 186 (N.Y. Civ. Ct. 1980) (noting that in New York State, three elements are needed to constitute an illegal lottery: (1) consideration, (2) chance, and (3) prize); Geis v. Cont’l Oil Co., 511 P.2d 725, 727 (Utah 1973) (explaining that under Utah state law, “the statutory elements of a lottery are: (1) [p]rize; (2) chance; (3) any valuable consideration”); Edelman, *supra* note 8, at 26–28.

46. *See* Edelman, *supra* note 8, at 28–29.

“To determine whether an activity satisfies the gambling element of chance, [most] courts will . . . apply one of three tests: the ‘predominant purpose test,’ the ‘any chance test,’ or the ‘gambling instinct test.’ The ‘predominant purpose test,’ which is applied by most states, deems an activity to be one of chance where ‘greater than 50 percent’ of the result is derived from chance. By contrast, the ‘any chance test’ finds that an activity is based on chance if ‘a particular game contains any chance that influences the outcome of the game,’ and the ‘gambling instinct test . . . looks to the nature of an activity to determine if it appeals to one’s gambling instinct.”

*Id.* (second ellipsis in original) (footnotes omitted) (quoting Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, a Monkey, and the Game of Scrabble: The Hazard of Using Illogic To Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 390–94 (2009)).

47. Edelman, *supra* note 14, at 130–34; Edelman, *supra* note 8, at 28 (“A majority of states adopt . . . the ‘predominant purpose test’ as the measure of chance.”); *see also* O’Brien v. Scott, 89 A.2d 280, 283 (N.J. Super. Ct. Ch. Div. 1952) (explaining that under New Jersey’s application of the predominant purpose test, “[t]he test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment” (citation omitted)).

48. *See, e.g., In re Allen*, 377 P.2d. 280, 281 (Cal. 1962) (in bank) (“The term ‘game of chance’ has an accepted meaning established by numerous adjudications. . . . The test is not whether the game contains an element of chance or an element of skill but which of them is the dominating factor . . . .”); *Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1223 (Kan. Ct. App. 2011) (finding that the predominant element test is an appropriate test for the state to apply in determining whether a particular contest constitutes a game of “skill” or game of

Nearly one dozen other states including New York and Missouri alternatively apply a “material element test,” which considers not only skill-to-chance ratios, but also “whether the contest is entered into among novices or experts [and] whether the amount of information provided to the contestants negates the skill-based advantages that true experts may have obtained.”<sup>49</sup> Some material element test states have found card games such as Texas Hold’em to violate state gambling laws even though the defendants have introduced evidence purporting to show that the underlying contest entails more skill than chance.<sup>50</sup> Consequently, fantasy sports and daily fantasy sports companies operating in these states cannot rely solely on mathematical studies to defend the legality of their games.<sup>51</sup>

Finally, a few states have adopted even stricter standards than either the predominant purpose test or the material element test.<sup>52</sup> Among them are Arizona, Arkansas, Iowa, and Tennessee, which all deem contests to be illegal “if they involve any chance whatsoever, even a modicum of chance.”<sup>53</sup> Louisiana and Montana disallow

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“chance”); *Commonwealth v. Lake*, 57 N.E.2d 923, 925 (Mass. 1944) (“Where the game contains elements both of chance and of skill, in order to render the laws against lotteries effectual . . . it has been found necessary to draw a compromise . . . with the result that by the weight of authority a game is now considered a lottery if the element of chance predominates and not a lottery if the element of skill predominates.”).

49. Edelman, *supra* note 14, at 134; *see also* N.Y. PENAL LAW § 225.00(1) (McKinney Supp. 2016) (defining a “contest of chance” to include “any contest, game, gaming scheme or gaming device in which the outcome depends *in a material degree* upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein” (emphasis added)); *Ellison v. Lavin*, 71 N.E. 753, 755–56 (N.Y. 1904) (indicating that in a prediction competition, provision of substantial information to negate much of the advantage in knowledge that a skilled expert may have would point in the direction to deeming a contest as a game of chance).

50. *Cf. United States v. DiCristina*, 726 F.3d 92, 101–02 (2d Cir. 2013) (finding that a particular poker contest violates the material element test even if it can be shown that the contest mathematically entails more skill than chance).

51. *See supra* notes 49–50 and accompanying text; *see also* Edelman, *supra* note 14, at 134, 144, 149 (noting that ambiguity in determining the legality of daily fantasy sports in material element test states).

52. *See infra* text accompanying notes 53–55.

53. Edelman, *supra* note 14, at 134–35. Some of the states in which daily fantasy sports contests are deemed to be illegal (unless separately licensed) if they involve even a modicum of chance seem to include Arizona, Arkansas, Iowa, and Tennessee. *See* ARIZ. REV. STAT. ANN. § 13-3301(4) (Supp. 2015) (defining illegal gambling as “risking or giving something of value *for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event* but does not include bona fide business transactions which are valid under the law of contracts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity or guarantee and life, health or accident insurance” (emphasis added)); TENN. CODE ANN. § 39-17-501(1) (Supp. 2016) (defining “gambling,” subject to a number of exceptions generally irrelevant to fantasy sports, as “risking anything of value for a profit whose return is to any degree contingent on chance”); *State v. Torres*, 831 S.W.2d 903, 905 (Ark. 1992) (stating that under Arkansas law, gambling means “the risking of money, between two or more persons, on a contest or chance of any kind, where one must be *loser* and the other *gainer*” (emphasis in original) (citation omitted)); *Parker-Gordon Importing Co. v. Benakis*, 238 N.W. 611, 613 (Iowa 1931) (noting that Iowa finds it irrelevant whether a particular game is predominantly based on chance or skill). In addition, a

all forms of online gaming with an entry fee and prize, irrespective of whether the underlying contest entails skill or chance.<sup>54</sup> Meanwhile, several other states disallow contests based on “a future contingent event not under [one’s] control or influence”—a test that, according to some attorneys general, might implicate particular formats of daily fantasy sports.<sup>55</sup>

### B. Court Analysis of Fantasy Sports Under General Gambling Laws

Although state laws pertaining to illegal gambling are plentiful, court decisions applying these laws to fantasy sports are scarce.<sup>56</sup> The first published decision to discuss whether fantasy sports constitute a game of skill was the 2007 U.S. District Court for the District of New Jersey decision *Humphrey v. Viacom, Inc.*<sup>57</sup> There, the court stated that success in full-season fantasy sports emerges from skill, including participants’ “skill in selecting players . . . , trading players . . . , adding and dropping players during the course of the season, and deciding who among his or her players will start and which players will be placed on the bench.”<sup>58</sup>

Thereafter, the U.S. District Court for the Northern District of Illinois had the opportunity to assess legality of daily fantasy sports in *Langone v. Kaiser*—a case seeking to disgorge profits from a daily fantasy sports operator and its winners.<sup>59</sup> But the court failed to do so.<sup>60</sup> Instead, it decided *Langone* purely on jurisdictional and procedural grounds, leaving the legal issue of daily fantasy sports unaddressed under Illinois state law.<sup>61</sup>

Most recently in *Schneiderman v. FanDuel*, the New York Supreme Court was tasked with addressing the legal status of daily fantasy sports in a litigation filed by the state attorney general, which sought to shut down both FanDuel and DraftKings’s

recent Nevada gaming commission ruling purports that Nevada also applies some variant of the any chance test to daily fantasy sports. See *infra* notes 74–75 and accompanying text. Similarly, a recent Texas attorney general decision purports Texas applies the same to daily fantasy sports. See *infra* notes 93–95 and accompanying text.

54. See MONT. CODE ANN. § 23-5-112 (2015); ROSE & OWENS, *supra* note 43, at 213 (describing Louisiana as another such state that disallows all forms of Internet gaming).

55. See [Decision + Order on Motion] at 5, *Schneiderman v. FanDuel, Inc.*, No. 453056/15 (N.Y. App. Div. Dec. 11, 2015), NYSCEF No. 112 (quoting N.Y. PENAL LAW § 225.00(2) (McKinney Supp. 2016)).

56. See *infra* text accompanying notes 57–65.

57. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648 (D.N.J. June 20, 2007) (designated as “for publication” even though not reported in F. Supp. 2d).

58. *Id.* at \*2, \*10–11 (quoting the provision of the Unlawful Internet Gambling Enforcement Act’s fantasy sports exception that exempts from federal law fantasy sports contests that, among other requirements, contain “winning outcomes” that “reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting or other events.”); see also *id.* at \*1 (clarifying in the definition of “fantasy sports” that the court is only considering contests that take place “in a given sport throughout a sport’s season” and not particularly contests that may last for a shorter time interval).

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

60. *Id.*

61. *Id.* at \*3, \*8.

businesses within the state.<sup>62</sup> At the preliminary stage of litigation, the New York Supreme Court enjoined FanDuel and DraftKings from continuing to “accept[] entry fees, wagers or bets from New York consumers.”<sup>63</sup> In doing so, the court concluded that there was “a greater likelihood of success on the merits” that a court would find these contests constituted illegal gambling and “contest[s] of chance” under New York state law.<sup>64</sup> Nevertheless, New York courts never made an ultimate determination on the legality of daily fantasy sports, and the state governor has since signed into law a new statute that makes the legal assessment of daily fantasy sports under preexisting law moot.<sup>65</sup>

### C. Agency Analysis of Fantasy Sports Under General Gambling Laws

Beyond these three court cases, a few gaming commission rulings have also broached the legal status of fantasy sports contests.<sup>66</sup> In 2011, the Washington State Gambling Commission held that the founder of a fantasy NASCAR website, Fantasy Thunder, violated Washington state gambling laws by operating a half-season fantasy NASCAR contest in which participants had to select eight NASCAR drivers using a salary cap.<sup>67</sup> At the conclusion of the Gambling Commission’s investigation, the website founder accepted a guilty plea for “attempted transmitting and receiving gambling information.”<sup>68</sup> The plea deal required the fantasy sports operator to serve

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62. Decision + Order on Motion, *supra* note 55.

63. *Id.* at 1, 4, 6, 9.

64. *Id.* at 9. *See generally id.* at \*6 (explaining that in order to obtain a preliminary injunction enjoining daily fantasy sports operators FanDuel and DraftKings from operating in the State of New York, New York’s attorney general was required to show “(1) the likelihood of ultimate success on the merits; (2) irreparable injury to him absent granting of the preliminary injunction; and (3) that a balancing of the equities favors his position” (citations omitted)).

65. *See infra* Part IV.G.; Reuven Blau, *DraftKings Argues Fantasy Sports Have Been Legal for Years in Pending NY State Case*, N.Y. DAILY NEWS (Feb. 22, 2016, 7:48 PM), <http://www.nydailynews.com/news/national/draftkings-argues-legality-fantasy-sports-ny-case-article-1.2540445> [<https://perma.cc/VGA9-VKJX>] (discussing ongoing status of daily fantasy sports litigation in New York).

66. *See infra* text accompanying notes 67–77.

67. *See* Ryan Rodenberg, *What Washington Fantasy Ruling Can Teach Us About New York AG Case*, ESPN: CHALK (Dec. 3, 2015), [http://espn.go.com/chalk/story/\\_/id/14276124/daily-fantasy-washington-state-fantasy-ruling-teach-us-ny-ag-case](http://espn.go.com/chalk/story/_/id/14276124/daily-fantasy-washington-state-fantasy-ruling-teach-us-ny-ag-case) [<https://perma.cc/6SN9-H8Y7>]; *see also* Case Report at 15, No 2010-00212 (Wash. State Gambling Comm’n Nov. 30, 2015) (explaining that the Fantasy Thunder contest operated over multiple weeks, and contestants were required to allocate a salary cap to eight drivers per week that they believed would perform well in their weekly race).

