Pennsylvania
Gaming Control Board

Fantasy Sports Report

Prepared pursuant to Act 7 of 2016 to address the potential of fantasy sports as a gambling product in the Commonwealth of Pennsylvania.

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Pennsylvania Gaming Control Board
Fantasy Sports Report
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I. Executive Summary

The arena of fantasy sports has rapidly expanded during the course of the last year, with reports estimating play raising more than $3 billion in entry fees from approximately 4.5 million players and industry revenues of nearly $300 million in 2015, alone. These significant sums arise concurrently with an estimated advertising campaign which spent in excess of $200 million over the same time period. The rise of fantasy sports and more particularly daily fantasy sports (DFS), has also brought intense scrutiny premised on whether DFS constitutes illegal gambling, whether contests are fairly played, and whether DFS should be regulated by the States in a manner to assure a variety of consumer protections and provide compulsive and problem gambling assistance.

DFS gained its foothold through an exemption in the definition of "bet or wager" found in the federal Unlawful Internet Gambling Enforcement Act (UIGEA). UIGEA did not, however, legalize fantasy sports. Rather issues of the legalization of gambling and related activities have largely been left to the States to address based upon the definitions and nuances of gambling laws in each of the states, which often depend on the degree of skill or chance involved in the play of a contest. To date, five states have banned all fantasy sports, Attorneys General in 12 states have opined that DFS constitute illegal gambling or their legality is unclear, two Attorneys General have stated that DFS are legal in their states. Legislation to specifically legalize or regulate DFS has been introduced in 29 states with three states recently passing such legislation.

Pennsylvania law defines gambling as an activity involving consideration (a bet or wager), an outcome predominated by chance, and a reward or prize for winning the contest. The determination of whether DFS constitutes gambling and hence is illegal in Pennsylvania depends on whether chance or skill is the predominant factor in determining the winner of the contest. While there undoubtedly are elements of both chance and skill involved in the DFS contest, no Pennsylvania court or other body has issued an authoritative pronouncement relative to this issue.

Should the General Assembly pursue the path of regulating DFS, the Agency responsible for regulation must be identified and licensing fees and/or revenue taxation rates must be determined. If the Gaming Control Board should be

given oversight responsibility, the Board suggests that the play of fantasy sports in Pennsylvania be provided through the existing slot machine licensees as a gaming-related amenity operated through the licensee's web-site. DFS providers would contract with slot machine licensees much like current gaming service providers and would be vetted and licensed as determined appropriate by the Board. Operating DFS through the already-licensed slot machine licensees provides several significant advantages to the Commonwealth. It provides an in-state presence for the Board's oversight, eliminates potential jurisdictional disputes, partners DFS providers with established entities which have an existing relationship with the Board and regard for Pennsylvania's regulatory environment, and does not disrupt the funding mechanism for the Board's oversight of slot machine licensees.

Finally, regulation of DFS to protect the public's interests as well as those of the Commonwealth's interests can occur within the parameters set forth in this report. The key is establishing a regulatory environment which is reasonable to the industry, while providing protection and fairness to the playing public. If Pennsylvania pursues a path of oversight and regulation of DFS, the Board advocates the development of a regulatory system which assures broad discretion to the regulator to prescribe rules and respond to ever-changing technological advances, strong internal controls providing appropriate accounting of revenues, audit protocols and suspicious activity identification, adequate security of patron accounts and monies, a minimum age restriction of 21 years of age to play, age and location verification systems, self-exclusion opportunities and options for periodic monetary entry fee limitations. The Board also suggests game fairness measures be required such as restricting computer script or computer algorithm-based selection of team entries, prohibiting the offering of DFS based upon collegiate sports, restrictions on professional athletes from entering contests involving the sports in which they play, and restrictions on employees of DFS providers from participating in DFS contests.

II. Introduction

On February 23, 2016, Governor Wolf signed into law Act 7 of 2016 which, *inter alia*, amended Section 309 of The Administrative Code, relating to the Pennsylvania Gaming Control Board, which provided:

A. Not later than 90 days after the effective date of this section, the Pennsylvania Gaming Control Board shall submit a report to the chairperson and minority chairperson of the Community, Economic and Recreational Development Committee of the Senate and the chairperson and minority chairperson of the Gaming Oversight Committee of the House of Representatives on the potential of fantasy sports as a gambling product in this Commonwealth. Section 1211.1(b) provides ten points or topics which are to be addressed in the board's Fantasy Sports Report.

B. In compiling the report, the Pennsylvania Gaming Control Board shall consider and address the following:

1. A definition of "Fantasy Sports."
2. The structure of the different fantasy sports formats and the underlying activities that may be appropriate for oversight.
3. Fantasy Sports entities, including the roles and relationships of ancillary fantasy sports businesses, including host internet websites, collegiate and professional sports organizations and persons with a controlling interest in fantasy sports entities.
4. How regulation of fantasy sports would fit into the Commonwealth's current gambling laws and policies.
5. Compulsive and problem gambling.
6. Protection of minors.
7. Measures to ensure the well-being and safety of players.
8. Safeguards and mechanisms to ensure the reporting of gambling winnings and facilitate the collection of applicable federal and state taxes in compliance with federal and state law.
9. Recommendations for Legislative action.
10. Any other information related to the conduct and operation of fantasy sports as the Board may deem appropriate.

III. Background

In order to prepare the report, the Board has received input from representatives of the fantasy sports industry as well as Pennsylvania's casino industry and has canvassed a wide variety of publications and websites relevant to the topics of traditional Fantasy Sports as well as the more recent Daily Fantasy Sports (DFS). Over the course of the last year, the increasing volume of information available in the public domain on the topic is eclipsed only by the seemingly endless advertising and discussion of fantasy sports which has sprung into the living rooms and work places across the country.

Modern versions of fantasy sports, popularized in the 1980's and initially referred to as 'rotisserie leagues', focused on imaginary baseball teams picked by a group of journalists and formalized under the title Rotisserie League Baseball in 1980, named after the New York City restaurant La Rotisserie Française, where its founders met for lunch and first played the game.[1] Since that time, the concept of fantasy sports has grown to include football, basketball, hockey, golf, soccer, mixed martial arts (MMA) and auto racing with no limit on any other sports which could provide a fantasy team tournament.

DFS offer contests based upon real-world sporting events in which the participants are provided a budget or salary cap amount and draft players at predetermined salaries to compose the participant's team. The best athletes/players have higher salaries than less proven players. Points are accrued by the participant premised upon formulas in each contest based upon the individual performance of each athlete/player in the specified contest period. Participants are rewarded by finding and drafting players who are undervalued and who have break-out performances thus lending to high point accumulation in the contest.

Traditional Fantasy Sports were primarily based upon season-long contests. Players selected their teams before the sport's season began and played throughout the course of the season. Different leagues had differing rules with some allowing a team to hold their players from season to season (referred to as Keeper Leagues), and others permitting trades and even free agency signings of players to other rosters throughout the course of the season.

[1] Kelly, Jonathan. ("Q&A: Fantasy Baseball Creator Daniel Okrent". *Vanity Fair, March 2008).*

Currently, though, fantasy sports leagues have largely migrated from a season-long format to a more fast-paced weekly or daily version in which players are forming teams and entering contests with greater frequency. As the FanDuel site, (www.fanduel.com), states: "PLAY WHEN YOU WANT, One-day leagues—no season-long commitment. Pick your team in minutes with our salary cap format." "THOUSANDS OF LEAGUES. More than 20,000+ leagues to choose from every day—that means more options & more winners." "PLAY WHEN YOU WANT. WHERE YOU WANT. ON ANY DEVICE." [2] Similarly, DraftKings (www.draftkings.com), provides at various times information touting the ability to play with no commitment, play anywhere and from any device. Technology and the ability to instantly obtain the day's injury reports, weather conditions and team news have changed the ability of fantasy players to select their rosters with increasing knowledge and precision as to how they may perform on any given day, thus facilitating the daily and weekly fantasy contests.

The play of each form of fantasy sports has come to be understood as involving the exercise of the elements of both skill <u>and</u> chance during the course of the contest. Participants may utilize skill based upon their individual knowledge of players and analyzing statistics to draft players for their fantasy team, and that level of knowledge or skill may have an effect on winning outcomes in relation to all other players who have differing levels of knowledge and skill in selecting teams. However, once a fantasy team is selected, chance also plays an important role in the fantasy sports contest in terms of factors outside of the participants' control such as injuries occurring to a player after the team is drafted or during a game, the effect of sudden bad weather conditions on a player's performance, bad officiating calls, or any number of other variables which can come into play, and which are outside the control of the fantasy sports participant. The proportion of skill and chance used to play the game can vary greatly by individual player as well as by means to select teams.[3]

As the amount of skill versus chance involved in playing fantasy sports contests is subject to debate, with opinions varying widely based upon who is consulted and whether the contest is of a longer duration or simply a day-long

[2] The messaging on the websites changes periodically.

[3] For instance a novice with no knowledge about the sport or any player could simply sign up and draft a complete team with no skill and based entirely on chance. That same individual could be playing the game against persons who have significant knowledge and analysis to buttress their picks and who would contend their team was largely picked upon skill.

event. There simply is no bright-line or objective test to quantify the degree of skill needed or utilized in any particular fantasy sports contest. The question of skill versus chance is important because, in Pennsylvania, like a number of other states, a game in which a wager is made to win a prize and which is predominated by chance constitutes gambling which is illegal unless specifically authorized by law. On the other hand, if the contest is predominated by skill, then the contest is not gambling and hence not illegal on that basis.

IV. Fantasy Sports Demographics

The Fantasy Sports Trade Association (FSTA) estimates that the number of fantasy sports participants in the United States and Canada has grown from approximately 500,000 in 1988 to 56,800,000 in 2015. The 2015 figure represents 14% of all adults in the United States. The FSTA provided a further demographic breakdown which includes 66% male/ 34% female; average age: 37; 57% of participants have a college degree or more; 47% of participants have a household income of $75K+; 66% have full time employment; and the average annual spend per participant is $465.[4]

Total spending in the United States on DFS contests is difficult to pin-point – largely a function of the industry not being regulated as well as the astronomical growth in the industry. Some sources estimate calendar year 2015 industry entry fees to eclipse $3 billion with significant year over year growth and more anticipated in the future. Despite the significant market, two companies, DraftKings and FanDuel, are estimated to account for about 85-95% of the market with a number of other smaller companies accounting for the rest.[5]

Testimony before the Massachusetts Gaming Commission in December 2015 by an industry consultant estimated that total DFS entry fees in 2015 were approximately $3.13 billion from an estimated 4.5 million unique players or $700 in entry fees per unique player. The standard hosting fee for daily fantasy sports gaming appears to be 9% to 13% of an entry fee which equates to approximately $280/$290 million in total industry revenue. The consultant further testified that the pool of regular users in DFS is much closer to 4 to 5 million than the 40 to 50

[4] See http://fsta.org/research/industry-demographics/
[5] Massachusetts Gaming Commission, Daily Sports Forum (Volume I, Page 19 & 20) http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-1.pdf

million figure often used by media.[6] Nonetheless, ESPN forecasts that by "2020 there will be $14.4 billion in paid entry fees.[7]

V. The Rise of Fantasy Sports

The issue of whether fantasy sports are legal or illegal in the United States has risen to the forefront during the 2015 calendar year with the growing popularity of fantasy sports and an advertising blitz by DraftKings and FanDuel coinciding with the Fall 2015 NFL football season. During that time period, DraftKings and FanDuel undertook an extremely aggressive television marketing campaign advertising DFS with purported winners of hundreds of thousands and even millions of dollars. Watching a Sunday afternoon football game without also seeing a fantasy sports commercial at every commercial interruption became virtually impossible. Monthly spending estimates for television advertising in September 2015, alone, were more than $100 million[8], and $206 million from January 1 to October 5, 2015[9]. With the advertising campaign, however, came greater scrutiny of the activity.

Allegations of fantasy sports contest fixing arose in late September of 2015 stemming from an alleged incident in which an employee of DraftKings used inside information, not yet released to the public (early released lineup information), to gain an advantage to play a DFS contest on FanDuel and win $350,000. [10] The incident highlighted the potential for fraud in the play of DFS and set off a storm of adverse publicity for providers of DFS contests, and particularly both DraftKings and FanDuel.

Further unwanted publicity focused on the advertised perception that anyone can win. On October 12, 2015, the Washington Post published an article "All the reasons you (probably) won't win money playing daily fantasy sports" asserting that "beyond its simple concept, daily-fantasy game play is loaded with quirks, risks and hidden pitfalls that critics say can stack the deck for veterans and lead

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[6] Id.
[7] Breitbart.com States To Tax Fantasy Sports Exponential Growth October 29, 2015 http://www.breitbart.com/california/2015/10/29/states-tax-fantasy-sports-exponential-growth/
[8] http://adage.com/article/media/draftkings-fanduel-spe/300658/
[9] http://www.inc.com/ilan-mochari/fantasy-sports-betting-startups-206-million-tv-ads.html
[10] http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html?_r=0; http://www.nydailynews.com/sports/football/lawsuit-alleges-insider-trading-fanduel-draftkings-article-1.2390687

casual players to lose out." The article points to high volume players paying significant entry fees with varying lineups and winning huge profits. In fact, one sampling cited indicated the top 1 percent of players paid 40% of the entry fees but reaped 91% of the profits. Other problems rise from the use of automated computer scripts which analyze data to find favorable matches and set lineups to increase the odds. The automated scripts also facilitate the playing of hundreds of contests in a single day.[11]

In yet another article, "It's basically impossible for You to Win Money Playing Daily Fantasy Football" from Complex Sports (September 16, 2015), the author wrote:

> It seems like fun, right? Pick your lineup based on the salary cap restrictions, compete either in a large contest or simply head-to-head against someone else, watch the games, and watch the cash roll in.
>
> Except just like anything related to gambling, it's really not that simple.
>
> The folks at Bloomberg Businessweek went in depth to show you just how screwed you are if you think you have a shot at winning money on anything resembling a consistent basis. *While any player might get lucky on the back of a handful of entries, over time nearly all of the prize money flows to a tiny elite equipped with elaborate statistical modeling and automated tools that can manage hundreds of entries at once and identify the weakest opponents. ...*
>
> *Analysis from Rotogrinders conducted for Bloomberg shows that the top 100 ranked players enter 330 winning lineups per day, and the top 10 players combine to win an average of 873 times daily. The remaining field of approximately 20,000*

[11] https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/

> *players tracked by Rotogrinders wins just 13 times per day, on average. ... The money-losing players tend to get lucky, win a few times, reinvest the prize money, and eventually lose.*
>
> If you look at these contests as nothing more than an inexpensive form of entertainment and a way to make the games more interesting, then obviously there's no harm done. But play responsibly kids, because the odds are stacked against you, to say the very least.[12]

The Board cites these articles not to suggest that fantasy sports are inherently bad or in any way fraudulent, but rather to illustrate that there are pitfalls which may lie before the unwary or novice player, especially in an unregulated playing field.