68. Rodenberg, *supra* note 67; *see also* Rob Kauder, *Gambling Agents Bust NASCAR Betting Site Run Out of Valley Home*, KXLY.COM (Sep. 13, 2011, 3:44 PM), <http://www.kxly.com/news/Gambling-agents-bust-NASCAR-betting-site-run-out-of-Valley-home/692628> [<https://perma.cc/F8RB-3AGG>] (stating that “Washington State Gambling Commission agents have arrested a Spokane Valley man believed behind an online NASCAR gambling site that exchanged thousands of dollars in illegal winnings to participants over the last decade”).

one year of probation and forfeit \$100,000 in company assets.<sup>69</sup>

Thereafter, in the spring of 2013, the New Jersey Division of Gaming Enforcement approved temporary regulations to allow for daily fantasy sports to operate through state casinos.<sup>70</sup> According to the *New York Times*, the goal of the New Jersey Division of Gaming Enforcement was to allow casinos to offer these games both internally and on the Internet, even “reaching people who live outside New Jersey.”<sup>71</sup> Nevertheless, New Jersey’s fantasy sports regulations did not specifically address the legality of daily fantasy sports operating outside of a casino relationship—leaving this issue to be determined by preexisting state law.<sup>72</sup>

Most recently, in October 2015, the Nevada Gaming Control Board analyzed the legality of pay-to-play daily fantasy sports in a formal memorandum that declared daily fantasy sports contests illegal if operated without a state gambling license.<sup>73</sup> Although most legal commentators had presumed that the Nevada Gaming Control Board would have applied the predominant purpose test to determine whether daily fantasy sports constituted illegal gambling,<sup>74</sup> the Board instead concluded that “the determination of whether an activity constitutes a gambling game or a sports pool under Nevada law does not require analysis of the level of skill involved.”<sup>75</sup>

The Nevada Gaming Control Board’s ruling on the illegality of daily fantasy sports surprised many gaming attorneys, as it shifted the general perception of Nevada from being one of the more favorable states for operating daily fantasy sports contests into one of the most risky.<sup>76</sup> The ruling also may have prompted legislators

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69. Rodenberg, *supra* note 67; *see also* Kauder, *supra* note 68 (describing the original charge against the founder was a “single felony charge of 2nd Degree Professional Gambling”). According to Professor Rodenberg’s article, Fantasy Thunder’s founder briefly attempted to defend his contest by arguing that it was a game of skill, “but there is no evidence that arguments about how fantasy sports fit within the skill-versus-chance debate were considered by enforcement officers prior to recommending criminal charges.” Rodenberg, *supra* note 67.

70. Joshua Brustein, *New Jersey To Allow Casinos To Offer Daily Fantasy Sports*, N.Y. TIMES (Mar. 18, 2013), [http://www.nytimes.com/2013/03/19/sports/atlantic-city-casinos-to-offer-fantasy-sports-betting.html?\\_r=0](http://www.nytimes.com/2013/03/19/sports/atlantic-city-casinos-to-offer-fantasy-sports-betting.html?_r=0) [<https://perma.cc/6MFQ-H29B>]; *see also* News Release, N.J. Office of Att’y Gen., Division of Gaming Enforcement Announces Temporary Adoption of Regulations for Fantasy Sports Tournaments in Atlantic City Casinos (Mar. 18, 2013), <http://nj.gov/oag/newsreleases13/pr20130318a.html> [<https://perma.cc/6VCN-6ZVC>].

71. Brustein, *supra* note 70.

72. *See id.*; *see also* News Release, *supra* note 70.

73. Nev. Att’y Gen. Memorandum, *supra* note 7, at 2.

74. *C.f.* Las Vegas Hacienda, Inc. v. Gibson, 359 P.2d 85, 87 (Nev. 1961) (providing an example of a case where Nevada seemingly had applied the “predominant purpose test”).

75. Nev. Att’y Gen. Memorandum, *supra* note 7, at 4 (discussing a 2015 Nevada Senate bill that purportedly supports this conclusion). The Nevada memorandum differentiated the daily fantasy sports scenario from the legal review of a pay-to-enter golf competition, where the predominant purpose test has been applied, by the fact that “in daily fantasy sports, the outcome of any simulated game is determined by third parties—the actual players on actual teams and not by the owners, regardless of their skill in choosing lineups and assessing various other factors that may contribute to the outcome of the simulated game.” *Id.* at 5.

76. *See generally* Kevin Draper, *Nevada Regulators Rule Daily Fantasy Is Gambling, Order Sites To Shut Down in State*, DEADSPIN (Oct. 15, 2015, 7:17 PM), <http://deadspin.com/nevada-rules-daily-fantasy-is-gambling-orders-sites-to-1736830297> [<https://perma.cc/G5CK>].

in states with similar laws to request that an attorney general in their state review the legal status of “daily fantasy sports.”<sup>77</sup>

*D. Attorney General Analysis of Fantasy Sports Under General Gambling Laws*

Over the years, a few attorneys general have issued opinions on the legal status of fantasy sports; however, the number of opinions on this topic has increased rapidly following the Nevada Gaming Control Board’s determination that daily fantasy sports violated its state’s laws.<sup>78</sup> Thus far, the most favorable legal opinion pertaining to fantasy sports came from the Kansas attorney general in an April 24, 2015, memorandum, which declared that any contest that met a definition of fantasy sports that was modeled after the Unlawful Internet Gambling Enforcement Act complied with the laws of the state.<sup>79</sup> Other generally favorable attorney general opinions include a February 4, 2016, letter from the Rhode Island attorney general that concluded that even though the state should pass laws specifically related to daily fantasy sports, “Daily Fantasy Sports may currently operate legally in the State of Rhode Island,”<sup>80</sup> and a July 7, 2016, letter from the West Virginia attorney general, concluding that at least certain formats of daily fantasy sports complied with applicable state law under the predominant purpose test.<sup>81</sup>

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-H75F] (concluding that “[t]he Nevada Gaming Control Board offered perhaps the most significant rebuke of daily fantasy sports operators today in a month full of them, finding that daily fantasy sports constitutes gambling”).

77. *See infra* text accompanying notes 78–97.

78. *See infra* text accompanying notes 79–97.

79. Letter from Derek Schmidt, Kan. Att’y Gen., & Athena E. Andaya, Deputy Att’y Gen., to Hon. Mark A. Kahrs, State Representative 4 (Apr. 24, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/04/2015-009.pdf> [<https://perma.cc/T3PX-V8B6>] (recognizing that Kansas has adopted the predominant purpose test for ascertaining whether contests represent illegal games of chance). The opinion, however, draws no conclusion about contests that operate under the moniker of fantasy sports but fall outside of the Kansas statutory definition. *Id.* Some casual readers may be confused by language in the Kansas attorney general letter noting that “[u]nder federal law, Congress has determined that fantasy sports leagues are games of skill,” based on the fact the sentence does not appear alongside Congress’s narrow definition of fantasy sports as articulated by the Unlawful Internet Gambling Enforcement Act. *Id.* at 5. But for purposes of clarity, the federal definition of fantasy sports is unequivocally clear and limited; it does not include all contests that currently purport to operate under that moniker. *See* Edelman, *supra* note 14, at 142–44; *supra* note 29 and accompanying text (providing criteria to meet narrow definition of fantasy sports under the Unlawful Internet Gambling Enforcement Act).

80. Letter from Peter F. Kilmartin, R.I. Att’y Gen., to Hon. Gina Raimondo, Governor of R.I., Hon. M. Teresa Paiva Weed, President of the R.I. Senate & Hon. Nicholas A. Mattiello, Speaker of the R.I. House of Representatives 2–3 (Feb. 4, 2016), <http://www.legalsportsreport.com/wp-content/uploads/2016/02/Rhode-Island-DFS-Opinion.pdf> [<https://perma.cc/7HPN-6ANG>] (further explaining that Rhode Island applies the “dominant factor” test, and thus the burden to find daily fantasy sports illegal in Rhode Island is elevated over that in New York).

81. Letter from Patrick Morrissey, W. Va. Att’y Gen., Elbert Lin, W. Va. Solicitor Gen. & Julie Marie Blake, W. Va. Assistant Att’y Gen., to Hon. William P. Cole III, President of the W. Va. Senate 3 (July 7, 2016), <http://www.ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/Cole%20Fantasy%20Sports%20Opinion%20>

The many more negative legal opinions regarding fantasy sports have varied in content, with the most mainstream criticism targeted specifically at daily fantasy sports.<sup>82</sup> Among the more noteworthy legal opinions, a Florida attorney general opinion from January 1991 opined that it would violate Florida laws for NFL fans to form a full-season fantasy football contest with entry fees and a cash prizes.<sup>83</sup> According to the former Florida attorney general, although these contests involved the skill of individual contestants to pick the members of fantasy teams, “prizes are paid to the contestants [not based on their own performances but rather] based upon the performance of the individual professional football players in actual games.”<sup>84</sup>

That same year, the Attorney General’s Office of Louisiana concluded that a commercial fantasy football contest that required participants to enter by dialing a 1-900 number would violate Louisiana state law.<sup>85</sup> The Louisiana attorney general opinion explained that under existing state law, it was irrelevant whether these fantasy sports contests involved entirely skill, some skill, or no skill at all.<sup>86</sup> In January 1998, an Arizona attorney general’s opinion then concluded that fantasy football would constitute illegal gambling under Arizona’s any chance test because there are certain elements of chance intrinsic within even the most conservative formats of fantasy sports.<sup>87</sup>

With regards specifically to daily fantasy sports, in late 2015 the attorneys general from two of the most populous states published letters indicating their beliefs that these varieties of fantasy sports violated state laws.<sup>88</sup> The New York attorney general letters, dated November 10, 2015, ordered FanDuel<sup>89</sup> and DraftKings<sup>90</sup> to cease

(optimized)%20(M0130230xCECC6).pdf [https://perma.cc/C7XF-4LXZ].

82. See *infra* text accompanying notes 83–97.

83. 1991 Fla. Op. Att’y Gen. 6 (Fl. Att’y Gen. 1991), 1991 WL 528146.

84. *Id.* at 3.

85. La. Att’y Gen. Op. No. 91-95 (La. Att’y Gen. 1991), 1991 WL 575105 (noting that in Louisiana, one is prohibited from “conducting, or directly assisting in the conducting . . . of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a prize”).

86. *Id.* at \*2 (“Whether an element of skill is involved in selection of the team or individual players is relevant to determination of whether the activity is a lottery, however it is not dispositive of the issue of whether the activity constitutes illegal gambling.”).

87. See Ill. Att’y Gen. Letter, *supra* note 24, at 5 (citing Ariz. Op. Att’y Gen. No. I98-002 (Ariz. Att’y Gen. 1998), 1998 WL 48550); see also ARIZ. REV. STAT. ANN. 13-3301(4) (Supp. 2015) (defining illegal gambling under state law as “risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event”). See generally Edelman, *supra* note 4, at 448 (noting that even the daily fantasy sports operators that do business in some “any chance states” block Arizona users under their terms of service, recognizing the legal risk that exists under state gambling law).

88. See *infra* text accompanying notes 91–92.

89. Letter from Kathleen McGee, Chief, Internet Bureau, N.Y. Office of the Att’y Gen., to Nigel Eccles, Chief Exec. Officer, FanDuel 1 (Nov. 10, 2015), [http://ag.ny.gov/pdfs/Final\\_NYAG\\_FanDuel\\_Letter\\_11\\_10\\_2015\\_signed.pdf](http://ag.ny.gov/pdfs/Final_NYAG_FanDuel_Letter_11_10_2015_signed.pdf) [https://perma.cc/5UNE-3Q5P] [hereinafter N.Y. Att’y Gen. Letter to FanDuel].