Following the Fall 2015 issues cited above with DraftKings and FanDuel, in January 2016, another setback occurred when Vantiv Entertainment Solutions, a company that handles payment processing for the industry, notified Fantasy Sports operators that it would no longer handle wagers or payouts and that it was leaving the space altogether. Vantiv Entertainment Solutions informed its daily fantasy clients, which include FanDuel and DraftKings, that it "will suspend all processing for payment transactions" related to DFS in the United States and its territories on Feb. 29. According to Jonathan Ellman of Vantiv, the decision was prompted by an increasing number of state Attorneys General having determined that DFS constitutes illegal gambling.[13]

More bad news and uncertainty for players occurred on February 19, 2016, when it was announced that a smaller player in the Fantasy Sports field, FantasyHub, had refused to pay players and had stopped providing players with information about their money. The FantasyHub website provided at that time, that FantasyHub had temporarily suspended operations.[14] Further, a visit to the

[12] http://www.complex.com/sports/2015/09/impossible-to-win-money-daily-fantasy-football-draft-kings-fanduel
[13] http://www.nytimes.com/2016/01/30/sports/draftkings-fanduel-vantiv-daily-fantasy.html?_r=0
[14] http://www.ibtimes.com/daily-fantasy-controversy-dfs-site-fantasyhub-owing-players-money-has-temporarily-2315455; http://espn.go.com/chalk/story/_/id/14807947/daily-fantasy-dfs-site-fantasyhubcom-closes-leaving-players-hanging

FantasyHub website stated only that "FantasyHub has temporarily suspended operations. … We apologize for any inconvenience this may cause, but we are currently in discussions with a strategic 3rd party regarding the future of FantasyHub & its players."[15] By March 10, 2016, it was reported that DraftKings stepped in to cover hundreds of thousands of dollars in unpaid player balances and unfilled charitable donations from FantasyHub. FantasyHub had advertised that a percentage of deposits and winnings would be donated to charities. As of the suspension of operations though, more than $100,000 was owed to charities.[16] We point out the FantasyHub suspension of operations as illustrative of the perils which confront patrons when an internet business like DFS operates with little if any public visibility in an unregulated environment.

VI. Federal Law

There are several federal statutes which may have some bearing on the issues surrounding fantasy sports. They include the Wire Act[17], the Professional and Amateur Sports Protection Act of 1992 (PASPA),[18] the Unlawful Internet Gambling and Enforcement Act (UIGEA),[19] and the Illegal Gambling Business Act (IGBA)[20].

1. The Wire Act was advanced by then-Attorney General Robert Kennedy in 1961 as an Act of Congress designed to cut off the money supply to organized crime syndicates. The Wire Act criminalizes the business of betting or wagering by using a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers **on any sporting event or contest**, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers. Because telephone and telegraph were essentially the only way to communicate rapidly and efficiently with regard to things like point spreads, or laying bets in interstate fashion, the law was effectively aimed at ending book-making by phone.

[15] https://fantasyhub.com/
[16] http://espn.go.com/chalk/story/_/id/14945921/draftkings-bails-fantasyhub-covering-outstanding-debts-players-charities
[17] 18 U.S.C. §§1084 et seq.
[18] 28 U.S.C. §§3701 et seq.
[19] 31 U.S.C. §§5361 et seq.
[20] 18 U.S.C. §§1955 et seq.

The Internet did not exist at the time the Wire Act was passed and therefore internet gaming was not addressed in the Wire Act, although much subsequent thought was that the Wire Act prohibited internet gambling as well. That thought was disrupted in 2011, however, when the Department of Justice (DOJ) issued a letter opinion as a result of a question from New York and Illinois Lottery officials requesting whether those state's use of an out-of-state processor of lottery tickets accessed through the internet but sold only to in-state adults violates the Wire Act. In September 2011, the DOJ issued its opinion that the Wire Act applies only to sports and contest betting and would not apply to the sale of lottery tickets through internet transmission.

2. PASPA, also referred to as the Bradley Act, after its sponsor, New Jersey Senator and NBA-great Bill Bradley, outlawed sports gaming at the federal level in accordance with the Wire Act, and simultaneously established state-wide bans for all states which did not pass laws permitting sports wagering within one year of the Act. Only Montana, Oregon, Delaware and Nevada currently allow sports wagering with Nevada being the only one of those states that allows individual game wagering on sports other than professional football to take place at a physical location.[21]

PASPA provides that a State may not "sponsor, operate, advertise, promote … a lottery, sweepstakes, or other betting, gambling or wagering scheme based directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games. 28 U.S. C. §3702.[22]

In 2011, New Jersey voters approved a referendum for legal sports betting to occur in the state. The following year, Governor Christie signed a bill legalizing intrastate sports betting in New Jersey, but the NCAA, NBA, NFL, NHL and the Commissioner of MLB sued on the basis that the New Jersey Act violates PASPA. The U.S. District Court in New Jersey agreed and the New Jersey Act was enjoined. Eventually the District Court overturned the New Jersey law and that decision was affirmed on appeal by the Third Circuit Court of Appeals but in doing so, the Court noted that while New Jersey's act of authorizing sports betting

[21] Delaware permits parlay wagering on a NFL card. See http://www.delottery.com/games/sports/
[22] A copy of PASPA is attached as Appendix A.

violated PASPA, there was nothing requiring a state to affirmatively ban sports betting in the first instance. New Jersey law originally banned sports betting everywhere and New Jersey's attempt to legalize it at casinos and racetracks was commensurate with the state "sponsoring" sports betting which violates PASPA. *NCAA v. Christie*, 926 F.Supp.2d 551 (D.N.J. 2013), *aff'd* 730 F.3d 208 (2013), *cert. denied* 134 S.Ct. 2866.

In response, New Jersey enacted a new piece of legislation which repealed the 2012 law which authorized sports betting and created the 2014 Sports Wagering Law -- repealing the state's prohibition of sports wagering and repealing portions of laws providing for criminal penalties for sports betting but only "to the extent they apply or may be construed to apply at a casino or gambling house operated in this State in Atlantic City or a running or harness horse racetrack in this State ..." where private entities would oversee it. The sports leagues again sued to assert that New Jersey's law was a *de facto* state authorization of sports betting which was still in violation of PASPA. The District Court agreed[23] and the matter was again appealed to the Third Circuit at *NCAA v. Christie* which affirmed in a 2-1 panel decision. That opinion was vacated with rehearing *en banc* granted October 14, 2015. Reargument was conducted February 17, 2016 and the appeal remains pending.

With respect to fantasy sports, an unanswered question is whether PASPA was intended to only target direct betting on the outcomes of individual sporting events and games, or whether it also was intended to extend to contests such as fantasy sports. This question arises from the PASPA language, a State "may not sponsor, operate, advertise, promote … a lottery, sweepstakes, or other betting, gambling or wagering scheme **based directly or indirectly** (through the use of geographical references or otherwise), **on one or more competitive games** in which amateur or professional athletes participate, or are intended to participate, **or on one or more performances of such athletes in such games."** If a state directly authorizes fantasy sports, does that amount to a state sponsoring a betting, gambling or wagering scheme based directly or indirectly on one or more performances of amateur or professional athletes? Literature does not indicate that this question has been answered affirmatively or negatively by the federal law

[23] 61 F.Supp. 3d 488 (D.N.J. 11/21/2014)

enforcement authorities which would enforce PASPA. Still, for some, the question remains.

3. UIGEA

In 2006, Congress passed the **Unlawful Internet Gambling Enforcement Act (UIGEA)**, which had the effect of banning most gambling activities over the Internet[24] by prohibiting gambling businesses from accepting electronic payments and processing of bets by use of the internet. UIGEA did not ban the gambling *per se*, but instead defined "unlawful internet gambling" to mean "to place, receive or otherwise knowingly transmitting a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. §5362(10)(A). Thus, a form of gambling which is illegal in a State could not otherwise be facilitated through the internet, and conversely, a form of gambling legal under State law would be unaffected by UIGEA.

Of interest to this discussion is that while having the effect of banning many internet-based gambling activities through the limit on associated monetary transactions, UIGEA provided an exemption from the definition of "Bet or Wager" which carves fantasy sports from the application of UIGEA. 31 U.S.C. §5362(1)(E), Definitions, specifically provides:

Bet or Wager – The term "bet or wager" –- does not include --

(ix) 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 (as those terms are defined in section 3701 of title 28) 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.

[24] The relevant language of UIGEA is attached as Appendix B.

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

(III) No winning outcome is based—

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event. 31 U.S.C. 5362(1)(E)(ix).

By excluding fantasy sports from the definition of a "bet or wager" in UIGEA, Congress provided an avenue for sports leagues as well as private operators to conduct fantasy sports league tournaments over the internet without being subject to the ban on processing credit or fund transfers in connection with gambling activity which is legal under applicable Federal, State or Tribal law. To be clear though, UIGEA does not formally define fantasy sports, nor does it "legalize" fantasy sports or declare that fantasy sports are not "gambling." Instead, UIGEA is silent on those issues which then turn to State law for interpretation and legislative action.

UIGEA is a federal law complimentary of other gambling laws – taking aim at payment processing and routing of otherwise illegal gambling transactions. UIGEA does not alter existing gambling laws or expand the list of gambling which is permitted and legal. Rather, State law will generally define what is considered legal or illegal gambling in each State. Thus, it is important to realize that while UIGEA exempts fantasy sports from a "bet or wager" under that Act, it does not mean that fantasy sports are legal – but rather only that the processing of wagers on fantasy sports are not criminalized under UIGEA.[25]

Moreover, the exemption of fantasy sports contests from the definition of "bet or wager" in UIGEA should, for discussion and analysis purposes, be viewed in the context of the manner in which fantasy sports contests were conducted at that time. -- season-long contests. The concept of Daily Fantasy Sports or DFS, was not prevalent in 2006 and did not gain a strong foothold until after the 2009-

[25] Legality of Daily Fantasy Sports Under Nevada Law, State of Nevada Office of Attorney General, Memo at 7 (Oct. 16, 2015).

2011 time period when FanDuel and DraftKings, respectively, were founded. And, the virtual explosion of Daily Fantasy Sports occurred much more recently – tracing its exponential growth to just the last few years.

The difference between traditional season-long fantasy sports and daily fantasy sports may create distinctions in how each is treated under particular State laws.[26] As discussed in more depth below, season long fantasy sports may be argued to involve more skill than chance due to the constant readjusting of rosters throughout a season, whereas daily fantasy sports may involve more chance than skill as the participant has little if any opportunity to exert continuing influence in the contest once the lineup is set. The point being that UIGEA does not open the flood gates to fantasy sports in the states and further review of state law is required no matter where the contest is played to determine the legality of the activity based in substantial part on the nature and duration of the fantasy sports contest.

4. The Illegal Gambling Business Act

The **Illegal Gambling Business Act** was enacted as part of the Organized Crime Control Act of 1970. This Act was designed to be a companion to other laws, such as the Federal Wire Act, in targeting a source of income for organized crime. Unlike the Federal Wire Act, the Illegal Gambling Business Act is designed to assist states in enforcing their laws with regard to interstate gambling activities and is dependent on a predicate state offense. That Act provides:

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section –

(1) "illegal gambling business" means a gambling business which - (i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially

[26] The States may define "gambling" differently based upon the amount of chance involved, ranging from any degree of chance present is gambling to, a contest in which chance is the predominant factor is gambling. See http://www.cnbc.com/2015/04/06/fantasy-sports-vs-illegal-gambling-wheres-the-line-commentary.html

continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

VII. Other State Jurisdictions' Response to Fantasy Sports [27]

As noted, the legality of Fantasy Sports, whether season long or daily, has, thus far, been a matter left to the States to determine. States may declare fantasy sports illegal; may specifically authorize the play of fantasy sports including where, when, how and by whom they can be conducted and played, as well as establishing a licensing or taxation protocol; or may take no position at all leaving the unabated conduct of fantasy sports within those states as unchecked and unregulated.

Moreover, every state defines illegal gambling as involving three distinct elements: a wager or consideration, chance, and a reward or prize. In every state, illegal gambling involves staking something of value, typically money, on the outcome of a game or contest involving chance, with the winner receiving a valuable prize. But state laws differ significantly with regard to the level of chance necessary to make a game "gambling".

States define the degree of chance which constitutes gambling in one of three ways. The majority of states require that chance predominate over skill, i.e. be the "predominant factor" before a game may be considered gambling. Other states prohibit all games and contests that involve any degree of chance no matter how slight. And yet in others, the degree of chance must be "material" (significant) relative to the degree of skill for a contest to cross the line into the arena of gambling.

All fantasy sports games and contests involve at least some element of chance. As a result, in those few states where any chance makes a contest illegal,

[27] The website, http://www.legalsportsreport.com/dfs-state-watch/, provides an up-to-date listing of the current status of fantasy sports in each of the United States along with links to current legislative bills, attorney general opinions and relevant news coverage.

fantasy sports are illegal. Many, but not all, fantasy sports websites recognize this and prohibit residents of these states from participation in their contests. [28]

1. Fantasy Sports Illegal

Fantasy sports have long been considered illegal and banned in **Arizona, Iowa, Louisiana, Montana** and **Washington**.

2. State Attorneys General - Fantasy sports constitute illegal gambling activity, or are in an unclear area.

Over the last year, a number of states, largely through their respective Attorney General or Gaming Board have called into question the legality of continued fantasy sports play in those states. This group of states includes **Alabama**, **Georgia, Maryland, Mississippi, Nevada, New York, Illinois, Hawaii, South Dakota, Tennessee, Texas** and **Vermont**.

Alabama -- On April 5, 2016, the Alabama Attorney General issued cease and desist orders to Draft Kings and FanDuel after determining that paid daily fantasy sports constitute illegal gambling.

Georgia -- While no formal opinion has been issued by the Attorney General, a Deputy Attorney General wrote by letter dated February 26, 2016 to the Georgia Lottery Corporation that daily fantasy sports constitute gambling and are not authorized under Georgia law

Hawaii – The Attorney General, on January 27, 2016, issued an opinion concluding that daily fantasy sports contests constitute illegal gambling under Hawaii law.

Illinois -- On December 23, 2015, the Illinois Attorney General released an opinion declaring that daily fantasy sports "clearly constitute gambling."

Maryland -- On January 15, 2016, the Maryland Office of Attorney General issued a letter opinion in which that Office indicates that it is unclear whether daily fantasy sports are authorized under state law or not and therefore the question should be submitted to the electorate and specifically addressed by the General Assembly.

[28] http://www.cnbc.com/2015/04/06/fantasy-sports-vs-illegal-gambling-wheres-the-line-commentary.html

Mississippi – The Attorney General issued a January 29, 2016 opinion that fantasy sports wagering is illegal in Mississippi.

Nevada -- The Nevada Attorney General's Office declared on October 16, 2015, that daily fantasy sports constitutes gambling and cannot be offered in Nevada without licensure by the Nevada Gaming Board.

New York -- On November 10, 2015, the New York Attorney General issued a cease and desist letter to DraftKings and FanDuel ordering them to stop accepting bets in the state. The matter is subject to legal challenge in the New York courts and the parties have entered into a stipulated settlement that the sites will stop operating in New York until September (when the appeal will be considered), and pending legislation that would allow them to operate.

South Dakota – The Attorney General issued a statement on December 7, 2015, indicating "Based upon the current state of uncertainty, including the ongoing debate on whether daily fantasy sports wagering is predominately a permissive game of skill or an unlawful game of chance, it will not be my intent to seek felony indictments here in South Dakota absent a clear directive from our state legislature. I will continue to consider other alternatives including potential civil remedies and National Attorneys General joint action aimed at protecting the intent of our Constitutional and statutory provisions."

Tennessee – On April 5, 2016, the Tennessee Attorney General issued an Opinion that all fantasy sports are illegal under Tennessee which defines gambling as risking anything of value for a profit **whose return is to any degree contingent on chance**, … .

Texas – The Attorney General on January 19, 2016, issued a decision stating that "a court would likely determine that participation in daily fantasy sports is illegal gambling."

Vermont -- On January 18, 2016, the Vermont Attorney General's office, via email, concluded that daily fantasy sports violate Vermont's gambling laws. Since that time, legislation has been introduced that would legalize daily fantasy sports.

3. State Attorneys General - Fantasy sports permitted.

Against this backdrop, at least two other Attorneys General have issued opinions that daily fantasy sports are legal in both Kansas and Rhode Island.

Kansas – On April 24, 2015, the Kansas Attorney General issued an opinion that fantasy sports are games of skill and not illegal under Kansas law.

Rhode Island – On February 4, 2016, the Attorney General issued an opinion recognizing that daily fantasy sports, while encompassing elements of both chance and skill, have as a dominant factor skill which takes the activity outside the parameters of illegal gambling in Rhode Island. Nevertheless, the Attorney General opined that a high level of regulation be established over daily fantasy sports to ensure criminal elements do not infiltrate the game, youth participation is barred, and additional issues are addressed

4. Fantasy sports subject to legislative action

Legislation has been introduced in twenty-nine states which would specifically legalize and/or regulate daily fantasy sports contests. Among these states are **Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana (passed), Iowa, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, South Carolina, Tennessee (passed), Vermont, Virginia (passed), Washington, West Virginia,** and **Wisconsin**.

As to the three states which have recently enacted legislation, in March 2016, **Virginia's** Governor signed into law legislation requiring registration and a $50,000 fee to operate daily fantasy sports in Virginia. Also in March in **Indiana,** S 339 was enacted specifically providing for the regulation of fantasy sports through licensing and licensing fees for site operators, providing oversight by the Indiana Gaming Commission, providing a minimum age to play of 18, requiring tax withholdings on winnings, intercepting winnings to pay back child-support, and prohibiting operators from making political contributions. Finally, on April 28, 2016, **Tennessee's** Governor signed into law legislation which gives oversight of the DFS industry to the Secretary of State, imposes a 6% tax on revenue by Tennessee resident players, and gives the Secretary of State the authority to establish appropriate licensing fees.

VIII. Pennsylvania Gambling Laws

In Pennsylvania, the term "gambling" is not specifically defined in statute but instead finds its roots in common law. Pennsylvania common law has addressed and established a definition of gambling in Pennsylvania which involves a three-prong test in *Commonwealth v. Two Electronic Poker Game Machines*, 502 Pa. 186, 466 A.2d 973 (Pa Supreme Ct. 1983). As discussed therein, an activity is gambling if it involves, 1) consideration (a bet or wager), 2) an outcome predominated by chance, and 3) a reward or prize for winning the outcome of the contest. If, on the other hand, the outcome of the contest is not predominated by chance but rather is predominated by skill, then the contest would not constitute gambling. The determination of whether an activity constitutes gambling or not, thus, rests on the predominance element, i.e. is chance or skill of the player the predominant factor when determining the winner of the contest.

Chance vs. Skill in Fantasy Sports

The determination of whether the play of fantasy sports in Pennsylvania, as in many other jurisdictions, constitutes gambling turns on resolution of the issue of whether skill or chance is the predominant factor in the play and determination of a winner. A definitive answer to this question is a gray area and most certainly vacillates depending on the varied rules of individual contests which may include whether the contests are season long, weekly or daily, and whether teams are actively managed, keeper leagues or even randomly selected. A number of the Opinions of Attorneys General cited above delve into this issue and create a distinction between season long and daily fantasy sports.[29]

Without a doubt, the play of fantasy sports involves a combination of skill and chance. Utilizing one's knowledge of players, their historical performance and any number of variables which may affect their individual performance draws on the skill of the fantasy sports participant to select a team. However, once the team is selected and set for play, the participant's involvement is largely reduced to watching games and the sports players' performance. At that point in time, the fantasy sports participant's success in the contest shifts to a dependency on chance – the chance that the athlete will perform well on that day, that he will not be

[29] Representative opinions are included in Appendix C.

injured, that he will not be ejected from the game, that a sudden rain storm will not slow the field, …. .

Season long fantasy sports leagues, in their original form, saw players using accumulated knowledge and statistical backgrounds of individual athletes' performances to select a team through a mock draft. Throughout the course of the season, the participant could maintain control over the team and lineups such as by trading players, adjusting lineups, and compensating for injuries, weather conditions or the strengths or weaknesses for the week's opponents. The success of the season long team thus depends not only upon the players' initial skill at selecting the players for his team but also by the continuity of management throughout the season. This use of skill on a continuing basis throughout the course of a long season in order to determine the prize winner(s) generally has been determined to not constitute gambling due to the exercise of skill during the entire period of play, i.e. skill was the predominant factor.

On the other end of the spectrum are daily fantasy sports (DFS) which by their nature are quick paced -- pick a team and the contest occurs in one day. While skill undoubtedly can factor into picking the team initially, the daily contest does not afford the degree of opportunity to manage the team during the course of the contest – a key point of distinction among the various Attorneys General's Opinions. Once the single day competitions begin, chance takes over and the fantasy participant is a mere observer.

Moreover, recent articles have cited the use of computer algorithms or scripts to analyze data and pick players and teams for the participant. These articles raise the following questions for regulators and law enforcement alike. Is the use of a computer to analyze data and pick a team the skill of the participant or is it simply the use of a computer to do the work of the participant? Does the use of a computer to pick teams negate the claim of skill as the predominant factor and then inject chance as the predominate factor of the game? The Board cannot answer these questions but notes them as illustrative of the point that the determination of chance versus skill can indeed be complicated and dependent on a micro-examination of the facts of each contest – an endeavor better left to Courts and law enforcement authorities who enforce Pennsylvania's gambling laws or to further legislative definition.

Pennsylvania's Courts have not addressed the chance versus skill determination in the context of fantasy sports. The Courts have addressed the distinction with respect to certain video machines and poker, however. Those cases provide some guidance here. In *Commonwealth v. Two Electronic Poker Game Machines*, the Supreme Court held a video poker machine was a game of chance, stating "while skill, in the form of knowledge of probabilities, can improve a player's chance of winning and can maximize the size of the winnings, chance ultimately determines the outcome because chance determines the cards dealt and the cards from which one can draw – in short, a large random element is always present. … Skill can improve the outcome, in [a game]; it cannot determine it." 466 A.2d at 978.

In 2010, the Pennsylvania Superior Court issued a decision in *Commonwealth v. Dent*, 992 A.2d 190 (Pa. Super. 2010), *appeal denied*, 610 PA 592 (2011), in which the Court surveyed cases from various jurisdictions concerning the chance or skill analysis, to determine if Texas Hold 'Em Poker constituted gambling under the predominant factor test, ultimately concluding that it was gambling. The Court cited from the analysis of the Court in *Joker Club, LLC v. Hardin*, 643 S.E.2d 626 (N.C. Ct. App. 2007), as follows:

[W]hile all games have elements of chance, games which can be determined by superior skill are not games of chance. For example, bowling, chess, and billiards are games of skill because skill determines the outcome. The game itself is static and the only factor separating the players is their relative skill levels. In short, the instrumentality for victory is in each player's hands and his fortunes will be determined by how skillfully he use (sic) that instrumentality.

Poker, however, presents players with different hands, making the players unequal in the same game and subject to defeat at the turn of a card. Although skills such as knowledge of human psychology, bluffing, and the ability to analyze odds make it more likely for skilled players to defeat novices, novices may yet prevail with a simple run of luck. No amount of skill can change a deuce into an ace. Thus, the instrumentality for victory is not entirely in the player's hand. In *State v. Taylor*, our Supreme Court noted this distinction. 111 N.C. 680, 16 S.E. 168 (1892).

It is a matter of universal knowledge that no game played with ordinary playing cards is unattended with risk, whatever may be the skill, experience or

intelligence of the gamesters engaged in it. From the very nature of such games, where cards must be drawn by and dealt out to players, who cannot anticipate what ones may be received by each, the order in which they will be placed or the effect of a given play or mode of playing, there must be unavoidable certainty as to the results. *Id.* at 681–82, 16 S.E. at 169.

This is not so with bowling, where the player's skill determines whether he picks up the spare; or with billiards, where the shot will find the pocket or not according to its author's skill. During oral argument, counsel for plaintiff analogized poker to golf, arguing that while a weekend golfer might, by luck, beat a professional golfer such as Tiger Woods on one hole, over the span of 18 holes, Woods' superior skill would prevail. The same would be true for a poker game, plaintiff contended, making poker, like golf, a game of skill. This analogy, while creative, is false. In golf, as in bowling or billiards, the players are presented with an equal challenge, with each determining his fortune by his own skill. Although chance inevitably intervenes, it is not inherent in the game and does not overcome skill, and the player maintains the opportunity to defeat chance with superior skill. Whereas in poker, a skilled player may give himself a statistical advantage but is always subject to defeat at the turn of a card, an instrumentality beyond his control. We think that is a critical difference. 643 S.E.2d at 630–31. Upon this reasoning, the Court stated, we agree on skill to some degree, it is predominantly a game of chance. 992 A.2d at 196.

Thus it remains to be determined whether Pennsylvania Courts would determine that chance or skill is the predominant factor in the play of fantasy sports. The answer to that question also may depend heavily on whether traditional, season-long fantasy sports contests are examined or the more fast-paced daily version. As recited in the preceding section, other jurisdictions have found the distinction between the two types of fantasy sports to be significant, primarily with traditional fantasy sports in which the participant maintains control of his team throughout the season to involve a higher degree of skill than the daily game which has some degree of skill in the setting of one’s team and then lets the rest to chance during the games of that day.

The distinction between predominance of chance and skill is significant to this discussion as all gambling in Pennsylvania is illegal unless authorized by the General Assembly through statute. The currently-legal forms of gambling are

those provided through the Race Horse Industry Reform Act[30], the Pennsylvania Lottery[31], bingo as contemplated in Pennsylvania's Bingo Law[32], casino-style gambling as provided for in the Pennsylvania Race Horse Development and Gaming Act[33], and small games of chance under the Local Option Small Games of Chance Act[34], and pull tabs, raffles and daily drawings as authorized under the Tavern Gaming Act.[35,36]

It is against this backdrop that the Gaming Control Board reports and responds to the points or topics listed in Act 7 of 2016. The Board recognizes that it is the General Assembly's prerogative to determine and establish Commonwealth policy through legislation. The Board therefore highlights options available to the General Assembly as well as provides certain recommendations based upon the Board's experiences in regulating casino-style games should the General Assembly determine that it intends to create a regulatory structure for the play of fantasy sports in Pennsylvania.

We also respond to the items with the presumption that fantasy sports are not illegal in Pennsylvania as no Court has ruled them such and the Commonwealth's Attorney General has not issued a formal Opinion finding fantasy sports to be illegal. A determination of illegality of either or both traditional fantasy sports or daily fantasy sports could, of course, have an effect on the Board's responses. Moreover, the recommendations set forth herein presume that the General Assembly pursues the option of regulating the activity via statutory mandate.

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[30] 4 P.S. §325 et seq.
[31] 72 P.S. §§3761-101 et seq.
[32] 10 P.S. §301 et seq.
[33] 4 Pa.C.S. §§1101 et seq.
[34] 10 P.S. §328.101 et seq.
[35] 10 P.S. 328.901 et seq.
[36] In addition to any criminal penalties for unauthorized gambling as addressed in those statutes, Pennsylvania's criminal code (Title 18) addresses other illegal gambling in 18 PA.C.S. §§5513 and 5514. Pursuant to Section 5513, a person is guilty of a misdemeanor of the first degree if he intentionally or knowingly makes, assembles, sets up, maintains, sells, lends, leases gives away or offers for sale, loan or lease or gift any punch board, drawing card, slot machine or any device to be used for gambling purposes, except playing cards, or if he uses or allows to be used any premises for the purpose of unlawful gambling. Section 5514, Pool selling and bookmaking, provides, *inter alia*, that a person is guilty of a misdemeanor of the first degree if he engages in pool selling or bookmaking; occupies any place for the purpose of receiving, recording or registering bets or wagers or of selling pools; receives, records, registers, forwards or purports to forward to another any bet or wager upon the results of any political nomination, appointment or election, **or upon any contest of any nature** (emphasis added).

IX. Fantasy Sports as a Gambling Product in Pennsylvania

1. DEFINITION

The Board advocates defining fantasy sports similar to the definition embodied in UIGEA but removing references to 1) collegiate sports and 2) the relative skill of the participant:

Fantasy sports – a fantasy or simulation sports game or contest involving athletic events in which a participant owns or manages an imaginary team and competes against other participants or a target score for a predetermined prize determined by statistics generated based on performance by individual athletes participating in actual professional athletic events, provided the outcome shall not be based solely on the performance on an individual athlete, or on the score, point spread, and any performance of any single real team or combination of teams.[37]

2. THE STRUCTURE OF THE DIFFERENT FANTASY SPORTS FORMATS AND THE UNDERLYING ACTIVITIES THAT MAY BE APPROPRIATE FOR OVERSIGHT

A. Traditional Fantasy Sports

Today the concept of fantasy sports has evolved far beyond what any of the original creators could ever have imagined to include sports such as: auto racing, baseball, basketball, American football, soccer, golf, hockey, boxing, cricket, Formula1 racing, MMA fighting, rugby, surfing, and wrestling. The list of potential activities which could form the basis of imaginary "teams" is endless and extends beyond traditional sports.

In the traditional model (which adjusts slightly to accompany the activity that the league is monitoring), a group of people convene to select – or "draft" – real players to assemble a full team. Live statistics during an athletic performance are compiled to determine a winner which is typically tracked through different web sites or mobile applications. This can be done with friends to compete

[37] The Board recommends removing references to "the relative skill of the participants" from the UIGEA language since it becomes unnecessary if the General Assembly were to pass legislation making fantasy sports a legal form of gambling, i.e. skill or chance does not matter. Likewise, as have some jurisdictions, the Board recommends that collegiate sports be removed from available options.

exclusively against people they know or it can be done completely anonymously on host website platforms such as ESPN, Yahoo or CBS (among others).

It is believed that the traditional fantasy sports model was the model envisioned by Congress in 2006 when UIGEA was enacted which excluded fantasy sports from UIGEA's ban on payment transactions relating to bets and wagers processed via the Internet. The traditional form of fantasy sports was symbolic of how the game was played at that time. Perceived skill through analysis and continual management of a team through a traditional season was the norm.