90. Letter from Kathleen McGee, Chief, Internet Bureau, N.Y. Office of the Att’y Gen., to Jason Robins, Chief. Exec. Officer, DraftKings 1 (Nov. 10, 2014), <http://ag.ny.gov/pdfs>

operations within New York because these contests, according to the New York attorney general, violated sections of state penal law disallowing staking or risking something of value “upon the outcome of a contest of chance or a future contingent event not under [one’s] control or influence.”<sup>91</sup> Likewise, the Illinois attorney general letter, dated December 23, 2015, concluded that pay-to-play daily fantasy sports contests violate subsection 28-1(a)(1) of the Illinois Criminal Code, which disallows playing “a game of chance or skill for money or other things of value.”<sup>92</sup>

Thereafter, on January 19, 2016, the Texas attorney general concurred with the views of both the New York and Illinois attorneys general, concluding that the “odds are favorable that a [Texas] court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling, but that participation in traditional fantasy sport[s] leagues that occurs in a private place where no person receives any economic benefit other than personal winnings . . . does not involve illegal gambling.”<sup>93</sup> The Texas attorney general’s letter further opines that paid daily fantasy league participants illegally “wager[] on ‘the performance of a participant in a game or contest,’”<sup>94</sup> and that paid daily fantasy sports contests met the minimum threshold for illegal chance under Texas state law, which constituted the any chance test.<sup>95</sup>

Since then, the attorneys general of Hawaii, Maryland, Mississippi, and Tennessee have also issued opinions finding at least certain formats of daily fantasy sports to violate their state’s gambling laws.<sup>96</sup> Meanwhile, the attorneys general of

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/Final\_NYAG\_DraftKings\_Letter\_11\_10\_2015.pdf [https://perma.cc/99ZG-2NX3] [hereinafter N.Y. Att’y Gen. Letter to DraftKings].

91. N.Y. Att’y Gen. Letter to FanDuel, *supra* note 89, at 1.

92. Ill. Att’y Gen. Letter, *supra* note 24, at 6–7, 9, 12–13 (further noting that “daily fantasy sports contests” may additionally violate subsection 28-1(a)(12) of the Illinois Criminal Code, which deems it to be illegal gambling where one “knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money”).

93. Legality of Fantasy Sports Leagues Under Tex. Law, Tex. Att’y Gen. Op. KP-0057, at 8 (Tex. Att’y Gen. 2016), <http://media.oag.state.tx.us/mediaroom/2016/pdf/kp0057.pdf> [https://perma.cc/TGH4-NGEG].

94. *Id.* at 3 (citation omitted).

95. *Id.* at 4–5 (explaining that elements of chance in daily fantasy sports include injuries, weather conditions, state of the game equipment, and official calls); *see also id.* at 2 (explaining Texas attorney general’s conclusion that daily fantasy sports do not fall within a special state law exception for “a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered into a contest” (citation omitted)).

96. Letter from Kevin K. Takata, Haw. Deputy Att’y Gen., to Hon. Rosalyn H. Baker, Haw. State Senator (Jan. 27, 2016), <http://ag.hawaii.gov/wp-content/uploads/2016/01/News-Release-2016-2.pdf> [https://perma.cc/KZ6Z-ZC23]; Md. Att’y Gen. Letter, *supra* note 11; Letter from Jim Hood, Miss. Att’y Gen., to Allen Godfrey, Exec. Dir., Miss. Gaming Comm’n (Jan. 29, 2016), [http://www.legalsportsreport.com/wp-content/uploads/2016/01/A.Godfrey\\_Jan.29-2016-Fantasy-Sports-Wagering-in-the-state-of-Mississippi.pdf](http://www.legalsportsreport.com/wp-content/uploads/2016/01/A.Godfrey_Jan.29-2016-Fantasy-Sports-Wagering-in-the-state-of-Mississippi.pdf) [https://perma.cc/CQ9N-FY63]; Legality of Fantasy Sports Contests in Tenn., Tenn. Att’y Gen. Op. No. 16-13 (Apr. 5, 2016), <http://www.legalsportsreport.com/wp-content/uploads/2016/04/Tennessee-TN-AG-Opinion-DFS-April-2016.pdf> [https://perma.cc/F277-Q5P5].

Alabama, Delaware, Georgia, and Idaho have less formally expressed their views that daily fantasy sports violate state laws.<sup>97</sup>

### III. STATE LAWS SPECIFICALLY RELATED TO FANTASY SPORTS

While most states have governed fantasy sports contests exclusively under general gambling laws, three states prior to 2016 had implemented special legislation to more specifically govern fantasy sports.<sup>98</sup> The purpose of each state's fantasy sports law is somewhat different, as well as its underlying legal language.<sup>99</sup>

#### A. Montana

In 2007, the state of Montana became the first state to pass legislation specifically related to fantasy sports when Governor Brian Schweitzer signed into law House Bill No. 616.<sup>100</sup> This bill made it “unlawful to wager on a fantasy sports league by telephone or by the internet,”<sup>101</sup> but it allowed for other forms of commercial fantasy sports that were operated in person, including daily fantasy sports games in football and NASCAR that operated in conjunction with the Montana state lottery.<sup>102</sup> The primary purpose of Montana's law was to enable state-operated, online fantasy sports contests to serve as a new source of revenue, offsetting the decline in state gaming funds that resulted from the collapse of Montana's horse racing industry.<sup>103</sup>

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97. Dustin Gouker, *DraftKings, FanDuel, Yahoo Get Cease-and-Desist Letters in Delaware*, LEGAL SPORTS REP. (July 8, 2016), <http://www.legalsportsreport.com/10679/draftkings-fanduel-yahoo-get-cease-desist-letters-delaware/> [https://perma.cc/RYJ5-6L5J]; Dustin Gouker, *Georgia AG Latest To Say Daily Fantasy Sports Are Illegal Gambling; DFS Bill Scuttled*, LEGAL SPORTS REP. (Feb. 29, 2016), <http://www.legalsportsreport.com/8634/dfs-illegal-gambling-georgia/> [https://perma.cc/2CSB-V7FP]; News Release, Ala. Att'y Gen., Attorney General Determines Paid Daily Fantasy Sports Contests Are Illegal Gambling (Apr. 5, 2016), <http://www.ago.state.al.us/News-810> [https://perma.cc/93PU-KLS5]; News Release, Idaho Att'y Gen., Attorney General Reaches Agreement To Terminate Paid Daily Fantasy Sports in Idaho (May 2, 2016), [http://www.ag.idaho.gov/media/newsReleases/2016/nr\\_05022016.html](http://www.ag.idaho.gov/media/newsReleases/2016/nr_05022016.html) [https://perma.cc/5PXD-GLV3].

98. See *infra* text accompanying notes 100–28.

99. See *infra* text accompanying notes 100–28.

100. H.B. 616, 60th Leg. (Mont. 2007) (enacted); see also MONT. CODE ANN. § 23-5-801 (2015).

101. MONT. CODE ANN. § 23-5-802 (2015).

102. *Id.* (stating that “[i]t is lawful to conduct or participate in a fantasy sports league, including a fantasy sports league that is operated under a parimutuel system of wagering regulated under Title 23, chapter 4”); see also John Harrington, *Montana Lottery Looks To Raise Funds with Fantasy Football Game*, INDEP. REC. (Helena, Mont.), Aug. 3, 2008, 2008 WLNR 14534195 (explaining that participants in the Montana Lottery's fantasy football game would “select a ‘team’ of several NFL players plus a defensive unit, and score points based on those players' statistical performances each week,” with “[t]he three highest scores of the week split[ting] the pot”); *Horse Racing Pins Hopes on Fantasy Lotto Games*, GREAT FALLS TRIB. (Great Falls, Mont.), Sept. 8, 2009, 2009 WL 17847758 (discussing the Montana state lottery's short-duration football and NASCAR contests).

103. See *Lottery Teams Up with Horse Racing Board on Fantasy Football*, ASSOCIATED PRESS, May 6, 2008 (available through advanced search in Westlaw NewsRoom for article

Since 2007, Montana has twice considered revising its laws on fantasy sports.<sup>104</sup> The first time was in the spring of 2009 when the National Collegiate Athletic Association threatened to disallow Montana from hosting college sports playoff games if it continued to operate online fantasy sports contests.<sup>105</sup> The second time was in 2015 when a state representative proposed amending the state's fantasy sports law to allow private companies to operate online commercial fantasy sports contests with buy-ins of \$100 or less.<sup>106</sup> Ultimately, Montana's legislature tabled the proposed amendment to its fantasy sports law after the Montana Coin Machine Operators Association and the Gaming Industry Association of Montana each opposed the expansion of legalized fantasy sports to include online contests.<sup>107</sup>

### B. Maryland

On April 1, 2012, Maryland then became the second state to enact a statute specifically applicable to fantasy sports.<sup>108</sup> The Maryland law emerged from concern about the legality of online, full-season fantasy sports contests—an activity that was popular among residents but not widely available due to perceived legal risk.<sup>109</sup>

title and publication date) (noting that the Montana Lottery was working with the State Board of Horse Racing to develop a statewide fantasy football game to help save the collapsing horse racing industry within the state). *See generally* Curt Backa, *Racing with a New Attitude*, GREAT FALLS TRIB. (Great Falls, Mont.), July 10, 2008, at S1 (explaining that “with the help of the Montana Lottery, fantasy sports betting is set to start in September with the opening of the NFL season”).

104. *See infra* text accompanying notes 105–07 .

105. *See Latest Montana Sports*, ASSOCIATED PRESS, May 30, 2009 (available through advanced search in Westlaw NewsRoom for article title and publication date); *see also* Jay Skurski, *Legal Battles Put a Damper on the Fun*, BUFFALO NEWS, June 7, 2009, at D5, 2009 WLNR 10976271 (explaining that “Montana officials must clarify their laws regarding fantasy sports or else the NCAA may prevent Montana and Montana State from hosting home playoff games, thus costing them revenue and home-field advantage”).

106. Alex Sakariassen, *The Fantasy Sports Debate*, MISSOULA INDEP., Jan. 29, 2015, at 6, 2015 WLNR 37641648 (quoting state Representative Forrest Mandeville lamenting that he could not win prizes in online fantasy sports leagues based on Montana law).

107. *See id.* (discussing opposition to Forrest Mandeville's proposed fantasy sports bill).

108. *See* Marc Edelman, *Update on Fantasy Sports and the Law: Change Coming to Maryland*, SPORTS LAW BLOG (Apr. 17, 2012), <http://sports-law.blogspot.com/2012/04/update-on-fantasy-sports-and-law-change.html> [<https://perma.cc/ZL6N-W3CG>]; *see also* H.B. 7, 2012 Leg., Reg. Sess. (Md. 2012) (enacted); *Bill Info—2012 Regular Session—HB 7*, GEN. ASSEMBLY MD. (2012), <http://mgaleg.maryland.gov/webmga/firmMain.aspx?ys=2012rs%2fbillfile%2fhb0007.htm> [<https://perma.cc/VS2M-9CB9>] (noting that the bill passed 115–15 in the Maryland House of Representatives and 46–1 in the Maryland Senate).

109. *See* David Hill, *Delegate Is on the Side of Fantasy Sports Teams: His Bill Would Clear Up Legality Questions*, WASH. TIMES (D.C.), Jan. 4, 2012, at A14 (available through advanced search in Westlaw NewsRoom for article title and publication date) (explaining that prior to the passing of Maryland's fantasy sports bill, the laws within the state were sufficiently vague that popular fantasy sports websites such as ESPN and CBS Sports did not allow contestants to play in their contests that included both entry fees and prizes); *see also* Md. Att'y Gen. Letter, *supra* note 11, at 4 (explaining that the legality of fantasy sports under preexisting Maryland law was never made clear; however, a 2006 Maryland Attorney General opinion on

To provide traditional fantasy sports operators with legal comfort in offering their contests, Maryland's law stipulates that any "prohibitions against betting, wagering, and gambling do not apply to the participation in a fantasy competition."<sup>110</sup> The law proceeds to define a "fantasy competition" to include "any online fantasy or simulated game or contest such as fantasy sports," in which four conditions are met:

- (1) participants own, manage or coach imaginary teams;
- (2) all prizes and awards offered to winning participants are established and made known to participants in advance of the game or contest;
- (3) the winning outcome of the game or contest reflects the relative skill of the participants and is determined by statistics generated by actual individuals (players or teams in the case of a professional sport); and
- (4) no winning outcome is based (i) solely on the performance of an individual athlete; or (ii) on the score, point spread, or any performances of any single real-world team or any combination of real-world teams.<sup>111</sup>

Maryland's fantasy sports law arguably applies to many formats of full-season fantasy sports contests—at least presuming the dicta in *Humphrey v. Viacom, Inc.* were to hold up in Maryland court decisions.<sup>112</sup> Nevertheless, because Maryland's statute requires that a fantasy sports contest must determine its winners based on the "relative skill of the participants," Maryland's new law still seems to prohibit fantasy sports contests in which participants compete against "the house" rather than against each other.<sup>113</sup> In addition, the Maryland law disallows contests that are not deemed to be based on "skill" as the term is defined by general state law, as well as disallows contests that are based only on a single real-world event.<sup>114</sup>

Finally, it remains unsettled whether Maryland's fantasy sports law grants any

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the legal status of poker cast certain doubts about prize-based fantasy sports contests); *cf.* Annie Linskey, *Bill Would Allow Cash for Fantasy Sports*, BALT. SUN, Jan. 8, 2012, at 7A, 2012 WLNR 590776 (explaining that "the Fantasy Sports Trade Association, a national group that advocates for companies that run fantasy leagues . . . recently hired a federal lobbyist and opened a political action committee" to support the passing of favorable bills toward fantasy sports, such as the one proposed in Maryland).