However, the Internet expansion of the late 1990's created a fantasy sports revolution. Enabling players to easily obtain and compute statistics and monitor their teams transformed Rotisserie baseball into the fantasy sports industry that we know today. Daily fantasy sports were not commercially prevalent in 2006 and the creation of the newer version and the high-speed pace of play, although perhaps predictable as a result of the internet, was still several years away.

B. Daily Fantasy Sports

As the traditional leagues gained popularity and attention, naturally market forces encapsulated ways to translate the participation into revenue. Originally it was as simple as a platform increasing the value of their website portal through increased traffic, increased advertising and increased market presence. Once traditional revenue streams capped, the market began looking towards less traditional methods to monetize fantasy sports play and created the concept of DFS. This method of fantasy play took an entire season and confined it into a day or weekend – all to restart the next day or next week.

There are several different ways to play DFS. Individual operators may refer to the contests with slightly different jargon or have slight variations on how the provider runs the contests. Nevertheless, the basic concepts remain the same. Among the most popular are:

Head-to-Head (H2H)

The most simplistic of fantasy games is a head-to-head match-up either with someone you know or someone you do not. The provider (typically FanDuel or DraftKings) provides a platform by which to conduct a draft, calculate statistics and assign a winner, and occasionally serves as a networking platform if a player

chooses to play with people they do not know. In this game you face a single opponent for a set buy-in and whoever builds the highest scoring team wins the cash prize.

50/50s and Multipliers

The next in the progression of games is the 50/50 or "Double-up" game. This is similar to a Head-to-Head match, with more people ranging from 10 to thousands of players. In this format, after the predetermined timeframe is over and the scores are calculated, every player is ranked. Typically, those in the top half come close to doubling their entrance fee (the provider takes a rake, which is why it is not an exact double) and the bottom half lose their entrance fee.

A Multiplier game is similar to this but lessens the number of winners to pay the rake and exactly doubles the entrance fee. An example of this would be if 23 players each paid a $5 entrance fee, the top 10 players would win $10 and the remaining $15 would be paid to the provider as a rake. Yet another variation includes a triple-up or even a quadruple-up, each which provides the payout to an increasingly smaller group of participants

Tournaments and Leagues

Tournaments and Leagues allow anywhere from 3 players to hundreds of thousands to join. The primary difference between the two concepts is that tournaments do not have a cap on entries and can grow very large prize pools as the number of entries grow. Leagues have a set number of entries with a predetermined prize pool.

A tournament with a guaranteed prize pool (GPP) is the biggest pay-out game in DFS, occasionally paying the winner up to $1 million. The structure in a GPP is that the prize is guaranteed to the winners, regardless if all the spots available in the "league" are filled. A player would pay an entrance fee and draft a team and the payouts are tied according to the finish.

A league has a smaller field and smaller pay-out. This again can be a format a player enters exclusively with people they know, exclusively with people they do not know or with a hybrid of the two. The parameters of the pay-out can be set by the league prior to drafting teams, thereby lessening the top-heavy slant of payouts.

Satellites and Qualifiers

The final method of DFS is a Satellite or Qualifier game. These games are contests that feed into other larger contests. Participants buy into a cheaper contest to win a spot in a larger and more expensive contest which the player may not ordinarily want or be able to join. The biggest difference between a Satellite and a Tournament format is the number of winners. A Satellite game is typically much smaller than a Tournament.

The only differentiation between a Satellite game and a Qualifier game is that the winner of a Satellite game is immediately entered into a higher-prize tournament whereas a Qualifier game requires the winner to win multiple tournaments before winning the entry into a large tournament contest.

C. eSports

Finally, we mention eSports as a relatively new offering by fantasy sports providers. While not a traditional fantasy sports game, the increasing popularity and offering of eSports through some fantasy sports websites is noted. eSports is video gaming in a professional setting. These typically are online tournaments or an orchestrated atmosphere where competitors who feel their video game skills are good enough to compete with the best from around the world enter into a contest for a prize. Contests can occur through a website or in-person in a tournament format.

D. Activities Appropriate for Oversight

The activities appropriate for regulation run the gamut for state legislatures to decide: States could decide to regulate all of the activity, none of the activity, or anything in between. At the very least, issues to consider, and as addressed below in more detail, would include the fairness of the game, patron protection in terms of the payment of winners and account security, assurance of the integrity of funds, age and location of the player verification, addressing compulsive and problem gaming concerns including identified problem gamblers and the establishment of a rigorous exclusion program, and the integrity of the platform offering the game.

3. FANTASY SPORTS ENTITIES, INCLUDING THE ROLES AND RELATIONSHIPS OF ANCILLARY FANTASY SPORTS BUSINESSES, INCLUDING HOST INTERNET SITES, COLLEGIATE AND PROFESSIONAL SPORTS ORGANIZATIONS AND PERSONS WITH A CONTROLLING INTEREST IN FANTASY SPORTS ENTITIES

Ownership structures of many fantasy sports entities are difficult to discern due to the nature of being a private company and corresponding absence of significant public information. Along with the two well-known companies, DraftKings and FanDuel, fantasy sports providers include: Daily MVP, Draft Ops, DraftDay, DraftPot, Fantasy Aces, Fantasy Feud, FantasyDraft, FantasyScore, Star Fantasy Leagues, StarsDraft and Yahoo. Provided below is a description of the two primary companies along with their partnerships with professional sports organizations. Also included as Appendix D is a chart that details which sports are available on the various fantasy sports sites.[38]

DraftKings

DraftKings officially launched its website at the beginning of the Major League Baseball season in 2012. The initial funding commitment of $1.4 million was received from Atlas Ventures, but additional investments would follow.

Initially designed as a one-on-one competition portal, the company quickly grew into “five-man leagues” and beyond.

Since its inception in 2012, the company is reported to have raised $626 million from investors in fundraising rounds which have included participation by Fox Sports, the Raine Group, Redpoint Ventures, GGV Capital, BDS Ventures and Atlas Ventures. DraftKings also has acquired rival websites such as StarStreet.

In November of 2014 the company announced exclusive licensing rights with the National Hockey League on an initial two-year deal, but executives from the NHL signaled their intent for the relationship to last “into perpetuity”. In April of 2015 the company announced a similar contract with Major League Baseball making it the “official daily fantasy game of baseball”.

[38] Information concerning funding, league affiliations along with sports offerings are as listed on the website of Legal Sports Report, www.legalsportsreport.com

Partners include: Atlanta Falcons; Carolina Panthers; Dallas Cowboys; Denver Broncos; Kansas City Chiefs; Miami Dolphins; Minnesota Vikings; New England Patriots; New York Giants; NFLPA; Oakland Raiders; Pittsburgh Steelers; Tennessee Titans; Boston Bruins; Chicago Blackhawks; Colorado Avalanche; Detroit Red Wings; LA Kings; NHL; New York Rangers; St. Louis Blues; Boston Celtics: Golden State Warriors; Houston Rockets; LA Clippers; Minnesota Timberwolves; New York Knicks; New York Liberty; Philadelphia 76ers; Sacramento Kings; Atlanta Braves; Baltimore Orioles; Boston Red Sox; Chicago Cubs; Chicago White Sox; Cincinnati Reds; Cleveland Indians; Colorado Rockies; Detroit Tigers; Houston Astros; Kansas City Royals; LA Angels; LA Dodgers; Miami Marlins; Milwaukee Brewers; Minnesota Twins; MLB; New York Mets; New York Yankees; Oakland Athletics; Philadelphia Phillies; Pittsburgh Pirates; San Diego Padres; San Francisco Giants; St. Louis Cardinals; Tampa Bay Rays; Texas Rangers; Washington Nationals; Arsenal; Liverpool; Watford; MLS; ESPN; Madison Square Garden; Staples Center; Breeders Cup; UFC; International Speedway Corporation; Race Team Alliance; World Poker Tour; World Series of Poker; & WWE.

FanDuel

FanDuel was started in 2009 by the creators of Hubdub – a news and current events prediction marketing company. FanDuel initially raised about $1.2 million in venture capital from Pentech Ventures and Scottish Investment Bank. Since that time, FanDuel is reported to have raised another $362.5 million from sources which include a high-profile investor in the NBA, Shamrock Capital Advisors, NBC Sports Ventures, Kohlberg Kravis Roberts & Co, Piton Capital, and Comcast Ventures.

FanDuel has acquired a sports analytics company, Numberfire, and daily fantasy and esports competitor, AlphaDraft.[39] FanDuel now operates in New York, Edinburgh, Glasgow, Orlando, and Los Angeles.

Partners include: Baltimore Ravens; Buffalo Bills; Chicago Bears; Cincinnati Bengals; Cleveland Browns; Detroit Lions; Green Bay Packers; Houston Texans; Indianapolis Colts; Jacksonville Jaguars; New York Jets; Philadelphia Eagles; San Diego Chargers; St. Louis (Now Los Angeles) Rams;

[39] http://venturebeat.com/2015/09/24/fanduel-acquires-alphadraft-to-get-into-esports/

Tampa Bay Buccaneers; Washington Redskins; Atlanta Hawks; Brooklyn Nets; Charlotte Hornets; Chicago Bulls; Cleveland Cavaliers; Dallas Mavericks; Detroit Pistons; Indiana Pacers; Los Angeles Lakers; Memphis Grizzlies; Miami Heat; Milwaukee Bucks; NBA; Orlando Magic; Portland Trail Blazers; San Antonio Spurs; Utah Jazz; SB Nation; & Sportradar.

4. HOW REGULATION OF FANTASY SPORTS WOULD FIT INTO THE COMMONWEALTH'S CURRENT GAMBLING LAWS AND POLICIES

Currently, the Gaming Control Board's authority to regulate gaming derives solely from the Pennsylvania Race Horse Development and Gaming Act, 4 Pa.C.S. §§1101 et seq., and is limited to the regulation of slot machines and table games in Pennsylvania's licensed casino facilities which currently number twelve (12). Within that context, the Board has implemented a strong regulatory structure through the enforcement of internal controls for casino properties designed to assure proper accounting and audit protocols, security and surveillance, and prevention of problem gambling and under-age gambling.

More recently, House Bill 649 was introduced which, among other things, would have authorized intra-state Internet gaming to be conducted within Pennsylvania's borders and only through Pennsylvania licensed casino facilities. During the examination of the Internet gaming proposal, testimony received by the House Gaming Oversight Committee, and observations of the internet gaming platforms and regulation in New Jersey and Nevada where it has been implemented, it is clear that Internet gaming could also be accommodated and regulated in Pennsylvania by the Board through the licensed casino structure. Regulation of Internet gaming can be accomplished in a manner similar to the regulation of Pennsylvania's brick and mortar casinos – through strong internal controls which assure proper accounting, audit trails, account security, and age and location verification.

The Board cites to the research as to Internet gaming because fantasy sports are in their simplest form just another means of Internet gaming. Technology exists to provide reasonable assurances of identity and age upon signing up for a fantasy sports account, for funding accounts and assuring the security of those

accounts, for verifying player identity through the course of play, for tracking play and for accounting and audit purposes. [40]

In light of the similarities, the regulation of fantasy sports could fit within the established regulatory authority of the Board as contemplated in HB 649. The questions to be resolved by the General Assembly and the Administration in this regard revolve around whether the Board should regulate fantasy sports or whether another agency should do so; whether as a matter of policy, fantasy sports should be offered and operated through a licensed casino entity or whether non-casino fantasy sports providers, which likely may not have a physical location in Pennsylvania, should be permitted and regulated to provide fantasy sports independent of the licensed casino entities; and if the Gaming Control Board regulates fantasy sports providers, what funding mechanism should be established for regulatory oversight?

5. COMPULSIVE AND PROBLEM GAMBLING

In 2005, Pennsylvania authorized commercial gambling through the Pennsylvania Race Horse Development and Gaming Act (Gaming Act") and recognized the need to address potential negative effects through statutorily required funding and treatment[41] for compulsive and problem gambling. This dedicated funding is utilized by the Department of Health ("DOH"), the Department of Drug and Alcohol Programs and Single County Authorities ("SCA") for various programs to prevent, diagnose and treat gambling addiction.[42]

Compulsive and problem gaming is not limited to casino gambling and appears in all forms of gambling, including games played through the internet, without regard to factors such as age, sex, income level or any other factor. Should the General Assembly determine through legislation to regulate fantasy sports gaming, the Board advocates that the General Assembly also mandate or,

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[40] As heard with respect to internet gaming, the one aspect that cannot be eliminated is play by an underage individual who obtains a parent's or other adult's passwords to an account and utilizes that information to access the account of another.

[41] See Department of Drug and Alcohol Programs 2015 Compulsive and Problem Gambling Report (Page 2) http://www.ddap.pa.gov/Reports/Compulsive%20and%20Problem%20Gambling%20Annual%20Reports/2015%20Compulsive%20and%20Problem%20Gambling%20Annual%20Report.pdf

[42] See Department of Drug and Alcohol Programs; 2015 Compulsive and Problem Gambling Annual Report http://www.ddap.pa.gov/Reports/Compulsive%20and%20Problem%20Gambling%20Annual%20Reports/2015%20Compulsive%20and%20Problem%20Gambling%20Annual%20Report.pdf for overview on the impact of gambling on Commonwealth residents.

alternatively, provide the regulatory agency with the discretion to mandate providers of fantasy sports contests to develop procedures for participants to establish daily, weekly and monthly monetary spending thresholds. In addition, the Board advocates that provision for a self-exclusion mechanism be required by any provider of fantasy sports to Pennsylvania residents.

According to the National Council on Problem Gambling ("NCPG"), problem gambling includes gambling behaviors that compromise, disrupt or damage personal, family or vocational pursuits. Key indicators of problem behavior include[43]:

- A preoccupation with gambling;
- A desire to bet increasing amounts of money at greater intervals;
- "Chasing" loses; and
- An inability to stop gambling despite negative consequences.