110. MD. ANN. CODE, CRIM. LAW § 12-114(b) (LexisNexis Supp. 2015). *See generally* Md. Att'y Gen. Letter, *supra* note 11, at 4 (explaining that according to a policy analyst at the time, Lindsay A. Eastwood, traditional fantasy sports probably would not have been considered gambling even under Maryland's old law, but the new law would help to clarify as much).

111. MD. ANN. CODE, CRIM. LAW § 12-114(a)(1)–(4).

112. *See supra* text accompanying notes 57–58; *see also* *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at \*2, \*10–11 (D.N.J. June 20, 2007).

113. MD. ANN. CODE, CRIM. LAW § 12-114(a)(3).

114. *Id.* § 12-114(a)(3)–(4); *see also* Edelman, *supra* note 14, at 147–48 (explaining that the adjective "relative" in describing "skill of the participants" likely means that a contest is only permissible where the participants are competing against each other, and not against the house). *See generally* *Definition of Relative*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/relative> [<https://perma.cc/TS7N-BPPM>] (defining "relative" as "a thing having a relation or connection with or necessarily dependence on another thing").

additional protection to companies that provide daily fantasy sports contests rather than full-season contests.<sup>115</sup> Although there were some daily fantasy sports contests in operation at the time Maryland passed its fantasy sports law,<sup>116</sup> the bill's legislative history shows that the legislature had considered primarily full-season fantasy sports contests when drafting its language.<sup>117</sup> Furthermore, Maryland's assistant attorney general recently published her legal conclusion that pursuant to the state's constitution, no bill could legalize daily fantasy sports absent a favorable voter referendum.<sup>118</sup>

### C. Kansas

Lastly, on May 19, 2015, Kansas became the third state to enact a bill related to the legal status of fantasy sports.<sup>119</sup> Much like the Maryland law, the impetus for the Kansas law was to make it safer for fantasy operators to offer play-for-cash contests to state residents who wished to participate, especially after the state's Racing and Gaming Commission had inserted language onto its website concluding that in its opinion, "chance predominates over skill in fantasy leagues" and thus "if a fantasy sports league has a buy-in . . . for its managers and gives a prize, then all three elements of an illegal lottery are satisfied."<sup>120</sup>

To avoid the risk of a Kansas state court accepting the state Racing and Gaming Commission's presumption of fantasy sports' illegality, Kansas's law specifically excludes paying entry fees into a "fantasy sports league" from the state law definition of the term "bet."<sup>121</sup> It further defines a "fantasy sports league" as follows:

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115. See *infra* text accompanying notes 116–18. See also MD. ANN. CODE, CRIM. LAW § 12-114(a)(4); Md. Att'y Gen. Letter, *supra* note 11, at 5 (concluding that whether Maryland's 2012 fantasy sports bill "intended to encompass [daily fantasy sports] is less clear").

116. Md. Att'y Gen. Letter, *supra* note 11, at 12 (stating that in 2012, "daily fantasy sports were still in their 'infancy'").

117. *Id.* at 5 (quoting the bill's legislative history). But see *id.* at 12 (discussing the mention of shorter duration fantasy sports contests in both the Fiscal and Policy Note associated with Maryland's 2012 fantasy sports bill and the language that appeared on the Ways and Means Committee Floor Report).

118. Md. Att'y Gen. Letter, *supra* note 11, at 8, 11 (noting that Maryland's fantasy sports bill "would have been required to go to referendum if it authorized 'additional forms' of, or the 'expansion' of, 'commercial gaming'").

119. H.B. 2155 sec. 19(a)(1)(9), 2015 Leg. (Kan. 2015) (signed into law May 19, 2015); see also Dustin Gouker, *Game On in Kansas: State Officially Legalizes Fantasy Sports*, LEGAL SPORTS REP. (May 19, 2015), <http://www.legalsportsreport.com/1493/kansas-legalizes-fantasy-sports> [https://perma.cc/27BF-85XK].

120. *Are Fantasy Sports Leagues Legal?*, KAN. RACING & GAMING COMM'N, <http://www.krgc.ks.gov/index.php/component/content/article/2-uncategorised/113-fantasysportsillegal> [https://perma.cc/58FU-9C3S]; see Marc Edelman, *Kansas Takes Steps to Outlaw Fantasy Football: Bad News for Yahoo!, CBS, and the NFL*, FORBES (Aug. 25, 2014, 11:00 AM), <http://www.forbes.com/sites/marcedelman/2014/08/25/kansas-takes-steps-to-outlaw-fantasy-football-bad-news-for-yahoo-cbs-and-the-nfl/#2c96aa71146d>.

121. KAN. STAT. ANN. § 21-6403(a)(9) (West, Westlaw through 2016 Reg. & Spec. Sess.); see also *Kansas Lawmaker Wants Fantasy Sports Leagues To Be Legal*, U. WIRE (Missoula, Mont.), Feb. 16, 2015 (available through advanced search in Westlaw NewsRoom for article

[A]ny fantasy or simulation sports game or contest in which no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization and that meets the following conditions: (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 individual athletes in multiple real-world sporting events; and (3) no winning outcome is based: (A) On the score, point spread or any performance or performances of any single real-world team or any combination of such teams; or (B) solely on any single performance of an individual athlete in any single real-world sporting event.<sup>122</sup>

Interestingly, the Kansas bill, despite its fanfare, may have done nothing to actually change the legal status of fantasy sports within the state.<sup>123</sup> This is because although Kansas's bill contains an explicit carve-out for "fantasy sports leagues," like the Maryland statute, the Kansas law only recognizes as "fantasy sports" those contests that are based on the "skill of the participants."<sup>124</sup> Because the word "skill" is not elsewhere defined within the statute, one must turn to Kansas common law for the proper definitions of skill.<sup>125</sup> There, a court would assess the definition of skill under the predominant purpose test.<sup>126</sup> Thus, to the extent a fantasy sports business could show that its game mathematically constituted fifty-one percent or more skill, the contest likely would have complied with state law both before and after the statute (despite the gaming commission's presumption otherwise).<sup>127</sup> Meanwhile, if a contest constituted less than fifty-one percent skill, there similarly is a strong argument that the contest was illegal both before and after, as well.<sup>128</sup>

#### IV. STATE BILLS PROPOSED TO REGULATE FANTASY SPORTS DURING 2015 AND 2016 LEGISLATIVE SESSIONS

While Montana, Maryland, and Kansas were the only states as of January 1, 2016, to have implemented laws specifically related to fantasy sports, Colorado, Indiana,

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title and publication date) (noting that the bill's intent was to prevent the Kansas Racing and Gaming Commission from "making criminals out of the average citizen of Kansas" (quoting Kan. Rep. Brett Hildabrand)).

122. KAN. STAT. ANN. § 21-6403(d).

123. See *infra* text accompanying 124–28.

124. KAN. STAT. ANN. § 21-6403(d)(2).

125. See KAN. STAT. ANN. § 21-6403 (containing no definition of "skill").

126. See, e.g., *Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1223 (Kan. Ct. App. 2011) (applying the dominant factor test to determine whether a card game known as *Kandu Challenge* constituted a game of skill).

127. See *supra* text accompanying notes 47–48.

128. See *supra* text accompanying notes 47–48.

Mississippi, Missouri, New York, Tennessee, and Virginia have all passed new fantasy sports laws in 2016.<sup>129</sup> Meanwhile, many other states currently have fantasy sports bills before their state legislatures.<sup>130</sup>

Much like the earlier fantasy sports bills passed in Montana, Maryland, and Kansas, these new fantasy sports bills seek to bring greater certainty to the legal status of fantasy sports.<sup>131</sup> Nevertheless, the motivations and implications of these bills vary.<sup>132</sup> Some of these bills address fantasy sports simply in an attempt to provide legal clarity.<sup>133</sup> Others address the issue primarily from a consumer protection perspective, or from the desire to bring additional tax revenue to the state.<sup>134</sup> Meanwhile, still other bills arise primarily from lobbying efforts of the Fantasy Sports Trade Association, as well as from the lobbying efforts of the two largest daily fantasy sports operators, DraftKings and FanDuel.<sup>135</sup> These bills seek primarily to protect the interests of the large, daily fantasy sports operators at the expense of all other constituent groups.<sup>136</sup>

#### A. California

Among the many states with proposed bills to regulate fantasy sports, California has proposed the most comprehensive bill.<sup>137</sup> The California bill, which is titled the Internet Fantasy Sports Games Protection Act, was initially proposed by Assembly

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129. Dustin Gouker, *DraftKings, FanDuel Beat the Clock in New York: Legislature Passes Fantasy Sports Bill*, LEGAL SPORTS REP. (June 17, 2016), <http://www.legalsportsreport.com/10514/new-york-passes-fantasy-sports-bill> [<https://perma.cc/9B3X-ETKV>] (providing a list of states that have passed bills related to fantasy sports between January and June of 2016).

130. See *infra* text accompanying notes 131–85.

131. See *supra* text accompanying notes 100–28; see also *infra* text accompanying notes 131–85.

132. See *infra* text accompanying notes 131–85.

133. See Chris Isidore, *Fantasy Sports May Face Big Crackdown*, CNN MONEY (Oct. 25, 2015, 6:39 PM), <http://money.cnn.com/2015/10/25/news/companies/casinos-fantasy-sports> [<https://perma.cc/6G4N-3NDU>] (quoting sources ranging from agents of the American Gaming Association to lobbyists for FanDuel and DraftKings arguing for state regulations for purposes of enhancing “clarity”).

134. See Kadner, *supra* note 4 (arguing that states should make daily fantasy sports legal, “tax the heck out of [them] and share in the windfall that millions of our fellow residents are cheerfully generating for the people operating these enterprise”).

135. See Dustin Gouker, *Fantasy Sports Trade Association President: ‘We Need To Formally Legalize Fantasy Play in 50 States,’* LEGAL SPORTS REP. (Jan. 20, 2016) <http://www.legalsportsreport.com/7458/fsta-president-dfs-legality-in-states> [<https://perma.cc/S5TT-TYX5>].

136. See *infra* text accompanying notes 197–203 (explaining why bills with fixed licensing fees for fantasy operators serve primarily to protect the interests of the largest daily fantasy sports companies and not the overall marketplace and its varied constituencies).

137. See *infra* text accompanying notes 138–47; see also Ryan Kartje, *Daily Fantasy Sports Industry Waits for California’s Next Move*, ORANGE COUNTY REG., Dec. 27, 2015, 2015 WLNR 38395972 (noting that Adam Gray “had been more proactive than most state lawmakers” on daily fantasy sports and was among the first to propose a new statute).

Member Adam Gray on September 10, 2015.<sup>138</sup> If implemented, California’s fantasy sports bill would require any person or entity “to apply for, and receive, a license from the [California Gambling Control Commission] prior to offering an Internet fantasy game for play.”<sup>139</sup> To obtain a license, an applicant would need to pay a one-time licensing fee of an undetermined amount, as well as pay an annual regulatory fee, and act with “good character, honesty, and integrity.”<sup>140</sup>

The California bill explicitly defines “fantasy sports” to include games of all durations—making certain that this definition encompasses both traditional fantasy sports and daily fantasy sports.<sup>141</sup> It otherwise limits the definition of permissible fantasy sports games much in the same way as does the UIGEA.<sup>142</sup> For instance, the California bill does not allow for operating contests against the house.<sup>143</sup> In addition, the California bill does not allow for the licensing of fantasy sports games that are “[b]ased on the score, point spread, or performance of any single real-world team or any combination of real-world teams,” or “[b]ased solely on the single performance of an individual athlete in a single real-world sporting event.”<sup>144</sup>

Lastly, the proposed California bill would change some of the default provisions with respect to user entry into fantasy sports contests to further protect the interests of its citizens.<sup>145</sup> Most notably, the bill seeks to establish a minimum age of twenty-one to participate in fantasy sports contests,<sup>146</sup> even though the age of majority in California for most other matters is eighteen. In addition, the bill seeks to protect pathological gamblers by requiring each licensed fantasy sports provider to make an “online self-exclusion form” available to ensure that residents who put themselves on the exclusion list are not later accepted as paying customers in contests.<sup>147</sup>

138. Gambling: Internet Fantasy Sports Game Protection Act, Assemb. B. 1437, 2015–2016 Reg. Sess. (Cal. 2015) (as amended in Assemb., Sept. 10, 2015), [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1437](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1437) [<https://perma.cc/989E-22XQ>]. California’s proposed bill would also apply to full-season fantasy sports contests. *Id.* at sec. 1, § 19754(a) (noting that the proposed California bill applies to “Internet fantasy sports games of any duration”).

139. Assemb. B. 1437 (Legislative Counsel’s Digest); *see also id.* at sec. 1, § 19770(a).

140. Assemb. B. 1437 (Legislative Counsel’s Digest); *see also id.* at sec. 1, § 19770(b)(1)–(3) (further discussing requirements of past and current character to obtain a license).

141. Assemb. B. 1437 sec. 1, § 19760(d).

142. *See id.* (Legislative Counsel’s Digest).

143. *See id.* at sec. 1, § 19760(d)(1) (limiting the definition of an “Internet fantasy sports game” to a game where a participant “[c]ompetes against other registered players or a target score as the owner or manager of an imaginary or simulated team of professional athletes in an imaginary of simulated game” (first emphasis added)).

144. *Id.* at sec. 1, § 19772(b)(4)(A)–(B).

145. *See infra* text accompanying notes 146–47.

146. *See* Assemb. B. 1437 sec. 1, § 19774(d)–(e).

147. *See* Assemb. B. 1437 (Legislative Counsel’s Digest); *see also* KEVIN WASHBURN, GAMING AND GAMBLING LAW: CASES AND MATERIALS 66–69 (2011) (setting out the Diagnostic and Statistical Manual of Mental Disorders (4th ed.) Diagnostic Criteria for 312.31 Pathological Gambling).

*B. Florida*

Florida also has proposed a detailed bill that seeks to affirmatively legalize and regulate at least some formats of fantasy sports.<sup>148</sup> However, there are several notable differences between the California and Florida bills.<sup>149</sup> First, the Florida bill is not explicit about whether short-duration contests meet the definition of fantasy sports.<sup>150</sup> In addition, the Florida bill proposes a minimum age of eighteen to participate in fantasy sports—an age three years younger than that of the California bill and representing the standard age of majority within the state.<sup>151</sup> Furthermore, the Florida bill includes a proposed registration fee for contest operators of \$500,000 for the initial registration and \$100,000 for the annual renewal.<sup>152</sup> Although a fee of this size should provide additional revenue to the state, it would also likely keep most startup and midsize companies out of the Florida fantasy sports marketplace.<sup>153</sup>

*C. Illinois (Largely Replicated by Colorado, Indiana, Missouri, and Virginia)*

The Illinois state legislature similarly has a bill to regulate fantasy sports under review,<sup>154</sup> even though the state attorney general plans to proceed with its gambling law challenge against FanDuel and DraftKings despite the bill's momentum. The current draft of the Illinois bill seeks to impose many of the same requirements on fantasy sports operators as do the California and Florida bills.<sup>155</sup> Like the Florida bill, it requires fantasy sports operators to verify participants are a minimum of eighteen years of age, which, likewise, is the standard age of majority within the state.<sup>156</sup> The Illinois bill also requires fantasy sports host sites to segregate player funds used as entry fees from operational cash of the business, annually contract with a third party to conduct an independent audit of the business, and protect the sharing of

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148. *See infra* text accompanying notes 149–53.

149. H.B. 707, 2016 Sess. (Fla. 2016) (as reported by Bus. & Professions Subcomm., Jan. 11, 2016) (died in committee Mar. 11, 2016), <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=183771.docx&DocumentType=Amendments&BillNumber=0707&Session=2016> [<https://perma.cc/5T7L-TK94>].

150. *See id.* at sec. 1, § 501.935(1)(c).

151. *See id.* at sec. 1, § 501.935(2)(b)(4).

152. *Id.* at sec. 1, § 501.935(2)(a); *see also* William R. Levesque, *Casino Issue Divides Voters*, TAMPA BAY TIMES, Jan. 1, 2016, at 1 (discussing the bill's proposed initial annual fee to operate in the State of Florida).

153. Marc Edelman, *Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports*, 6 PACE INTELL. PROP. SPORTS & ENT. L.F. 1, 18–19 (2016) (discussing the impact of high licensing fees on smaller market participants and potential new entrants to the daily fantasy sports marketplace).

154. Fantasy Contests Act, H.B. 4323, 99th Gen. Assemb. (Ill. 2016) (as introduced by Rep. Michael J. Zalewski), <http://www.ilga.gov/legislation/99/HB/PDF/09900HB4323lv.pdf> [<https://perma.cc/K7HP-LVM6>].

155. *See id.*

156. *See id.* at sec. 10, § 3.

confidential information with contest participants.<sup>157</sup> Illinois's proposed fantasy sports bill does not include any registration fees.<sup>158</sup>

Since the Illinois legislature introduced its bill, several other states have proposed similar bills. In many cases, these bills likely began by using the same language as used in Illinois, but added a licensing or registration fee to the bill to provide additional revenue for the state.<sup>159</sup> Virginia, for example, has proposed and passed a bill similar to Illinois's Fantasy Contests Act<sup>160</sup> that includes an "onerous"<sup>161</sup> \$50,000 licensing fee on all fantasy sports operators.<sup>162</sup> Similarly, Indiana has proposed and passed a similar bill with a licensing fee set initially at \$50,000, and subject to rise as high as \$75,000.<sup>163</sup> More reasonably for smaller market participants, Missouri's bill includes an annual application fee set at the lesser amount of \$10,000 per year or ten percent of the applicant's previous year's net revenues.<sup>164</sup> Meanwhile, Colorado's Fantasy Contests Act includes a licensing fee for fantasy sports operators but offers an explicit exclusion for small fantasy contest operators (those with fewer than 7500 players in Colorado).<sup>165</sup>

#### D. Tennessee

The Tennessee bill,<sup>166</sup> which was signed into law on April 27, 2016, includes

157. *Id.* at sec. 10, §§ 2, 8, 9.

158. *See id.*

159. *See infra* text accompanying notes 162–65.

160. Fantasy Contests Act, S.B. 646, 2016 Sess. (Va. 2016) (as passed by Senate and House, Feb. 25, 2016) (enacted), <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB646ER+pdf> [<https://perma.cc/3QQK-8QXC>].

161. Dustin Gouker, *Fantasy Sports Industry 'Deeply Concerned' with \$50K Fee in Virginia Law*, LEGAL SPORTS REP. (Mar. 8, 2016), <http://www.legalsportsreport.com/8915/fsta-pushes-back-on-dfs-fees> [<https://perma.cc/HY8A-8ADN>].

162. S.B. 646 at sec. 2.

163. S. Enrolled Act 339, 119th Gen. Assemb., 2d Reg. Sess., sec. 15(b) (Ind. 2016) (as passed by the Gen. Assemb.) (enacted), <http://iga.in.gov/static-documents/7/f/1/5/7f15fe9f/SB0339.07.ENRH.pdf> [<https://perma.cc/V92S-MJDE>] (stating that "[a] game operator shall pay to the division an initial fee of at least fifty thousand dollars (\$50,000) for the privilege of conducting paid fantasy sports games under this chapter. The division may increase the initial fee up to seventy-five thousand dollars (\$75,000) to pay for all of the direct and indirect costs of the operation of the division").

164. Missouri Fantasy Sports Consumer Protection Act, H.B. 1941, 98th Gen. Assemb., 2d Reg. Sess. § 313.970(1) (Mo. 2016) (as passed by Gen. Assemb.) (enacted), <http://www.house.mo.gov/billtracking/bills161/billpdf/truly/HB1941T.PDF> [<https://perma.cc/7KML-AMZT>].

165. Fantasy Contests Act, H.B. 16-1404 sec. 1, §§ 12-15.5-102(7), 12-15.5-104(2)(a) (Colo. 2016) (as passed by Gen. Assemb.) (enacted), [http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/4F153CC1C580418687257F780057F3FD?Open&file=1404\\_enr.pdf](http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/4F153CC1C580418687257F780057F3FD?Open&file=1404_enr.pdf) [<https://perma.cc/3BVX-G7AT>] (defining a "[s]mall fantasy contest operator" as "a fantasy contest operator that has no more than seven thousand five hundred fantasy contest players in Colorado" and noting that "[a] small fantasy contest operator need only be registered, not licensed, in order to offer fantasy contests for a fee").

166. Fantasy Sports Act, S.B. 2109 (Tenn. 2016) (as amended by S. Commerce & Labor Comm.) (enacted), <http://www.capitol.tn.gov/Bills/109/Amend/SA0779.pdf> [<https://perma.cc>]

generally the same consumer protections as provided by the Illinois bill and its progeny, but it also includes some innovative additional terms.<sup>167</sup> Most notably, as a way of preventing the potential bankruptcy of the least successful daily fantasy sports contestants, the Tennessee bill limits individual player deposits on any fantasy sports website to \$2500 per month or less, unless the player can provide sufficient proof of high net worth or gross income such as “the types of certifications used to qualify accredited investors.”<sup>168</sup> In addition, the Tennessee bill explicitly excludes from the definition of a permissible “fantasy sports contest” those contests where operators allow participants to autodraft their teams or choose between preselected teams of athletes.<sup>169</sup>

#### E. Texas

A pair of proposed Texas bills, meanwhile, would make illegal all unregistered fantasy sports contests but legalize those contests that paid a registration fee.<sup>170</sup> The first proposed Texas bill changes the state penal code to explicitly make it a misdemeanor for a person to either operate an online website or make an online bet that is based “on the outcome of a sporting event or on participation in a competition based on the performance of the players in a sporting event or series of sporting events.”<sup>171</sup> The second proposed bill then seeks to license and regulate “sports betting websites” (presumably including fantasy sports and daily fantasy sports websites) subject to the payment of a licensing fee.<sup>172</sup>

#### F. Iowa, Michigan, and Mississippi

By contrast, the Iowa, Michigan, and Mississippi bills seek to mimic the Maryland and Kansas approach—legalizing those contests that meet the definition of fantasy sports under the UIGEA, irrespective of the payment of a fee.<sup>173</sup> Not surprisingly,

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[V4A5-6WJE].

167. See Dustin Gouker, *Tennessee Governor Signs Daily Fantasy Sports Bill; Third State To Enact DFS Law*, LEGAL SPORTS REP. (Apr. 28, 2016), <http://www.legalsportsreport.com/9774/tennessee-governor-signs-daily-fantasy-sports-bill-law-third-state-regulate-dfs> [https://perma.cc/NHG9-VARE].

168. S.B. 2109 sec. 1, § 47-18-5603(b)(7)(A).

169. *Id.* at sec. 1, § 47-18-5602 (6)(B) (exclusions from the definition of “fantasy sports contest”).