In the United States, two million adults (1%) can be classified as meeting the criteria for pathological gambling with an additional four to six million adults (2-3%) considered to be problem gamblers.[44] The NCPG also notes that any type of gambling, for a problem gambler, is a potential issue because it is the individual's inability to control their desire to gamble that is the cause. Anecdotal reports seem to indicate that speed of play may exacerbate the desire to gamble which would seem to implicate games with shorter wager-to-response times as a more likely cause for concern.[45]

With respect to fantasy sports, the NCPG notes the following:

- Fantasy sports players are frequently described as predominately young, male, sports enthusiasts and likely to gamble and each of these groups is known to be at a higher risk for gambling addiction.[46]

[43] National Council of Problem Gambling; Frequently Asked Questions: What is problem gambling? http://www.ncpgambling.org/help-treatment/faq/
[44] National Council of Problem Gambling; Frequently Asked Questions: How widespread is problem gambling in the U.S.? http://www.ncpgambling.org/help-treatment/faq/
[45] National Council of Problem Gambling; Frequently Asked Questions http://www.ncpgambling.org/help-treatment/faq/
[46] See Also Testimony of Zakary Cutler, Director of Product Management for Draft Kings before the MA Gaming Commission (Page 99) http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-1.pdf

- Game characteristics associated with daily fantasy sports gaming, such as high frequency of contests, large number of entries per contest, larger and more frequent payouts, are attendant with a higher risk for gambling addiction.
- Gamblers Anonymous has added fantasy sports to the list of activities it defines as gambling and advises individuals in recovery to avoid due to the risk of triggering a gambling addiction.
- Indicators such as preoccupation, inability to limit time and money which causes emotional and financial harm are likely to meet the established criteria for gambling addiction. [47, 48]

The Gaming Act required the Board to establish and maintain a self-exclusion program[49] which allows individuals to proactively preclude themselves from gambling at or visiting a Pennsylvania licensed facility and requires certain affirmative obligations on casinos. The Board-created Office of Compulsive and Problem Gambling ensures that every slot machine licensee establishes and implements an approved compulsive and problem gambling plan and maintains Pennsylvania's self-exclusion program.[50]

Self-exclusion is a tool for individuals to utilize which is generally available wherever commercial gaming has been authorized and can readily be adapted to fantasy sports. For instance, using DraftKings and FanDuel as an example, DraftKings provides a link, entitled Responsible Gaming, to a dedicated webpage which provides the following information:

- An overview of a self-exclusion option and a self-limitation option.
- Background information and a link to the National Center for Responsible Gaming.
- DraftKings contact information to potentially allow a family member to prohibit another family member from playing and betting on fantasy sports through DraftKings in certain circumstances.

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[47] National Council of Problem Gambling; Talking Points on Fantasy Sports http://www.ncpgambling.org/wp-content/uploads/2016/02/NCPG-FS-Talking-Points-Mar-1-2016.pdf
[48] *See* NCPG-adopted Fantasy Sports Consumer Protection Guidelines, http://www.ncpgambling.org/wp-content/uploads/2014/04/Fantasy-Sports-Consumer-Protection-Guidelines-Final-December-4-2015.pdf.
[49] Pennsylvania Gaming Control Board; Self-Exclusion Program http://gamingcontrolboard.pa.gov/?p=66
[50] Through Jun 2015, 8,575 individuals have requested self-exclusion. http://gamingcontrolboard.pa.gov/files/communications/2014-2015_PGCB_Annual_Report_min.pdf, p. 4.

- Links to parental controls NetNanny and CyberSitter.

DraftKings provides access to the National Council for Responsible Gaming and offers self-exclusion as well for periods ranging from 3 months to five years. In addition, DraftKings permits players to place limitations on deposits of up to $2,000 per day, $4,000 per week and $6,000 per month.[51]

FanDuel provides essentially similar information through a link on their homepage entitled Trust and Safety. Again, self-exclusion is limited to account holders for varying lengths of time.[52] FanDuel also offers information from the National Council for Problem Gambling as well as the National Center for Responsible Gaming. In addition, FanDuel provides a link to the National Council of Problem Gambling online Chat feature.[53]

The Attorney General for Massachusetts recently announced comprehensive regulations relative to Daily Fantasy Sports Contests.[54] The regulations include protections for individuals who may have a gambling addiction.[55] The measures include:

- Establishment of Self-Exclusion with options for players to limit their play.
- Establishment of 3rd party exclusion as well as 3rd party establishment of deposit and loss limits.
- Restrictions on direct marketing to Self-Excluded individuals.
- Provision of problem gambling assistance and treatment providers.
- Employee training on problem gambling including training for the recognition and provision of assistance to individuals who may have a compulsive gambling problem.
- Player deposit limit of $1,000 but also providing that a player may request an increased monthly deposit limit.

[51] See: "Overview" and "Need Help?" https://www.draftkings.com/help/responsible-gaming
[52] See: Responsible Play - You Don't Have To Play. Period. https://www.fanduel.com/trust
[53] See: Need Additional Help? https://www.fanduel.com/trust
[54] Virginia and Indiana also provide for self-exclusion and require daily fantasy sports operators take reasonable measures to prevent individuals who have self-excluded from participating in daily fantasy sports contests.
[55] Final Regulations 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts See Section 34.10 http://www.mass.gov/ago/consumer-resources/consumer-information/dfs/final-3-25-dfs-regulation.pdf

In light of the foregoing and with recognition that the play of fantasy sports contests have similar risks involved as casino gambling in terms of compulsive and problem gambling, the Board recommends that if regulated, fantasy sports providers should:

i. be required to provide compulsive and problem gambling funding in a manner similar to commercial gaming licensees;

ii. provide a self-exclusion program similar to commercial gaming licensees;

iii. provide a mechanism for individuals to limit spending on a daily, weekly and monthly basis; and

iv. explore third party exclusion upon satisfaction of certain legal requisites.

In addition, if legislation provided for the regulation of this industry by the PGCB, the Board recommends that the enabling statute provide the Board with wide discretion in crafting regulations to establish protections for players relating to concerns of compulsive and problem gamblers.[56]

6. PROTECTION OF MINORS

The Board notes that the age to be considered a "minor" including the age for individuals to engage in legalized forms of gambling vary within Pennsylvania. In Pennsylvania, "minor" seems to be defined differently depending upon the statute being referenced.

- The Pennsylvania Crimes Code defines "Minor" as an individual who is less than 18 years of age.[57]
- The Pennsylvania Race Horse Development and Gaming Act, in contrast, does not define "minor" but limits gambling to individuals 21 years of age or

[56] Pennsylvania House Gaming Oversight Committee Public Hearing on Internet and Mobile Gaming, See Testimony of Gaming Laboratories International, LLC. See Page 81 & 82 http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2015_0059T.pdf
[57] 18 Pa.C.S., Section 3001 http://www.legis.state.pa.us/WU01/LI/LI/CT/htm/18/18.htm

older while allowing individuals 18 years of age or older to work at a licensed facility.[58]

- The Pennsylvania Race Horse Industry Reform Act prohibits wagering by individuals who are younger than 18 years of age.[59]
- The Pennsylvania Lottery prohibits the sale of lottery tickets to any person less than 18 years of age.[60]
- The Pennsylvania Liquor Code prohibits the sale to or possession of alcohol by an individual less than 21 years of age.[61]
- Pennsylvania prohibits the sale of tobacco to individuals less than 18 years of age.[62]

If fantasy sports are to be regulated within Pennsylvania, the General Assembly must answer two questions relating to the age of participants. The first concerns at what age will Pennsylvania allow participation in fantasy sports contests. Second, how will fantasy sports providers assure that players who do not meet the established age limits are prevented from engaging in fantasy sports gaming.

Providers of fantasy sports gaming, unless barred by statute, generally allow individuals 18 years of age or older to participate in contests. Indiana and Virginia statutorily provide that individuals 18 years of age or older may participate in daily fantasy sports gaming. Nevada, which recently determined daily fantasy sports gaming to be gambling, prohibits individuals less than 21 years of age from gambling. The Massachusetts Attorney General recently published regulations which would restrict entry fee based daily fantasy sports gaming to individuals 21 years of age or older.

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[58] 4 Pa.C.S., See Section 1207(a) Section 1318(a) and Section 1518(a)13 and 13.1 http://www.legis.state.pa.us/WU01/LI/LI/CT/HTM/04/04.HTM

[59] See Amendments to Act 175 of 1929, Section 2840-D http://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2015&sessInd=0&billBody=H&billTyp=B&billNbr=0941&pn=2662

[60] Act 91 of 1971, Section 309 http://www.legis.state.pa.us/WU01/LI/LI/US/PDF/1971/0/0091..PDF

[61] See Act 271 of 1974, Section 1991 http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=01&div=0&chpt=19&sctn=91&subsctn=0

[62] 18 Pa.C.S. Section 6305 http://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18&div=0&chpt=63&sctn=5&subsctn=0

The crux of the issue centers on the age between 18 years of age and 21 years of age and, to a certain extent, social gaming for minors in general. According to CollegeGambling.org, while 1 percent of the United States' adult population have a severe gambling problem, 6 percent of college students have a gambling problem.[63] This is indicative that "college students appear to mature out of these problems…after college."[64]

In addition, the Report of the Task Force on College Gambling Policies, in 2009, reflects that 42% of students[65] at colleges and universities in the United States participated in some form of gambling during the prior year.[66] In addition, the Report noted that:

> Adolescents appear to be at a higher risk for developing a gambling disorder than adults. Anywhere from 2% to 7% of young people experience a serious gambling addiction. An estimated 6% to 15% of youth have level 2 gambling problems (ie, they have problems with gambling but do not meet diagnostic criteria for pathological gambling). Most adults with a gambling problem started gambling at an early age. Scientists have learned that the adolescent brain is still growing, and that accounts for the frequently impulsive behavior and unwise decisions characteristic of teenagers.[67, 68]

The Massachusetts Attorney General testified before the Massachusetts Gaming Commission that allowing individuals less than 21 years of age to play

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[63] CollegeGambling.org Fact Sheet: Gambling Disorders http://www.collegegambling.org/just-facts/gambling-disorders

[64] CollegeGambling.org Fact Sheet: Gambling Disorders among College Students http://www.collegegambling.org/just-facts/gambling-disorders-among-college-students

[65] Report of the Task Force on College Gambling Policies, See page 6 http://ncrg.org/sites/default/files/uploads/docs/publiceducation_outreach/a_call_to_action_full_report_92909.pdf

[66] Report of the Task Force on College Gambling Policies, See Table 2: College Student Gambling Activities Page 12 http://ncrg.org/sites/default/files/uploads/docs/publiceducation_outreach/a_call_to_action_full_report_92909.pdf; The breakdown of types of gambling engaged in were: Lottery/number - 25%, Casino Gambling - 20%, Cards, dice or game of chance - 12%, Professional sports gambling - 11%, College sports gambling - 9%, Horse/dog races - 4%, Internet gambling - 2%, Betting with a bookie - 1%.

[67] Report of the Task Force on College Gambling Policies, See page 11 http://ncrg.org/sites/default/files/uploads/docs/publiceducation_outreach/a_call_to_action_full_report_92909.pdf

[68] See Additional Information Reference Sources provided at http://www.collegegambling.org/just-facts/gambling-disorders-among-college-students

entry fee based daily fantasy sports games was bad policy, citing the growing student debt problem as well as the indication that individuals between 18 years of age and 21 years of age appear to be more susceptible to addictions.[69]

In addition, the Director of Research and Responsible Gaming for the Massachusetts Gaming Commission, testified that:

> ….the relationship between fantasy sports and college students was that there was indeed a heightened risk for problem gambling among college students who did participate in fantasy sports. You know, you need to take a look at this with extreme caution.[70]

Age verification for daily fantasy sports is similar to that addressed with respect to Internet gaming. In a sense, this process encompasses two steps. First, the creation of an account and the collection of detailed information required for the creation of the account which could include name, address, credit card information, driver's license number, bank information, passwords and a social security number. Second, the back of the house system, designed to track, review and recognize anomalies with an account log-in or activity on the account. In assuring underage players are rejected or unable to play, both of these areas have to be robust and reviewed on a regular basis.

On March 18, 2015, the House Gaming Oversight Committee received testimony from a representative of Caesars' Entertainment which illustrates the meshing of these two processes.

> It's fascinating to watch technology. It's run by programmers that are trained in multiple different ways than geo-location. It's your IP address. It's your WIFI address. It's, you know, where your --- they can look at where your unit is. We have one of our Representatives --- Congressmen, first of all, he tried to get on from his computer in Washington, D.C., which is VPM'd. It's linked up to his Nevada address, we wouldn't let him on. He got home and drove down to Laughlin and went

[69] MA Gaming Commission December 10, 2015 Daily Fantasy Sports Forum (Vol. II) See Page 24 & 25 http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-2.pdf
[70] MA Gaming Commission December 10, 2015 Daily Sports Forum (Vol. I) See Page 213 http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-1.pdf

> across the river to Bullhead City and tried to get on. It wouldn't let him on. They've had similar occurrences in New Jersey, where they'll take their laptop and they'll go into Hoboken, which is right across the river. And because of the technology, they've not had one incidence of somebody who was not actually in the state being able to access online.
>
> Same thing with underage and who you are. In about a 60-second time frame they can have ten different questions that verifies who you are, what is your name, what's your Social Security number, what's your driver's license, where is your bank account, what is your bank account number, what is your address. And if one of these answers comes up questionable, they deselect. They wouldn't allow the player on. So the technology is very sophisticated.[71, 72]

The Massachusetts Gaming Commission received substantially similar testimony from a number of witnesses during a Fantasy Sports Forum. A representative of FanDuel stated:

> We currently upon registration we collect name, date of birth and address and we run that through a third-party vendor who verifies identity with respect to your age and who you are and we take that really seriously.
>
> If that doesn't work, for some reason you can't distinguish between two John Smiths who live on the same street, we will collect social security number to dig down and make sure that we have the absolutely right person and we know exactly who they are and how old they are because it is obviously an issue.
>
> We also -- it sort of goes to the three things we need to know, your identity to make sure you don't have multiple accounts,

[71] House Gaming Oversight Committee Public Hearing - Keeping Pennsylvania Casinos Competitive March 18, 2015 (See Page 18 & 19) http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2015_0028T.pdf

[72] See similar testimony before the House Gaming Oversight Committee by Penn National Gaming, Inc. http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2015_0059T.pdf, (see Page 53) Caesars Interactive Entertainment, Inc., (See Page 61,62, 142); Gaming Laboratories International, LLC&, (See Page 73 and 74); and (See Page 79 & 80); Geocomply, (Page 93 through 96); and Caesars Entertainment/Harrah's Philadelphia (See Page 21 through 26).

> your age to make sure that you're over 18 or maybe even older in the state going forward and where you are because obviously there is different regulations in different states. So we also use geo-location information to determine exactly where you are.[73]

Likewise, a Draft Kings official provided the following testimony:

> From an age verification standpoint, what we are doing now is -- before we would collect date of birth and we verify through third parties with your address and your credit card information in real-time. But now as soon as you sign up, you're required in real-time before even depositing to enter all this information.
>
> And in the background, we run a check to a third party that's approved to check for age and identity verification. And if anything doesn't match up, our fraud teams get an alert and they immediately ban the accounts.[74]

At present, New Jersey, Delaware and Nevada offer Internet gaming in some form. All three states require Internet gaming providers to use age verification protocols in order to prevent an underage individual from participating in Internet gaming.[75, 76, 77] There appears to be no evidence that underage gaming is prevalent in New Jersey, Nevada or Delaware. The 2014 Division of Gaming Enforcement Report entitled Internet Gaming in New Jersey, also does not indicate underage gaming occurred.[78, 79, 80]

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[73] MA Gaming Commission, Daily Fantasy Sports Forum (Vol. I) See Page 129 & 130 http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-1.pdf

[74] MA Gaming Commission, Daily Fantasy Sports Forum (Vol. I) See Page 78 & 79 http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-1.pdf

[75] Regulations of the Nevada Gaming Commission and Nevada Gaming Control Board, See 5A.070 (4) Internal Controls for Operators of Interactive Gaming http://gaming.nv.gov/modules/showdocument.aspx?documentid=2942

[76] New Jersey See 13:69O-1.3 Internet or mobile gaming accounts, 13:69O-1.2 General Requirements for Internet and Mobile Gaming http://www.nj.gov/oag/ge/docs/Regulations/CHAPTER69O.pdf

[77] Delaware State Lottery Office Internet Lottery Rules & Regulations See 13.2.3 Date of Birth or affirmation of legal gambling age, 13.2.4 Self-verification that the information provided is correct http://www.delottery.com/pdf/InternetlotteryRules.pdf

[78] Division of Gaming Enforcement, Research Report: Internet Gaming in New Jersey http://www.nj.gov/oag/ge/2015news/ResponsibleGamingFinalReport%202015.pdf

[79] Correspondence by David Rebuck, Director of the New Jersey Division of Gaming http://www.nj.gov/oag/ge/2015news/Internetgamingletter.pdf

[80] Press of Atlantic City, November 9, 2014 Article New Jersey on hunt for online gambling violators http://www.pressofatlanticcity.com/news/breaking/new-jersey-on-hunt-for-online-gambling-violators/article_a6bd600e-67bc-11e4-a917-735481be0cf2.html

Despite the early successes in prohibiting underage gamblers in the internet gambling arena, ongoing efforts to thwart underage gaming is critical. Given the previous information relative to security layers checks necessary to open an account, it is unlikely that the scenario of a minor using a credit card to open an account would be wide spread or effective. However unlikely, there are no assurances against minor participation where the minor gains access through the participation of a willing parent or other adult.[81, 82] While this is almost certainly in violation of the terms and conditions of holding a DFS account, it is illustrative of a risk which can arise in fantasy sports contests – especially if operated as an unregulated industry.