170. An Act Relating to the Operation of a Sports Betting Website and the Placement of a Bet Through a Sports Betting Website, H.B. 4019, 84th Sess. (Tex. 2015) (as introduced), <http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB04019I.pdf#navpanes=0> [https://perma.cc/T9HT-J6YJ]; An Act Relating to the Licensing and Regulation of Sports Betting Websites, H.B. 4040, 84th Sess. (Tex. 2015) (as introduced), <http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB04040I.pdf#navpanes=0> [https://perma.cc/5KN7-LQ9J].

171. H.B. 4019 sec. 1 (adding language into existing Texas law to clearly bring online fantasy sports contests within the scope of illegal betting).

172. H.B. 4040.

173. See S.B. 2541, 2016 Reg. Sess. (Miss. 2016) (as sent to governor), <http://billstatus.ls.state.ms.us/documents/2016/pdf/SB/2500-2599/SB2541SG.pdf> [https://perma.cc/KZ2P-7DTD]; S.B. 459 (Mich. 2015) (as introduced, Sept. 9, 2015), <https://www.legislature>

these three bills—as well as the California, Florida, Illinois, Virginia, Indiana, Colorado, and Texas bills—present identical problems to Kansas’s 2014 bill in that all of these bills include a circular reference pertaining to contest legality, given that the UIGEA language only recognizes as “fantasy sports” those contests that involve the “relative skill” of their participants—an issue that must be determined as a factual matter under each state’s law.<sup>174</sup>

Furthermore, even though the Iowa, Michigan, and Mississippi bills are nearly identical in their language, the bills may lead to differing results about the legality of fantasy sports in each respective state.<sup>175</sup> Since Iowa is an any chance state, fantasy sports contests presumably would not meet the minimum threshold of skill required under state law and thus would be deemed illegal even after the passing of the bill.<sup>176</sup> By contrast, given that Michigan and Mississippi apply the “predominant purpose test,” many traditional fantasy sports contests, as well as some daily fantasy sports contests, are likely to comply with Michigan and Mississippi law, even after the bill’s passage.<sup>177</sup>

### G. New York and Washington

Finally, both the New York bill that was signed into law on August 3, 2016, and the proposed Washington bill explicitly classify fantasy sports as “not games of chance,” while otherwise adopting an identical definition for fantasy sports as stated in the UIGEA.<sup>178</sup> New York’s recently signed fantasy sports bill and Washington’s proposed bill are superior in clarity to most other fantasy sports bills because they obviate the need for a contest to prove it meets any requisite level of skill to comply

.mi.gov/documents/2015-2016/billintroduced/Senate/pdf/2015-SIB-0459.pdf [https://perma.cc/X2Q7-UKMP]; H.B. 281, 86th Gen. Assemb. (Iowa 2015) (as introduced, Apr. 9, 2015), <https://legiscan.com/IA/text/HF281/id/1128293> [https://perma.cc/EL9L-GXPH]; *see also Bill To Legalize Fantasy Sports Payouts To Return*, QUAD CITY TIMES (Davenport, Iowa), Jan. 1, 2016, at 6 (referencing John Cacciatore, a lobbyist in Des Moines for DraftKings and FanDuel).

174. *See supra* text accompanying notes 123–28; *see also* S.B. 459; H.B. 281.

175. *See infra* text accompanying notes 173–74.

176. *E.g.*, *Parker-Gordon Importing Co. v. Benakis*, 238 N.W. 611, 613 (Iowa 1931) (explaining that Iowa finds it irrelevant whether a particular game is based predominantly on skill or chance; any chance whatsoever is disallowed).

177. *See supra* text accompanying note 173.

178. S.B. 8153, 2015–2016 Legis. Sess., sec. 1, § 1400 (N.Y. 2016) (enacted), <https://www.nysenate.gov/legislation/bills/2015/S8153> [https://perma.cc/VE5V-ARZG] (further noting that “interactive fantasy sports contests” also do not constitute “wagers on future contingent events not under the contestants’ control or influence”—another matter of concern based on the state attorney general’s lawsuits against DraftKings and FanDuel); *see also* H.B. 1301, 64th Leg., 2015 Reg. Sess., sec. 1 (Wash. 2015), (as first read, Jan. 16, 2015) <http://lawfilesexternal.wa.gov/biennium/2015-16/Pdf/Bills/House%20Bills/1301.pdf> [https://perma.cc/ER67-M23R]. If the proposed Washington bill is not implemented, the Washington State Gambling Commission believes that most fantasy sports contests operating within the state violate two different provisions of law—one disallowing contests that meet the definition of “game[s] of chance” and the other prohibiting “transmission of gambling information over the phone of internet.” Wash. State Gambling Comm’n, *supra* note 7, at 3.

with this law.<sup>179</sup> Nevertheless, because the recently signed New York bill and the proposed Washington bill otherwise track the language of the UIGEA carve-out, each bill's definition of "fantasy sports" presumably does not apply to the following: (1) contests played "against the house," (2) contests based on a single sporting event such as one golf tournament or NASCAR race, or (3) contests based on individual sports where an athlete's place of finish serves as a meaningful aspect of the scoring system.<sup>180</sup>

Of course, even the New York and Washington bills are not without fault.<sup>181</sup> Washington's proposed bill seems to allow for a wide variety of fantasy sports contests without imposing any rules whatsoever to regulate company conduct within the industry.<sup>182</sup> In addition, the bill does not clarify whether its definition of fantasy sports is intended to include daily fantasy sports—an activity that did not exist at the time Congress passed the UIGEA but is now fortified within some vernacular definitions of "fantasy sports."<sup>183</sup>

Meanwhile, New York's bill leaves open the possibility for the state to add a registration fee.<sup>184</sup> Although an earlier version of the New York bill included a de facto exemption for full-season fantasy sports contests that, in almost all cases, earn total annual revenues within New York that are less than \$500,000, that exemption does not appear in the final version of the bill.<sup>185</sup>

#### V. DEVISING NEW LAWS TO REGULATE FANTASY SPORTS

When drafting new laws to regulate the fantasy sports marketplace, legislators need to keep in mind many factors.<sup>186</sup> Eight of the most important factors for legislators to consider include the following: (1) how to define the term "fantasy sports," (2) how to determine whether fantasy sports contests constitute games of skill, (3) whether states should charge fantasy sports operators a fixed licensing fee, (4) what public disclosures to require from fantasy sports companies, (5) whether to allow

179. See S.B. 8153, at § 1400 (stating that "interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants"); H.B. 1301, at § 2(1) (stating that "[f]antasy competitions are considered by the state as games of skill and are specifically exempted from any classification as gambling").

180. See *supra* note 29 and accompanying text.

181. See *infra* text accompanying notes 182–85.

182. See H.B. 1301.

183. See *id.*

184. See Michael Virtanen, *Small Fantasy Sports Companies Lobby To Stop Possible Law*, WSB-TV (Mar. 29, 2016, 5:41 PM), <http://www.wsbtv.com/sports/small-fantasy-sports-companies-lobby-to-stop-possible-law/185706046> [<https://perma.cc/6HEV-5FFX>].

185. See S.B. 8153, 2015–2016 Legis. Sess., sec. 1, § 1400 (N.Y. 2016) (enacted), <https://www.nysenate.gov/legislation/bills/2015/S8153> [<https://perma.cc/8MM7-TEF5>] (not containing any such language about a full-season fantasy sports exemption).

186. See Marc Edelman, *Fantasy Games, Real Laws: 10 Factors States Must Consider when Regulating the Fantasy Sports Market*, FORBES (Apr. 20, 2015, 10:45 AM), <http://www.forbes.com/sites/marcedelman/2015/04/20/fantasy-games-real-laws-10-factors-states-must-consider-when-regulating-the-fantasy-sports-market> (introducing, in far less detail, many of the same factors referenced here).

professional sports leagues to own shares of fantasy sports operators, (6) how to minimize the risks of fantasy sports leading to gambling addiction, (7) how to determine the minimum age for fantasy sports contest eligibility, and (8) how to ensure that fantasy sports operators do not default on their prize payouts.<sup>187</sup>

#### A. How To Define the Term “Fantasy Sports”

When legislators draft fantasy sports laws, the first issue for them to consider is how to define the term “fantasy sports.”<sup>188</sup> Many of the proposed fantasy sports bills simply adopt the definition of fantasy sports that is stipulated in the UIGEA.<sup>189</sup> However, at the time Congress passed the UIGEA, Kevin Bonnet had not even coined the term daily fantasy sports.<sup>190</sup> Thus, legislators who adopt the UIGEA definition of fantasy sports need to clarify whether their fantasy sports laws are intended to govern only those formats of fantasy sports that existed at the time of the UIGEA’s passing or also the broad range of short-duration contests that today also describe themselves as daily fantasy sports.<sup>191</sup>

#### B. How To Determine Whether Fantasy Sports Contests Constitute Games of Skill

Once legislators determine the appropriate contours of their definition of fantasy sports, they must next determine how to address whether fantasy sports contests meet the requisite definition of “skill” necessary to operate legally under their state’s gambling laws.<sup>192</sup> Under most states’ gambling laws, fantasy sports operators are prohibited from conducting contests that are based on “chance,”—a term that, depending upon jurisdiction, might mean “chance” as defined by the predominant purpose test, material element test, or any chance test.<sup>193</sup>

For purposes of promoting legal clarity, legislators drafting new fantasy sports laws should replace these three fact-intensive tests for chance with bright-line rules that determine a contest’s legal status with certainty before the contest launches.<sup>194</sup> For full-season fantasy sports, legislators should establish a presumption that these contests constitute legal games of skill (and not illegal games of chance) as long as they include all of the strategic elements described by the court in *Humphrey v.*

187. See *infra* text accompanying notes 188–233 and accompanying text.

188. See *infra* notes 189–91 and accompanying text.

189. See *supra* note 29 and accompanying text.

190. Edelman, *supra* note 14, at 124 (explaining that Kevin Bonnet, founder of the website FantasySportsLive.com, “coined the term ‘daily fantasy sports’” in March 2007 to give his contests “an aura of legality”).

191. Cf. Edelman, *supra* note 14, at 143 (“Given that the UIGEA became law in 2006 (one year before the term ‘daily fantasy sports’ entered the vernacular), it is not entirely certain whether the UIGEA’s ‘fantasy sports carve-out’ protects anything beyond the traditional, full season versions of fantasy sports.”).

192. See *supra* notes 46–55 and accompanying text.

193. See *supra* notes 46–55 and accompanying text.

194. See generally Timothy R. Holbrook, *Substantive Versus Process-Based Formalism in Claim Construction*, 9 LEWIS & CLARK L. REV. 123, 127 (2005) (explaining that bright-line rules are intended “to afford greater predictability and certainty to the law”).

*Viacom*.<sup>195</sup> By contrast, for shorter-duration contests, including daily fantasy sports, legislators should instruct the state's gambling commission to grant licenses that allow contests to enter the marketplace upon an operator's successful showing of substantial skill-based elements to its contest along with full compliance with all other statutory requirements.<sup>196</sup>

### *C. How To Decide Whether To Charge Operators a Fixed Licensing Fee*

Among these other statutory requirements, state legislators must decide whether to mandate fantasy sports operators to pay a fixed licensing fee.<sup>197</sup> On the one hand, a fixed licensing fee provides states with important tax revenue—perhaps explaining their popular inclusion in many recent fantasy sports bills.<sup>198</sup> However, on the other hand, a fixed licensing fee serves as a barrier to entry for companies that lack cash reserves to pay for the right to operate within the state.<sup>199</sup> For example, Florida's proposed \$500,000 licensing fee for fantasy sports operators likely exceeds the total startup costs for many of the first generation daily fantasy sports operators.<sup>200</sup>

While the largest daily fantasy sports operators have hired lobbyists to argue in favor of a system that requires paying fixed licensing fees, this approach is untenable because it would lead to an oligopoly market for purchasing fantasy sports services.<sup>201</sup> As with any oligopoly market, this would likely yield “tacit collusion” and thus higher consumer prices and less consumer choice.<sup>202</sup> Furthermore, if states require fantasy sports operators to pay fixed licensing fees, it would lead to the result

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195. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at \*2, \*10–11 (D.N.J. June 20, 2007) (discussing important elements of skill in full-season fantasy sports contests).