In recognition of the substantial testimony cited above, the Board recommends the following:

i. The age for participating in fantasy sports contests be established to prohibit individuals less than 21 years of age from participating, which is consistent with commercial casino-style gaming.

ii. Underage participation in entry fee fantasy sports contests should trigger penalties for the underage individual. In addition, an adult who assists an underage individual in placing wagers on a fantasy sports contest should face civil and/or criminal penalties, including exclusion from eligibility to participate in fantasy sports contests operated by regulated entities.

iii. Provide broad discretion to the regulatory oversight agency to enact regulations relative to parental controls, account set-up and age verification procedures for DFS providers.

[81] ESPN.com Article Playing Daily Fantasy Sports With The Kids Is The New 'Having a Catch' http://espn.go.com/espnw/news-commentary/article/13616976/playing-daily-fantasy-sports-kids-new-having-catch

[82] Steve Ruddock Article Playing Daily Fantasy Sports With Your Kids? ESPN Article Raises Questions About Gambling http://www.uspoker.com/blog/espn-links-between-dfs-and-gambling/12435/

7. MEASURES TO ENSURE THE WELL-BEING AND SAFETY OF PLAYERS

Given the rapid increase in patrons, games and money played through the medium of internet-based fantasy sports, the integrity of the games being offered, player account security and the mitigation of risks from criminal elements are critically important.[83] These concerns apply equally for land based casinos and internet gaming as they do for fantasy sports. The largest difference being that, thus far, internet gaming and land-based commercial gaming are highly regulated whereas entities that provide fantasy sports are not.

A. Fairness and integrity of games

As can be expected, there is a wealth of information which a player can utilize to understand the basics of how to participate in fantasy sports contests, whether free play or entry fee based.[84] In addition, using FanDuel and Draft Kings as an example, both entities provide thorough information as to how to participate[85] as well as Contest Rules.[86] This information is similar to what is statutorily required of Pennsylvania's slot machine licensees.

While a television ad campaign placed DFS in the limelight, it was almost assuredly the alleged use of information by an employee which triggered the attention of the law enforcement and regulatory agencies.[87] To their credit FanDuel

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[83] Compulsive and problem gaming and underage gaming, while equally important, are addressed elsewhere in this report and therefore not included in this section on well-being and safety of players.

[84] ESPN.go.com So You Want To Play Fantasy Football? http://espn.go.com/fantasy/football/ffl/story?page=nfldk2k10howtoplay; Dummies.com How To Play Fantasy Football http://www.dummies.com/how-to/content/how-to-play-fantasy-football.html; NFL.com Fantasy 101 http://www.nfl.com/fantasyfootball/fantasy101; GamblingSites.org Fantasy Sports Betting - Basic Rules and How Betting Works http://www.gamblingsites.org/sports-betting/beginners-guide/fantasy/

[85] FanDuel.com This Is How You FanDuel https://www.fanduel.com/how-it-works; DarftKings.com Frequently Asked Questions https://www.draftkings.com/help/faq

[86] FanDuel.com Rules & Scoring https://www.fanduel.com/rules; DraftKings.com Example: Daily Fantasy Baseball League Rules https://www.draftkings.com/help/mlb

[87] NYTimes.com October 5, 2015 Scandal Erupts in Unregulated World of Fantasy Sports http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html?_r=0; Forbes.com October 15, 2015 The Daily Sports Scandal: Why Insider Trading May Be Just The Tip Of The Iceberg http://www.forbes.com/sites/marcedelman/2015/10/15/the-daily-fantasy-sports-scandal-why-insider-trading-may-be-just-tip-of-the-iceberg-for-draftkings/#5959ca2b1da6

and Draft Kings as well as the FTSA responded quickly by requiring employees to read and sign a policy to disallow employees from participating,[88] stating:

> The Fantasy Sports Trade Association (FSTA), DraftKings and FanDuel have always understood that nothing is more important than the integrity of the games we offer to fans. For that reason, the FSTA has included in its charter that member companies must restrict employee access to and use of competitive data for play on other sites. At this time, there is no evidence that any employee or company has violated these rules. That said, the inadvertent release of non-public data by a fantasy operator employee has sparked a conversation among fantasy sports players about the extent to which industry employees should be able participate in fantasy sports contests on competitor sites. We've heard from users that they would appreciate more clarity about the rules for this issue. In the interim, while the industry works to develop and release a more detailed policy, DraftKings and FanDuel have decided to prohibit employees from participating in online fantasy sports contests for money.[89]

In addition, FanDuel and DraftKings have each hired highly respected professionals to conduct individualized internal audits for compliance with these restrictions.[90]

Another concern for the fantasy sports industry, and one that has drawn the interest of law enforcement and public officials, centered on who was winning the games or contests. Given the millions of individuals playing DFS and the advertising focusing on small wagers and big payouts, the facts seemed contrary to

[88] Businessinsider.com November 20, 2015 Here are the rules FanDuel laid out for employees to play on DraftKings http://www.businessinsider.com/fanduel-policy-for-employees-revealed-2015-11; FanDuel.com Terms of Use https://www.fanduel.com/terms; DraftKings.com Terms of Use https://www.draftkings.com/help/terms

[89] Fantasy Sports Trade Association, Draft Kings and Fan Duel Joint Statement http://fsta.org/fsta-draftkings-and-fanduel-joint-statement/

[90] ESPN.com FanDuel permanently bans employees from playing DFS amid inquiry http://espn.go.com/chalk/story/_/id/13827269/fanduel-permanently-bans-employees-playing-dfs-money-amid-inquiry

the image being portrayed. Using the 2015 Major League Baseball season as an example, "91 percent of DFS profits were won by just 1.3 percent of the players."[91]

While the "sharks and minnows" concept is not necessarily new, it is particularly highlighted in DFS contests. It may also be seen as the negative side of a self-regulated industry. While competition is an inherently good endeavor, it is highly doubtful that the average player appreciated the risks in entering contests with individuals who created their own "custom-built predictive models, which generate hundreds of lineups based on his forecasts."[92, 93] It is also highly doubtful that having known the risk, the average player would have entered a contest dominated by sharks.[94]

To address this issue, the Massachusetts Attorney General promulgated regulations that require:

- Games exclusively for beginner players which exclude highly-experienced players;
- Additional games that exclude highly experienced players;
- The prohibition of the use of unauthorized scripts;
- Daily Fantasy Sports Operators from approving scripts that provide a player or corporation a competitive advantage;
- Procedures for beginner players to:
    - Learn to play;
    - Learn how to identify highly experienced players;

[91] SportsBusinessDaily.com For daily fantasy sports operators, the curse of too much skill http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx
[92] Bloomberg.com You Aren't Good Enough to Win Money Playing Daily Fantasy Football http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football
[93] MIT Sloan Sports Analytics Conference The Analytics Behind Winning at Daily Fantasy Sports http://www.sloansportsconference.com/?p=13545
[94] MA Gaming Commission Daily Fantasy Sports Forum Volume I (See Page 155, 156 & 162 through 164) http://massgaming.com/wp-content/uploads/Transcript-12-10-15-Part-1.pdf

- Play beginner contests and low-cost contests.[95]

In order to assure the integrity of the games, the Board recommends the following:

i. All employees of a fantasy sports operator or provider should be prohibited from playing fantasy sports on the site of the employer. In addition, employees of a fantasy sports operator or provider who have access to non-public information concerning players, teams or other information which could influence the outcome of a fantasy sports contest should be barred from playing fantasy sports on any website.

ii. Professional athletes should be barred from playing in a fantasy sports contest in the sport in which the athlete participates.

iii. Computer "scripts", computer generated algorithms and "bots" may be not be used to pick teams in a fantasy sports contest.

iv. Games exclusively for beginner players which exclude highly-experienced players should be required;

v. The regulatory oversight agency should be provided with broad discretionary authority to establish regulations providing for the fairness of play for all players.

B. Account and Internet Security

Another issue of concern to regulators is the security of player accounts and internet data. With the nature of personal data to be submitted by a player to establish an account along with bank or credit card information to facilitate fund transfers, account security is paramount. Providers must have adequate safeguards in place to guard against unauthorized access to accounts as well as dispute mechanisms to resolve complaints.

In addition, the availability of computerized data resulting from play provides companies with a wealth of data which explodes exponentially as players research and compete in contests. Every key stroke is recorded and maintained.

[95] MA Daily Fantasy Sports Regulations (See 34.12 Fairness of DFS Contests (6), (7), (8), (9) & (11) http://www.mass.gov/ago/consumer-resources/consumer-information/dfs/final-3-25-dfs-regulation.pdf

This data is valuable not only to the provider of fantasy sports contests but to marketers and advertisers as well.

With this wealth of player data, it is critical that players have confidence that account information be secure, protected and retained in a form that allows regulatory agencies the ability to audit for financial and tax purposes as well as investigate consumer complaints and anomalies of play.[96] Again, this area is similar in scope to the regulation of Internet gaming.

Player complaints, in a regulated industry, are investigated and dealt with by the regulatory agency.[97] The Massachusetts Attorney General through the promulgation of regulations provided a process for the filing of a complaint, a timeline for a response and the retention periods as well as the availability to the Attorney General's Office for review.[98] The establishment for similar complaint processes would be appropriate in Pennsylvania as a means of consumer protection.

In this area, the Board recommends that:

i. Fantasy sports operators or providers should be required to maintain security of patron account information;

ii. Fantasy sports operators or providers should be required to establish a complaint mechanism for account dispute resolution; and

iii. The regulatory oversight agency should be provided authority to establish requirements of internal controls as deemed necessary to protect the patron and the patron's accounts.

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[96] Press of Atlantic City New Jersey on hunt for online gambling violators http://www.pressofatlanticcity.com/news/breaking/new-jersey-on-hunt-for-online-gambling-violators/article_a6bd600e-67bc-11e4-a917-735481be0cf2.html

[97] Player complaints, generally, are determined where the provider of daily fantasy sports is headquartered. See DraftKings.com Arbitration, Consent to Jurisdiction in Massachusetts, Attorney's Fees https://www.draftkings.com/help/terms; FanDuel.com Binding arbitration and class action waiver https://www.fanduel.com/terms

[98] 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts Section 34.16 Consumer Complaint Procedures http://www.mass.gov/ago/consumer-resources/consumer-information/dfs/final-3-25-dfs-regulation.pdf

C. Mitigation of Criminal Element Risks

Maintaining safeguards to prevent criminal activity in connection with fantasy sports, like with casino activity, is vital to the public trust of the gaming product and requires a multi-layered approach to mitigate risks to the greatest extent possible. Currently the Board requires licensed casino operators to implement a strong set of internal controls which are designed to assure financial integrity within the operation. Generally, as described in more detail in Item 9 (below), the internal controls focus on maintenance of accounting records, audit protocols, recordation of documents, and the filing of certain financial reports, financial statements and other relevant documents to assure the financial propriety of the business. The implementation of similar internal control requirements for providers of fantasy sports offerings would be a vital component of preventing financial criminal activity.

Providers of Fantasy Sports contests should also be required to monitor levels of play and deposits on account and report to the regulatory agency and appropriate state or federal law enforcement authorities all participant activity requiring a Suspicious Activity Report - Casino (SARC) as required under 31 CFR 1021.320 (relating to reports by casinos of suspicious transactions).

Additionally, the Board suggests the implementation of a licensing scheme for providers and their owners and persons who exercise control and management of the fantasy sports operation. Licensing should only occur after background investigations of each individual including a criminal history and financial background review of those in ownership and control positions.

The Board also suggests that provision be made to require providers of fantasy sports products in Pennsylvania to either 1) establish and maintain a remote centralized monitoring system in Harrisburg for the purpose of the regulatory oversight agencies having the ability to monitor the computerized fantasy sports operating systems as a tool to guard against criminal activity; or 2) require a dual monitoring system which records all play at a casino site in Pennsylvania if the Fantasy sports are operated through a licensed casino entity.

In addition, all operators, regardless of location should be required to maintain a digital and hard copy of all relevant records as determined by the regulatory oversight agency at a secure, physical location in Pennsylvania and

made available for inspection and copying as determined necessary for the assurance of the integrity of the game and the detection of potential criminal activity.

8. SAFEGUARDS AND MECHANISMS TO ENSURE THE REPORTING OF GAMBLING WINNINGS AND FACILITATE THE COLLECTION OF APPLICABLE FEDERAL AND STATE TAXES IN COMPLIANCE WITH FEDERAL AND STATE LAW

All providers of Fantasy Sports contests should be required to provide State and Federal revenue authorities with reports relating to revenues of the fantasy sports provider as well as winnings of participants requiring the issuance of IRS form 1099-G.

Currently the Board requires licensed casino operators to properly report and/or collect State and Federal taxes through the implementation of strict internal controls, and follow up for compliance with the internal controls through periodic audits by the Board's Bureau of Gaming Operations.

The areas of internal controls relevant to this topic and which are set forth in Chapter 465a of the Board's regulations provide for the maintenance of accounting records, audit protocols, recordation of documents and forms, the filing of certain financial reports, the auditing of financial statements, the submission of SEC required documents and statements, the filing of SARC forms with the Board's Bureau of Investigation and Enforcement, as well as for the retention and storage of various records for future investigative purposes.

The mechanism to ensure the reporting of gambling winnings and facilitate the collection of applicable federal and state taxes in compliance with federal and state law with respect to fantasy sports would not vary substantially from that currently required of land-based casinos through the Board's regulations. The most important tool to the regulatory oversight agency in this situation would be for the grant of broad discretionary authority to the agency both in terms of its ability to craft temporary regulations and to prescribe the types of documentation and information required by the agency.

9. RECOMMENDATIONS FOR LEGISLATIVE ACTION

The General Assembly is presented with three distinct options with respect to fantasy sports. First, fantasy sports can be declared to be illegal gambling in Pennsylvania. Should the General Assembly pursue this route, the play of fantasy sports will be forbidden and there would be no further recommendations.

Second, the General Assembly could decide to do nothing in regard to fantasy sports and the play will continue as is, unabated. In that case, the Commonwealth will certainly miss out on revenues from licensing fees as well some amount of taxation of fantasy sports providers' revenues as well as winnings by participants. More importantly, however, fantasy sports will continue to be conducted without State-required regulatory safeguards for players including in the areas of accounting and internal controls, account security, and compulsive and problem gaming initiatives.

Finally, the General Assembly can determine to pass legislation to regulate providers of fantasy sports in Pennsylvania. Should the General Assembly decide to pursue a statutory regulatory scheme for fantasy sports, the Board highlights below some of the considerations to be taken into account in proposing any legislation on this topic.

A. Who should regulate fantasy sports?

Should fantasy sports be regulated under statute, the General Assembly would have to designate a state agency with regulatory authority. As discussed in more detail below, if the Gaming Control Board is designated as the regulatory oversight body, then it would be reasonable to require fantasy sports to be operated through an existing casino licensee. Much as is contemplated with internet gaming, existing casinos, which maintain a substantial physical presence in Pennsylvania, could offer fantasy sports through their websites as another gaming amenity. The in-state presence coupled with familiarity and submission to the Board's jurisdiction creates a more easily regulated gaming offering.

On the other hand, if fantasy sports were to be operated independently from the casinos, there would not be the same logical nexus for the Gaming Control Board to be the regulatory body. Other agencies such as the Department of Revenue which currently collects taxes and oversees other gaming such as small

games of chance and the Pennsylvania Lottery could perform that same function. Ultimately this is a legislative decision.

B. Who should operate fantasy sports in Pennsylvania?

Currently, fantasy sports are conducted in Pennsylvania through the internet directly by the fantasy sports operators, i.e. DraftKings, FanDuel, ESPN, Yahoo, CBS and others. The General Assembly could opt to continue to have those operators provide fantasy sports contests as in their current form and simply require licensing of the operators and payment of Pennsylvania taxes by the operator. A negative to this out-of-state operator model is that there is no in-state presence for regulatory purposes, and no clear mechanism for payment of the regulatory costs associated with regulatory oversight.

An alternative model could provide that fantasy sports contests run through the existing brick-and-mortar casino licensees with the on-line operator contracting with the casino as a gaming service provider. The contests would be accessed through a link on the casinos' websites. This model would be very similar to that discussed in connection with HB 649 and proposals for internet gaming. Moreover, the licensed casino operator would be readily accessible to Board staff for inquiries and complaint resolution through the casino which, as in the on-line gambling context, has much at risk to assure that the contests are operated in accordance with regulatory expectations.

C. License fees and taxes

The General Assembly also would be called upon to establish a license fee and to address any tax rate for fantasy sports. The appropriate dollar point to set those two rates is difficult to determine in today's unregulated market as little is known about the profit margin in the business operation of fantasy sports. Indiana and Virginia, the two states which just recently enacted regulatory laws for fantasy sports, established an initial $50,000 license fee. In addition, Indiana has a $5,000 annual renewal fee. The Fantasy Sports Trade Association has expressed concern over the licensing fee as it would be difficult for many operators to afford. One article indicates that Star Fantasy Leagues had indicated it would leave Virginia

due to the size of the fee.[99, 100]

Of significance is that neither Indiana nor Virginia established a tax rate on fantasy sports revenues. As such, it appears that fantasy sports providers and operators would currently pay corporate income tax and not other taxes on revenues as experienced with commercial gambling enterprises. Should Pennsylvania regulate fantasy sports, the General Assembly would need to determine if the revenues would be taxed as well as an appropriate tax rate. Without further insight as to the actual fantasy sports business models and profit margins for fantasy sports providers and operators, there is sufficient uncertainty on this issue such that the Board takes no position currently as to an appropriate licensing fee or tax rate.

D. Prohibition on provider employee play

The September 2015 news reports of a DraftKing employee winning on FanDuel by using alleged insider information highlights an area where strict regulation is needed in order to promote integrity in the game. The Board suggests that the General Assembly prohibit any officials, officers and employees of a fantasy sports provider or operator from eligibility to establish an account and participate in fantasy sports gaming.

E. Prohibition on athlete participation in same sport

As with the concerns of fantasy sports employees using inside information to alter the fairness of the games, so too could the participation of an athlete in a fantasy sports contest involving the same sport the athlete participates in have a deleterious effect on the integrity of the contest. As such, it is recommended that professional athletes not be permitted to participate in fantasy sports contests involving the same sport in which the athlete participates.

[99] See http://www.legalsportsreport.com/8915/ftsa-pushes-back-on-dfs-fees/

[100] The Small Business Fantasy Sports Trade Association (SBFSTA) has been formed out of concern that high licensing fees will drive small fantasy sports operators out of business and create a "duopoly that serves only FanDuel and DraftKings." See www.sbfsta.org

F. Prohibition on play by persons under the age of 21

As highlighted at length in Item 6, above, the Board advocates that any legislation establish the age to play fantasy sports contest which includes an entry fee and prize payout be limited to persons age 21 and older.

G. Prohibition of computer or electronic device selected teams

Two issues appear to arise in the context of using computer scripts or algorithms or electronic devices as instruments to pick teams for Daily or Weekly fantasy sports contests. First, advocates of the legality of fantasy sports often tout the mantra that fantasy sports are games of skill utilizing the participant's skill in picking players. If players are selected by computer or at least influenced substantially by electronic analysis, the level of skill of the participant is diminished and the game becomes more predominated by chance than skill of the player. Second, the use of electronic devices to sort information, analyze and pick or assist in picking teams 1) places other players at a significant disadvantage and 2) permits the electronically-enhanced participant to enter hundreds or thousands of lineups into the same contest, thus virtually assuring a winning team at the expense of the ordinary player. This latter issue accounts in large part for the statistics cited in Section III, above, that the top 1 percent of players paid 40% of the entry fees but reaped 91% of the profits by the use of computer scripts selecting teams for the participant.

To create a more level playing field and protect the Pennsylvania consumer of fantasy sports, the Board suggests that the legislature consider limiting the ability of fantasy sports providers from accepting team selections for contests which have been selected by a computer or other electronic device. Alternatively, or in addition, the General Assembly could consider limiting the number of entries a participant could have in any one tournament as a means to prevent a single participant from mass entries to essentially stack the team against more novice participants.

H. Broad discretionary authority to regulate the industry must be provided

Finally, because the fantasy sports industry is relatively new and has been changing and adapting to new games and strategies at a feverish pace, it is imperative that the regulatory oversight agency which is designated to oversee the industry be given broad discretionary powers and authority to craft regulations as it deems necessary to provide adequate safeguards, and to do so expeditiously to meet the ever-changing technological advances upon which the industry depends for success. To this end, the authority to promulgate temporary regulations is vital.

Appendix A

PROFESSIONAL AND AMATEUR SPORTS PROTECTION

From Title 28—JUDICIARY AND JUDICIAL PROCEDUREPART VI—PARTICULAR PROCEEDINGSCHAPTER 178—PROFESSIONAL AND AMATEUR SPORTS PROTECTION
Sec.

§3701. Definitions

For purposes of this chapter—

(1) the term "amateur sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means—

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

Effective Date

Pub. L. 102–559, §3, Oct. 28, 1992, 106 Stat. 4229, provided that: "This Act [enacting this chapter and provisions set out as a note under section 1 of this title] shall take effect on January 1, 1993."

§3702. Unlawful sports gambling

It shall be unlawful for—

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

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

§3703. Injunctions

A civil action to enjoin a violation of section 3702 may 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.

§3704. Applicability

(a) Section 3702 shall not apply to—

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both—

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that—

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year

period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

References in Text

The effective date of this chapter, referred to in subsec. (a)(3)(A), is Jan. 1, 1993, see section 3 of Pub. L. 102–559, set out as an Effective Date note under section 3701 of this title.

Appendix B

31 U.S. Code § 5361 - Congressional findings and purpose

(a)Findings.—Congress finds the following:

(1)

Internet gambling is primarily funded through personal use of payment system instruments, credit cards, and wire transfers.

(2)

The National Gambling Impact Study Commission in 1999 recommended the passage of legislation to prohibit wire transfers to Internet gambling sites or the banks which represent such sites.

(3)

Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry.

(4)

New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.

(b)Rule of Construction.—

No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.

31 U.S. Code § 5362 - Definitions

(1)Bet or wager.—The term "bet or wager"—

(A)

means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome;

(B)

includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance);

(C)

includes any scheme of a type described in section 3702 of title 28;

(D)

includes any instructions or information pertaining to the establishment or movement of funds by the bettor or customer in, to, or from an account with the business of betting or wagering; and

(E) does not include—

(i)

any activity governed by the securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934 [1] for the purchase or sale of securities (as that term is defined in section 3(a)(10) of that Act);

(ii)

any transaction conducted on or subject to the rules of a registered entity or exempt board of trade under the Commodity Exchange Act;

(iii)

any over-the-counter derivative instrument;

(iv) any other transaction that—

(I)

is excluded or exempt from regulation under the Commodity Exchange Act; or

(II)

is exempt from State gaming or bucket shop laws under section 12(e) of the Commodity Exchange Act or section 28(a) of the Securities Exchange Act of 1934;

(v)

any contract of indemnity or guarantee;

(vi)

any contract for insurance;

(vii)

any deposit or other transaction with an insured depository institution;

(viii) participation in any game or contest in which participants do not stake or risk anything of value

other than—

(I)

personal efforts of the participants in playing the game or contest or obtaining access to the Internet; or

(II)

points or credits that the sponsor of the game or contest provides to participants free of charge and that can be used or redeemed only for participation in games or contests offered by the sponsor; or

(ix) 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 (as those terms are defined in section 3701 of title 28) 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 accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based—

(aa)

on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb)

solely on any single performance of an individual athlete in any single real-world sporting or other event.

(2)Business of betting or wagering.—

The term "business of betting or wagering" does not include the activities of a financial transaction provider, or any interactive computer service or telecommunications service.

(3)Designated payment system.—

The term "designated payment system" means any system utilized by a financial transaction provider that the Secretary and the Board of Governors of the Federal Reserve System, in consultation with the Attorney General, jointly determine, by regulation or order, could be utilized in connection with, or to facilitate, any restricted transaction.

(4)Financial transaction provider.—

The term "financial transaction provider" means a creditor, credit card issuer, financial institution, operator of a terminal at which an electronic fund transfer may be initiated, money transmitting business, or international, national, regional, or local payment network utilized to effect a credit transaction, electronic fund transfer, stored value product transaction, or money transmitting service, or a participant in such network, or other participant in a designated payment system.

(5)Internet.—

The term "Internet" means the international computer network of interoperable packet switched data networks.

(6)Interactive computer service.—

The term "interactive computer service" has the meaning given the term in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f)).

(7)Restricted transaction.—

The term "restricted transaction" means any transaction or transmittal involving any credit, funds, instrument, or proceeds described in any paragraph of section 5363 which the recipient is prohibited from accepting under section 5363.

(8)Secretary.—

The term "Secretary" means the Secretary of the Treasury.

(9)State.—

The term "State" means any State of the United States, the District of Columbia, or any commonwealth, territory, or other possession of the United States.

(10)Unlawful internet gambling.—

(A)In general.—

The term "unlawful Internet gambling" means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.

(B)Intrastate transactions.—The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where—

(i)

the bet or wager is initiated and received or otherwise made exclusively within a single State;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and placed in accordance with the laws of such State, and the State law or regulations include—

(I)

age and location verification requirements reasonably designed to block access to minors and persons located out of such State; and

(II)

appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with such State's law or regulations; and

(iii) the bet or wager does not violate any provision of—

(I)

the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II)

chapter 178 of title 28 (commonly known as the "Professional and Amateur Sports Protection Act");

(III)

the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV)

the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(C)Intratribal transactions.—The term "unlawful Internet gambling" does not include placing, receiving, or otherwise transmitting a bet or wager where—

(i) the bet or wager is initiated and received or otherwise made exclusively—

(I)

within the Indian lands of a single Indian tribe (as such terms are defined under the Indian Gaming Regulatory Act); or

(II)

between the Indian lands of 2 or more Indian tribes to the extent that intertribal gaming is authorized by the Indian Gaming Regulatory Act;

(ii) the bet or wager and the method by which the bet or wager is initiated and received or otherwise made is expressly authorized by and complies with the requirements of—

(I)

the applicable tribal ordinance or resolution approved by the Chairman of the National Indian Gaming Commission; and

(II)

with respect to class III gaming, the applicable Tribal-State Compact;

(iii) the applicable tribal ordinance or resolution or Tribal-State Compact includes—

(I)

age and location verification requirements reasonably designed to block access to minors and persons located out of the applicable Tribal lands; and

(II)

appropriate data security standards to prevent unauthorized access by any person whose age and current location has not been verified in accordance with the applicable tribal ordinance or resolution or Tribal-State Compact; and

(iv) the bet or wager does not violate any provision of—

(I)

the Interstate Horseracing Act of 1978 (15 U.S.C. 3001 et seq.);

(II)

chapter 178 of title 28 (commonly known as the "Professional and Amateur Sports Protection Act");

(III)

the Gambling Devices Transportation Act (15 U.S.C. 1171 et seq.); or

(IV)

the Indian Gaming Regulatory Act (25 U.S.C. 2701 et seq.).

(D) Interstate horseracing.—

(i)In general.—

The term "unlawful Internet gambling" shall not include any activity that is allowed under the Interstate

Horseracing Act of 1978 (15 U.S.C. 3001 et seq.).

(ii)Rule of construction regarding preemption.—

Nothing in this subchapter may be construed to preempt any State law prohibiting gambling.

(iii)Sense of congress.—

It is the sense of Congress that this subchapter shall not change which activities related to horse racing may or may not be allowed under Federal law. This subparagraph is intended to address concerns that this subchapter could have the effect of changing the existing relationship between the Interstate Horseracing Act and other Federal statutes in effect on the date of the enactment of this subchapter. This subchapter is not intended to change that relationship. This subchapter is not intended to resolve any existing disagreements over how to interpret the relationship between the Interstate Horseracing Act and other Federal statutes.

(E)Intermediate routing.—

The intermediate routing of electronic data shall not determine the location or locations in which a bet or wager is initiated, received, or otherwise made.

(11) Other terms.—

(A)Credit; creditor; credit card; and card issuer.—

The terms "credit", "creditor", "credit card", and "card issuer" have the meanings given the terms in section 103 of the Truth in Lending Act (15 U.S.C. 1602).

(B)Electronic fund transfer.—The term "electronic fund transfer"—

(i)

has the meaning given the term in section 903 of the Electronic Fund Transfer Act (15 U.S.C. 1693a), except that the term includes transfers that would otherwise be excluded under section 903(6)(E) of that Act; and

(ii)

includes any fund transfer covered by Article 4A of the Uniform Commercial Code, as in effect in any State.