196. Potential ways to submit persuasive evidence may include providing copies of the contest's game rules along with either a mathematical analysis of skill-to-chance ratios in a free “beta-testing” version of the game or affidavits on the issue by experts in the fields of gaming, law, and mathematics.

197. *See infra* text accompanying notes 198–99.

198. Edelman, *supra* note 186.

199. Editorial, *Nevada to Daily Fantasy Sports Sites: License, Please*, *LAS VEGAS REV. J.* (Oct. 19, 2015, 11:24 PM), <http://www.reviewjournal.com/opinion/editorials/editorial-nevada-daily-fantasy-sports-sites-license-please> [<https://perma.cc/4QEN-7D4P>] (“The financial and bureaucratic burdens of licensure create a barrier to entry and a big advantage for existing license holders. License holders know this and embrace regulation, despite its costs. It's true for casinos, teachers, cosmetologists and any highly regulated, credentialed industry.”); *see also* Edelman, *supra* note 186 (explaining how charging of a fixed licensing fee to operate daily fantasy sports contests could serve as a barrier to entry for new market competitors).

200. *See* H.B.-707, 2016 Sess., sec. 1, § 501.935(2)(a) (Fla. 2016) (as reported by Bus. & Professions Subcomm., Jan. 11, 2016), <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=183771.docx&DocumentType=Amendments&BillNumber=0707&Session=2016> [[http://web.archive.org/save/\\_embed/http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=183771.docx&DocumentType=Amendments&BillNumber=0707&Session=2016](http://web.archive.org/save/_embed/http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=183771.docx&DocumentType=Amendments&BillNumber=0707&Session=2016)] (stating Florida's proposed licensing fee); *see also* Virtanen, *supra* note 184.

201. *See* Edelman, *supra* note 186.

202. Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 *MINN. L. REV.* 9–11 (2004) (explaining the harms generated by market oligopolies).

that companies that launched their daily fantasy sports contests during the era of legal uncertainty (2007–2015) would be better positioned to compete in the market than companies that did not “gun jump” and thus have not begun to accumulate revenues.<sup>203</sup> By rewarding gun jumpers, legislators would not only be rewarding legal risk taking in the context of the fantasy sports industry, but they also would be implicitly encouraging future entrepreneurs to enter markets during times of legal uncertainty.

#### *D. How To Decide Upon Mandatory Company Disclosures*

Beyond matters of legal definitions and licensing fees, new fantasy sports laws also need to include a series of compulsory disclosures from all fantasy sports operators.<sup>204</sup> From a consumer protection perspective, the Daily Fantasy Sports Players Alliance has called for requirements that daily fantasy sports operators disclose their operating fees and percentages.<sup>205</sup> Other mandatory disclosures may include the disclosure of the names of contest winners, a list of employees with access to confidential game-related information, and a list of all individuals and entities that are shareholders of pay-to-play fantasy sports sites.<sup>206</sup>

Interestingly, the lack of transparency in the current daily fantasy sports marketplace is one of the few topics where both fantasy sports contestants and regulators agree about the need for reform.<sup>207</sup> Both the brick and mortar casino industry and sweepstakes providers currently must comply with a detailed set of statutory disclosure requirements.<sup>208</sup> The upstart daily fantasy sports industry is one of the few types of gaming—legal or otherwise—where such disclosure requirements are not yet well fortified.<sup>209</sup>

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203. See Jacob Pramuk, *DraftKings, FanDuel Lobby Congress Amid Legal Challenges*, CNBC (Jan. 21, 2016, 1:24 PM), <http://www.cnbc.com/2016/01/21/draftkings-fanduel-lobby-congress-amid-legal-challenges.html> [<https://perma.cc/E6ZH-8JWX>]; see also Edelman, *supra* note 186 (discussing high licensing fees as a possible barrier to entry for new or smaller companies into the daily fantasy sports marketplace).

204. See *infra* text accompanying notes 205–09.

205. See *Mission Statement*, DAILY FANTASY SPORTS PLAYERS ALLIANCE, <http://dfsplayers.org/mission.html> [<https://perma.cc/MB2J-6CY6>].

206. See Fantasy Contests Act, S.B. 646, 2016 Sess. (Va. 2016) (as passed by Senate and House, Feb. 25, 2016) (enacted), <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB646ER+pdf> [<https://perma.cc/29SW-J5E7>] (requiring these disclosures under a Virginia enacted bill).

207. *E.g.*, *Mission Statement*, *supra* note 205 (calling for increased disclosures among fantasy sports operators).

208. See generally WASHBURN, *supra* note 147, at 339–424 (discussing the regulation of lawful gaming through licensure); Steven C. Bennett, *An Introduction to Sweepstakes and Contests Law*, PRAC. LAW., Aug. 2007, at 39 (discussing the often detailed state regulations of sweepstakes).

209. See Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html> [<https://perma.cc/G5WH-VYCL>].

*E. Whether To Exclude Pro Sports Owners from Owning Fantasy Companies*

Along the same lines as promoting consumer welfare, legislators also must determine whether to require a complete firewall between professional sports business owners and daily fantasy sports companies.<sup>210</sup> Until 2005, professional sports leagues separated themselves from the fantasy sports industry, which allowed for league personnel to serve as purportedly neutral ombudsmen to the industry.<sup>211</sup> However, in February 2005, Major League Baseball became a “major promoter of . . . fantasy games by taking control of licensing and dictating the types of contests offered online.”<sup>212</sup> Since then, MLB and the NBA have each become major shareholders of the largest daily fantasy sports businesses—thus removing their capacity as neutrals on the industry.<sup>213</sup>

There are at least two compelling reasons to be cautious about professional sports team owners’ involvement in the daily fantasy sports industry.<sup>214</sup> First, professional sports leagues have primary jurisdiction under the Professional and Amateur Sports Protection Act to prevent the proliferation of sports gambling—calling into question of very real conflict of interest stemming from their ownership in a *cy pres* industry.<sup>215</sup> Second, from an equitable perspective, professional sports owners should

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210. See *infra* text accompanying notes 214–20.

211. E.g., Marc Edelman, *Major League Baseball Reverses Course; Now Fully Endorses Daily Fantasy Sports*, FORBES (Mar. 25, 2014, 4:25 PM), <http://www.forbes.com/sites/marcedelman/2014/03/25/major-league-baseball-reverses-course-now-fully-endorses-daily-fantasy-sports/#639b28a430d4> (noting the completion in Major League Baseball’s changed position on daily fantasy sports); Marc Edelman, *MLB’s New ‘Fantasy Sports’ Strategy: Selling Ad Space to Other Fantasy Host Sites*, FORBES (Feb. 8, 2013, 11:21 AM), <http://www.forbes.com/sites/marcedelman/2013/02/08/major-league-baseballs-new-fantasy-sports-strategy-selling-advertising-space-to-other-fantasy-host-sites/#605d94ad2993> (explaining that “[b]aseball owners’ first entry into the fantasy sports marketplace took place in 2005 when they paid the Major League Baseball Players Association millions of dollars for an exclusive license to use players’ names and statistics in their fantasy baseball games”); Brett Schrottenboer, *Leagues See Real Benefits in Daily Fantasy Sports*, USA TODAY (Jan. 1, 2015, 8:35 PM), <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279> [<https://perma.cc/FZ4R-T4PQ>] (noting historic separation between professional sports leagues and pay-for-cash daily fantasy sports).

212. Kevin Modesti, *MLB Is Now Living in a Fantasy World*, DAILY NEWS (L.A.), Feb. 17, 2005, at S1 (describing the five-year, \$50 million deal signed between the Major League Baseball Players’ Association and MLB that gave MLB the exclusive right to players’ names and likenesses for fantasy sports purposes and thus essentially sought to give the league control over the fantasy baseball industry). At the time, MLB’s senior vice president for public relations, Rich Levin distinguished traditional fantasy sports leagues from gambling businesses by noting that fantasy sports “is not traditional gambling, where money changes hands on a daily basis on the outcome of games.” *Id.*

213. See Dustin Gouker, *What the NFL, NBA and MLB Have To Say About Daily Fantasy Sports and Sports Betting*, LEGAL SPORTS REP. (Nov. 4, 2015), <http://www.newsjs.com/url.php?p=http://www.legalsportsreport.com/5798/nfl-nba-mlb-on-dfs-and-sports-betting> [<https://perma.cc/9T22-YFYK>].

214. See *infra* text accompanying notes 215–17.

215. See Professional and Amateur Sports Protection Act, 28 U.S.C. § 3703 (2012) (“A civil action to enjoin a violation of [the Professional and Amateur Sports Protection Act] may

not be allowed to leverage their shared monopoly over the professional sports marketplace into a second shared monopoly over the emerging sports gaming market.<sup>216</sup> Allowing for this outcome would make already wealthy monopolists even wealthier.<sup>217</sup>

#### F. How To Minimize the Risks of Participant Gambling Addiction

Furthermore, legislators need to find a balance between the interests of recreational fantasy sports participants and individuals who are predisposed to suffer from gambling addiction.<sup>218</sup> Although there is little evidence that competing in traditional fantasy sports contests would lead to pathological gambling behaviors, some

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be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation”); *see also* Edelman, *supra* note 14, at 141 (“Based on the broad prosecutorial powers granted by PASPA to the U.S. professional sports leagues, it is unlikely that any ‘daily fantasy sports’ contest that is operated in partnership with a U.S. league would face legal challenge under the act. By contrast, companies that describe themselves as ‘daily fantasy sports’ but do not partner with any U.S. league may be more likely to face a legal challenge”).

216. *See generally* Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 515 (1985) (“The debate over the ability of firms to use restrictive practices to leverage their monopoly power from one market to another has continued throughout the history of the antitrust laws. The most common application of the leverage hypothesis involves tying arrangements. For example, a firm with monopoly power over one product is observed selling it to customers only on the condition that they purchase another of the firm’s products as well. Courts and many commentators have long feared that such a tying arrangement will facilitate the firm’s monopolization of the market for the second product. The leverage hypothesis underlies a substantial portion of the antitrust attack on many other restrictive practices, ranging from vertical mergers and reciprocal dealing arrangements to many tactics scrutinized under Section 2 of the Sherman Act.”).

217. *See supra* note 219 and accompanying text.

218. *See Restoration of America’s Wire Act: Hearing on H.R. 707 Before the H. Subcomm. on Crime, Terrorism, & Investigations of the H. Comm. on the Judiciary*, 114th Cong. 10–12 (2015) (statement of John Warren Kindt, Professor Emeritus of Business Administration, University of Illinois) (opining that “Internet gambling places real-time gambling on every cell phone, at every school desk, at every work desk, and in every living room,” and that “[w]ith ease people can ‘click your phone, lose your home’ or ‘click your mouse, lose your house.’”); WASHBURN, *supra* note 147, at 66 (discussing the characteristics of “Pathological Gambling” and explaining that individuals with such addiction are “seeking ‘action’ (an aroused, euphoric state) or excitement even more than money”); Richard Morgan, *Fantasy Sports Ruined My Life’: Big Apple Man Loses Wife, Kids and \$150K*, N.Y. POST, Oct. 17, 2015, at 23 (describing the fate of “Bob”—a self-proclaimed fantasy sports addict from New York City—who lost large sums of money both paying fantasy sports and entering into NFL “suicide pools”); David Whitley, *Fantasy Is a Real Threat to Gambling Addicts*, ORLANDO SENTINEL, Oct. 6, 2015, at C1 (“[P]ragmatism says banning [fantasy sports along with traditional sports gambling] would go about as well as Prohibition. Humans have vices, and if adults want to risk their paychecks on whether the Bucs will lose by fewer than 9.5 points, have at it.”).

individuals at Gamblers Anonymous correlate the growth of daily fantasy sports with an increase in new cases of pathological gambling.<sup>219</sup>

One way for legislators to strike a balance between fantasy sports players' interests and those of the mental health community would be to require daily fantasy sports contests to include "a Surgeon General's-type warning telling players of fantasy's addictive dangers."<sup>220</sup> Legislators also should require fantasy sports operators to provide information on their websites about the help available for gambling addiction and to maintain a "self-exclusion form" for individuals who wish to block fantasy sports operators' access to their email addresses and Internet protocol addresses.<sup>221</sup>

Finally, state legislators may even wish to cap the amount of money that any fantasy sports operator may collect from any participant over the course of a twelve-month period—thus allowing for these contests to operate as a form of social gaming but not as a form of high-volume gambling activity.<sup>222</sup> Indeed, Tennessee's new fantasy sports law, as well as the recently proposed daily fantasy sports regulations in the State of Massachusetts, implement caps of this very nature.<sup>223</sup> It is troubling that some of the largest daily fantasy sports operators such as DraftKings have opposed some of Massachusetts's attempts to regulate daily fantasy sports, including, most particularly, their attempts to implement personal gambling caps.<sup>224</sup>

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219. Carl Campanile & Bruce Golding, *Fury on the 'Schneidlines': Bet-Blocked NY Sports Fans Rip AG's Web Crackdown*, N.Y. POST, Nov. 12, 2015, at 6 (quoting New York City's Gamblers Anonymous contact); see also Walt Bogdanich & Jacqueline Williams, *Fantasy Sites Can Lead to Ruin for Addicts; Compulsive Gamblers Say Aggressive Pitches Prove Hard To Resist*, INT'L N.Y. TIMES, Nov. 24, 2015, at 10 (discussing fate of Joshua Adams, an admitted problem gambler, who purports to have lost \$20,000 in daily fantasy sports games); Morgan, *supra* note 218 (describing "Bob," a current member of Gamblers Anonymous, who purports "his life was ripped apart" when he lost \$150,000 due to a fantasy sports and sports gambling addiction and who saw another member of Gamblers Anonymous in his 20s who "lost a lot of money playing daily fantasy sports"); Eddie Pells, *The Fantasy Gamble; Billion-Dollar Fantasy Football Business Is No Gamble to NFL*, CHARLESTON GAZETTE, Dec. 16, 2006, at P3D (quoting Arnie Wexler, who works with recovering addicts, as viewing fantasy sports as a dangerous behavior for those suffering from a gambling addiction).

220. Whitley, *supra* note 218.

221. See, e.g., Gambling: Internet Fantasy Sports Game Protection Act, Assemb. B. 1437, 2015–2016 Reg. Sess. (Cal. 2015) (as amended in Assemb., Sept. 10, 2015), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1437](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1437) [<https://perma.cc/WE34-33E5>] (Legislative Counsel's Digest).

222. See *infra* text accompanying note 223.

223. Fantasy Sports Act, S.B. 2109, sec. 1, § 47-18-5603(b)(7)(A) (Tenn. 2016) (as amended by S. Commerce & Labor Comm.) (enacted), <http://www.capitol.tn.gov/Bills/109/Amend/SA0779.pdf> [<https://perma.cc/QKZ7-PTMY>] (describing Tennessee's \$2500/month "soft" cap on user entries into a given site's fantasy sports contests); Peter Howe, *Massachusetts Attorney General Regulating Fantasy Sports*, NECN (Nov. 19, 2015), <http://www.necn.com/news/new-england/AG-Healey-to-Make-Announcement-on-Daily-Fantasy-Sports-351743621.html> [<https://perma.cc/85DZ-DA3X>] (discussing proposed regulations of fantasy sports in Massachusetts that included a \$1000 per month cap on fantasy sports wagering per participant, unless the participant could provide proof of the ability to financially withstand greater losses).

224. Dan Adams & Curt Woodward, *Mass. AG Proposes Age Limit for Daily Fantasy*

### G. How To Determine Minimum Age for Fantasy Participant Eligibility

States, moreover, need to protect minors from competing in play-for-cash fantasy sports contests.<sup>225</sup> Traditionally, both full-season and daily fantasy sports contests have declared their minimum age of entry as eighteen in most states and nineteen in Alabama and Nebraska.<sup>226</sup> Nevertheless, the proposed bills in states such as California have settled upon the age of twenty-one as the minimum age for entry into daily fantasy sports contests.<sup>227</sup> This is an age coinciding with the legal gambling and drinking ages in most states.

Once legislators decide upon the minimum age to participate in fantasy sports contests, they would then need to implement legal requirements for enforcement of their chosen age minimums.<sup>228</sup> Potential ways to verify user age include requiring copies of users' drivers licenses before they can enter any contest and scheduling Skype interviews with potential new participants. At present, one of the many prevalent criticisms of the daily fantasy sports industry is that consumers as young as fourteen have entered contests due to failure to enforce reasonable age-check requirements.<sup>229</sup>

### H. How To Prevent Fantasy Sports Companies from Defaulting on Payouts

Finally, state legislators should require fantasy sports operators to segregate entry

*Sports*, BOS. GLOBE (Nov. 19, 2015), <https://www.bostonglobe.com/business/2015/11/19/healey-proposes-fantasy-sports-regulations-amid-scrutiny/iCzChEn1pfAduKuNuqLtM/story.html> [<https://perma.cc/V8T9-XJL7>] (noting, more generally, that DraftKings "disagrees with some proposed rules" suggested in Massachusetts to regulate the fantasy sports marketplace); Tim Jones, *DraftKings To Announce New Consumer Protection Rules*, NECN (Jan. 22, 2016, 5:42 AM), <http://www.necn.com/news/business/Draft-Kings-New-Consumer-Protection-Rules-366173141.html> [<https://perma.cc/9L64-WMQX>] (noting DraftKings's opposition to some of the proposed Massachusetts rules to regulate and reform daily fantasy sports); Robert Silverman, *Can Massachusetts Kill DraftKings?*, DAILY BEAST (Jan. 13, 2016, 5:37 AM), <http://www.thedailybeast.com/articles/2016/01/13/can-massachusetts-kill-draftkings.html> [<https://perma.cc/32Z3-HZ47>] (quoting one industry analyst as noting that DraftKings "will oppose any player spending limits").

225. See *infra* text accompanying notes 226–29 and accompanying text.

226. Luke Kerr-Dineen, *Massachusetts Wants To Raise the Minimum Age To Play Daily Fantasy Sports*, USA TODAY: FOR THE WIN (Nov. 19, 2015, 2:09 PM), <http://ftw.usatoday.com/2015/11/massachusetts-wants-to-raise-the-minimum-age-to-play-daily-fantasy-sports> [<https://perma.cc/JBE3-YD4M>] (providing a standard example of an age eligibility clause by one daily fantasy sports website).

227. Gambling: Internet Fantasy Sports Game Protection Act, Assemb. B. 1437, 2015–2016 Reg. Sess., sec. 1, § 19774(d) (Cal. 2015) (as amended in Assemb., Sept. 10, 2015), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB1437](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB1437) [<https://perma.cc/XP6P-YZKB>] (providing proposed requirement that residents reach the age of twenty-one before gaining eligibility to participate in play-for-cash fantasy sports contests); see also Kerr-Dineen, *supra* note 226 (discussing proposals by Massachusetts state attorney general to increase the minimum age to legally participate in fantasy sports contests to 21).

228. See *infra* text accompanying note 229.

229. Bogdanich & Williams, *supra* note 219.

fees from operational funds and to keep entry fees in a separate bank account to ensure that operator sites do not default on paying prizes to winning participants.<sup>230</sup> The concern of fantasy sports operators defaulting on their payment obligations has been a longstanding problem in traditional, full-season fantasy sports, dating back to the failure of Gridiron Fantasy Sports to pay the winners of the World Championship of Fantasy Football during the 2010–11 season.<sup>231</sup> Defaulting on payments has also proven to be a problem in the daily fantasy sports marketplace, beginning with the Washington State Gambling Commission’s 2011 shutdown of Fantasy Thunder for reasons that included the nonpayment of winners,<sup>232</sup> and extending more recently to the 2016 defaults by daily fantasy sports startups FantasyHub and FantasyUp.<sup>233</sup>

#### CONCLUSION

The fantasy sports industry has undergone rapid changes in recent decades—transforming from an industry that once provided data management services to private fantasy leagues into an industry that offers daily fantasy sports contests with entry fees and prizes that resemble online gambling. At present, the legal status of daily fantasy sports is uncertain under many states’ laws, with the ultimate determination of legality likely varying based on “each individual contest’s game rules and states of operation.”<sup>234</sup>

In an effort to ensure continued growth of daily fantasy sports, numerous state legislators have proposed bills to affirmatively legalize and regulate fantasy sports contests, and a few states even passed new fantasy sports bills during their 2015–16 sessions. Nevertheless, many of the proposed bills to regulate fantasy sports fail to sufficiently define the term “fantasy sports,” as well as fail to protect the interests of all constituent groups impacted by fantasy sports legislation.

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230. See, e.g., Fantasy Contests Act, S.B. 646, 2016 Sess., sec. 1, § 59.1-557(D)(7) (Va. 2016) (as passed by Senate and House, Feb. 25, 2016) (enacted), <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB646ER+pdf> [<https://perma.cc/SHT7-4UWW>] (requiring that the operator of any fantasy sports contest “[s]egregate player funds from operational funds in separate accounts and maintain a reserve in the form of cash, cash equivalents, irrevocable letter of credit, bond, or a combination thereof in an amount sufficient to pay all prizes and awards offered to winning participants”).

231. See Petition for Preliminary and Permanent Injunctions, Restitution ¶¶ 33–34, Civil Penalties and Other Court Orders, *Missouri v. Gridiron Fantasy Sports, LLC*, No. 11SL-CC04862 (Mo. Cir. Ct. Dec. 8, 2011), <http://espn.go.com/pdf/2012/0801/Missouri%20AG%20vs.%20Gridiron%20Sports.pdf> [<https://perma.cc/JL8V-4KJ2>].

232. See *supra* note 230 and accompanying text.

233. See Dustin Gouker, *Daily Fantasy Sports Site FantasyHub Ceases Operations ‘Temporarily’ While Owning Players Money*, LEGAL SPORTS REP. (Feb. 19, 2016), <http://www.legalsportsreport.com/8411/fantasyhub-shuts-down> [<https://perma.cc/KFY3-PVDG>]; Dustin Gouker, *Daily Fantasy Sports Site FantasyUp Shuttters, ‘Does Not Have the Funds Needed To Process Withdrawals,’* LEGAL SPORTS REP. (Jan. 15, 2016), <http://www.legalsportsreport.com/7351/fantasyup-closes-down> [<https://perma.cc/DYJ9-EBHR>]; Dustin Gouker, *Insolvent Fantasy Sports Site FantasyUp Rescued by iTEAM Network, Which Will Pay Player Balances*, LEGAL SPORTS REP. (Feb. 2, 2016), <http://www.legalsportsreport.com/7811/iteam-takes-over-fantasyup> [<https://perma.cc/AXC8-9VYJ>].

234. Edelman, *supra* note 14, at 149.

Although new state laws have the potential to bring both predictability and equity to the fantasy sports marketplace, new fantasy sports laws cannot simply address these complex legal issues in the generality. Rather, new fantasy sports laws need to carefully define the term “fantasy sports” and determine the amount of skill required for a fantasy sports operator to meet its burden of establishing legality. Fantasy sports laws also need to ensure that contest operators disclose pertinent financial information to the public, segregate player funds from other cash sources, and implement adequate protections for minors, pathological gamblers, consumers, and potential new competitors.

With these many important considerations in mind, the fantasy sports industry has potential for sustained and ethical growth. Even if state laws are not a perfect way to govern the fantasy sports industry, well-crafted state bills certainly help to protect the interests of both fantasy sports consumers and competitors. Furthermore, well-crafted state laws will allow for fantasy sports entrepreneurs to innovate their product offerings with better guidance about the law, and with a reasonable framework for legal compliance.