(C)Financial institution.—

The term "financial institution" has the meaning given the term in section 903 of the Electronic Fund Transfer Act, except that such term does not include a casino, sports book, or other business at or through which bets or wagers may be placed or received.

(D)Insured depository institution.—The term "insured depository institution"—

(i)

has the meaning given the term in section 3(c) of the Federal Deposit Insurance Act (12 U.S.C. 1813(c)); and

(ii)

includes an insured credit union (as defined in section 101 of the Federal Credit Union Act).

(E)Money transmitting business and money transmitting service.—

The terms "money transmitting business" and "money transmitting service" have the meanings given the terms in section 5330(d) (determined without regard to any regulations prescribed by the Secretary

thereunder).

Appendix C

spend on athletes for the creation of a fantasy sports team.[2] The prizes are known in advance of the playing of the actual games, and the prize values do not change based on the number of entries in a particular contest. Participants earn fantasy points based on the statistical performance of the athletes in the actual games. Depending on the athletes' overall performance, participants may win a share of the predetermined prize. Entry fees help fund prizes, with a portion of the fees also going to the appropriate Contest Organizer. Complaint for Declaratory and Injunctive Relief at 5-6, *FanDuel, Inc. v. Schneiderman*, No. 161691/2015 (N.Y. Sup. Ct., New York County); Verified Petition at 7-8, *DraftKings, Inc. v. Schneiderman*, No. 102014/2015 (N.Y. Sup. Ct., New York County).

ANALYSIS

The Contest Organizers have suggested that their daily fantasy sports contests are authorized under Federal law. The Professional and Amateur Sports Protection Act (PASPA) (28 U.S.C. §3701 *et seq.* (2012)), which was enacted in 1992, makes it unlawful for "a person to sponsor, operate, advertise, or promote * * * a lottery, sweepstakes, or other betting, gambling, or wagering scheme based * * * on one or more competitive games in which amateur or professional athletes participate[.]" 28 U.S.C. §3702 (2012). However, the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 U.S.C. §5361 *et seq.* (2012)) was enacted after

[2] *See* FanDuel Website, *available at* https://www.fanduel.com/how-it-works; DraftKings Website, *available at* https://draftkings.com/help/how-to-play. Both FanDuel and DraftKings offer free "contests." However, this opinion addresses only those contests in which participants pay an entry fee.

PASPA's passage and prohibits any person engaged in the business of "betting" from knowingly accepting credit, electronic fund transfers, checks, or any other payment involving a financial institution to settle unlawful internet gambling debts. 31 U.S.C. §5363 (2012). The UIGEA excludes from the definition of "bet or wager" the participation in any fantasy sports game where: (1) all prize amounts are made known before the contest begins; (2) all winning outcomes are based on the relative skill and knowledge of the participants; and (3) no winning outcome is based on the scores or performance of a single, real world event or the performance of any real world team. 31 U.S.C. §5362(1)(E)(ix) (2012). The UIGEA specifically provides, however, that "[n]o provision of this subchapter shall be construed as * * * limiting * * * State law * * * or regulating gambling within the United States." 31 U.S.C. §5361(b) (2012). The UIEGA thus leaves to each state the authority to determine whether daily fantasy sports contests which fall under the UIEGA's requirements constitute illegal gambling.

In that regard, the online Terms of Use for FanDuel provide that individuals who are physically located in Arizona, Iowa, Louisiana, Montana, Nevada, New York, or Washington are not eligible to participate in contests. FanDuel Website, *available at* https://www.fanduel.com/terms. Similarly, the online Terms of Use for DraftKings provide that legal residents physically located in the foregoing states, with the exception of New York, are ineligible to participate in contests. DraftKings Website, *available at* https://www.draftkings.com/help/terms. It appears that the excluded states have gambling statutes that either expressly prohibit fantasy

sports gambling (Mont. Code Ann. §23-5-802 (2015), *available at* http://leg.mt.gov/bills/mca/23/5/23-5-802.htm) or internet gambling (La. Rev. Stat. §14:90.3 (2015), *available at* http://www.legis.la.gov/legis/LawSearch.aspx; Wash. Rev. Code §9.46.240 (2015), *available at* http://apps.leg.wa.gov/RCW/default.aspx?cite=9.46.240) or have been construed by State enforcement authorities to prohibit fantasy sports contests (*see* Ariz. Att'y Gen. Op. No. I98-002, issued January 21, 1998 (concluding that fantasy football constitutes gambling under Arizona law); Memorandum from J. Brin Gibson, Bureau Chief of Gaming and Government Affairs and Ketan D. Bhirud, Head of Complex Litigation, Office of the Nevada Attorney General, to A.G. Burnett, Chairman, Nevada Gaming Control Board, Terry Johnson, Member, Nevada Gaming Control Board, and Shawn Reid, Member, Nevada Gaming Control Board (October 16, 2015) (concluding that daily fantasy sports constitute sports pools and gambling games under Nevada law and therefore cannot be offered in Nevada without first obtaining a gaming license)).[3] *See also* 86th Iowa Gen. Assem., Senate File 166, 2015 Sess. (pending legislation proposing to add "Fantasy or Simulation Sports Contests" to the list of lawful *bona fide* contests).

[3]Additionally, on November 10, 2015, the New York Attorney General's Office issued cease and desist letters to FanDuel and DraftKings, asserting that their operations constitute illegal gambling under New York law. *See* Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Jason Robins, Chief Executive Officer, DraftKings, Inc. (November 10, 2015); Letter from Kathleen McGee, Chief, Internet Bureau, Office of the New York Attorney General, to Nigel Eccles, Chief Executive Officer, FanDuel Inc. (November 10, 2015). That matter is currently in litigation. *See* note 10.

In Illinois, the legality of daily fantasy sports is a matter of first impression.[4] The Criminal Code prohibits the playing of both "games of chance or skill for money[.]" Specifically, subsection 28-1(a) of the Criminal Code (720 ILCS 5/28-1(a) (West 2014)) defines the offense of gambling and provides, in pertinent part:

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[4]There is one decision from a Federal district court in Illinois addressing daily fantasy sports contests. In *Langone v. Kaiser*, the plaintiff brought a claim under section 28-8 of the Illinois Loss Recovery Act (720 ILCS 5/28-8 (West 2012)) seeking, in part, to recover money from FanDuel and from an Illinois resident that a third party allegedly lost to in a daily fantasy sports contest hosted by FanDuel. The court determined that "[t]he relevant question for the purposes of the Loss Recovery Act is not whether FanDuel's activity is illegal; the question is whether FanDuel is 'the winner' with respect to any particular 'loser.'" *Langone*, 2013 WL 5567587, at *7. The court held that because FanDuel does not risk its own money on the contests, it cannot be a winner or a loser under the Loss Recovery Act. Because the court specifically declined to address whether daily fantasy sports contests constitute illegal gambling under Illinois law, the case has no bearing on the instant inquiry.

We are also aware of four lawsuits pending in the Federal courts in Illinois involving DraftKings and/or FanDuel. *Izsak v. DraftKings, Inc.*, No. 14-cv-7952 (N.D. Ill. (2014)) (A class action alleging that DraftKings violated the Federal Telephone Consumer Protection Act (47 U.S.C. §227 *et seq.* (2012)) by sending unsolicited text messages to the cell phones of the plaintiff and the class members.); *Hemrich v. DraftKings, Inc.*, No. 3:15-cv-445 (S.D. Ill. (2015)) (A class action alleging that DraftKings violated the Illinois consumer fraud statute (815 ILCS 505/1 *et seq.* (West 2014)) and Missouri law by misleading consumers into believing that their initial deposit would be doubled through a "100% First-Time Deposit Bonus" and seeking money damages in the amounts of the doubled first-time deposits that the plaintiffs did not receive. The complaint specifically alleges that "DraftKings' business is a legal one under United States law[,]" citing the Unlawful Internet Gambling Enforcement Act of 2006 (31 U.S.C. §5362(1)(E)(ix) (2012). *Hemrich* Complaint at 4, ¶18.); *Guarino v. DraftKings, Inc. and FanDuel, Inc.*, No. 3:15-cv-1123 (S.D. Ill. (2015)) (A class action alleging that DraftKings and FanDuel fraudulently induced plaintiff and the class members into paying money to participate by claiming the games were fair games of skill without the potential for insiders to use non-public information to compete against them when, in fact, the defendants willfully failed to disclose that employees of DraftKings and FanDuel had valuable, non-public data and would use this information to compete against plaintiff and the class members. The complaint seeks a full refund for all of the money paid to the defendants by the class members, damages and restitution, or other equitable relief. As part of the allegations, the complaint states that daily fantasy sports contests are "not gambling because of the skill involved in picking a winning team." *Guarino* Complaint at 6, ¶ 29.); *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. (2015)) (A class action brought on behalf of a plaintiff who participated in DraftKings' contests and lost money and others similarly situated. The complaint alleges that DraftKings' daily fantasy sports contests are illegal gambling under Illinois law and seeks an order requiring DraftKings to disgorge all of the money wagered and lost by the plaintiff and the class members.). Only the *Stoddart* case raises the question of whether daily fantasy sports contests violate Illinois criminal law. The court has not reached that issue, however. The case is currently subject to an Order to Stay proceedings, pending the resolution of a Multidistrict Litigation transfer motion. Order, *Stoddart v. DraftKings, Inc.*, No. 3:15-cv-1307 (S.D. Ill. December 16, 2015).

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(a) A person commits gambling when he or she:

(1) knowingly plays a game of chance or skill for money or other thing of value, unless excepted in subsection (b) of this Section;

* * *

(12) knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet. This item (12) does not apply to activities referenced in items (6) and (6.1) of subsection (b) of this Section.[5]

Subsection 28-1(b) of the Criminal Code (720 ILCS 5/28-1(b) (West 2014)) exempts certain activities from the general prohibition on gambling. The Contest Organizers contend that the following exception applies to the daily fantasy sports contests they offer:

(b) Participants in any of the following activities shall not be convicted of gambling:

* * *

(2) Offers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest.

[5]Subsections 28-1(b)(6) and 28-1(b)(6.1) of the Criminal Code (720 ILCS 5/28-1(b)(6), (b)(6.1) (West 2014)) respectively exempt from the illegal gambling prohibitions lotteries conducted by the State of Illinois in accordance with the Illinois Lottery Law (20 ILCS 1605/1 *et seq.* (West 2014)) and the online purchase of lottery tickets for a lottery conducted by the State of Illinois under the program established in section 7.12 of the Illinois Lottery Law (20 ILCS 1605/7.12 (West 2014)).

The offense of gambling is a Class A misdemeanor under Illinois law. A second or subsequent conviction under subsections 28-1(a)(3) through (a)(12) of the Criminal Code is a Class 4 felony. 720 ILCS 5/28-1(c) (West 2014).

The primary purpose of statutory construction is to ascertain and give effect to the intent of the General Assembly. *Illinois Department of Healthcare and Family Services v. Warner*, 227 Ill. 2d 223, 229 (2008). Legislative intent is best evidenced by the language used in the statute, and where statutory language is clear and unambiguous, it must be given effect as written. *DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). One must view all of the provisions of the statute as a whole. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 422 (2002). Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute. *Land*, 202 Ill. 2d at 422. Illinois criminal statutes must be narrowly construed in favor of the accused. *People v. Williams*, 239 Ill. 2d 119, 127 (2010); *People v. Christensen*, 102 Ill. 2d 321, 328 (1984).

Subsection 28-1(a)(1) of the Criminal Code provides that a person commits the offense of gambling when he or she "knowingly plays a game of chance or skill for money[,]" unless excepted in subsection 28-1(b). The statutory language is straightforward and unequivocal. It clearly declares that *all* games of chance *or* skill, when played for money, are illegal gambling in Illinois, unless excepted. While the Contest Organizers assert that daily

fantasy sports contests are games of skill[6] rather than games of chance, that argument is immaterial because subsection 28-1(a)(1) expressly encompasses both. Moreover, participants must pay an entry fee or buy-in amount in order to win a prize. Consequently, the act of playing daily fantasy sports contests in Illinois constitutes illegal gambling under subsection 28-1(a)(1) of the Criminal Code, unless otherwise excepted.

Pursuant to subsection 28-1(a)(12) of the Criminal Code, a person also commits gambling when he or she "knowingly establishes, maintains, or operates an Internet site that permits a person to play a game of chance or skill for money or other thing of value by means of the Internet or to make a wager upon the result of any game[.]" The Contest Organizers operate websites that allow individuals to play games of chance or skill for money. Accordingly, entities which operate such contests commit the offense of gambling under Illinois law, unless otherwise excepted. *See Cie v. Comdata Network, Inc.*, 275 Ill. App. 3d 759, 764-65 (1995), *appeal denied*, 165 Ill. 2d 548 (1996) (subsection 28-1(b) exceptions apply to all gambling prohibitions in subsection 28-1(a)).

Subsection 28-1(b) of the Criminal Code sets out the only exceptions to activities that otherwise would constitute gambling under subsection 28-1(a). The Contest Organizers assert that their contests are excepted under subsection 28-1(b)(2). This subsection was included in the original enactment of article 28 of the Criminal Code of 1961 (*see* 1961 Ill. Laws 1983,

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[6]*See* FanDuel Website, *available at* https://fanduel.zendesk.com/hc/en-us/articles/210202858-Is-FanDuel-legal; DraftKings Website, *available at* https://www.draftkings.com/help/why-is-it-legal.

2033-37; Ill. Rev. Stat. 1961, ch. 38, par. 28-1 *et seq.*) and exempts "[o]ffers of prizes, award or compensation to *the actual contestants* in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest."[7] (Emphasis added.)

Reading the statute as a whole, it is clear that subsection 28-1(b)(2) applies only to the "actual contestants" in the actual sporting event.[8] In the context of daily fantasy sports, the "actual contestant" upon whose performance success or failure is based is the athlete or athletes whose "skill, speed, strength or endurance" determine the outcome. Thus, subsection 28-1(b)(2) exempts only those who actually engage in a *bona fide* contest for the determination of skill, speed, strength, or endurance, and not a daily fantasy sports contest participant who pays a fee to build a "team" and who may win a prize based on the statistical performance of particular athletes. In this regard, persons whose wagers depend upon how particular, selected athletes perform in actual sporting events stand in no different stead than persons who wager on the outcome of any sporting event in which they are not participants. None of these persons are the

[7]There is only one Illinois case which cites to this exception. In *People v. Mitchell*, 111 Ill. App. 3d 1026, 1028 (1983), the court upheld a jury's conclusion that "Hold 'em" poker was not a "bona fide contest for the determination of skill" under subsection 28-1(b)(2). The court held that the evidence supported the jury's conclusion that "the games, in fact, required a combination of skill and chance, and that they were definitely not the type of '*bona fide* contests' excepted from subsection [28-1](a)(1)." (Emphasis in original.) *Mitchell*, 111 Ill. App. 3d at 1028.

[8]The Contest Organizers have not suggested that daily fantasy sports contests involve determining the speed, strength, or endurance of the fantasy sports participants who enter the contests, nor could such a suggestion be made in good faith.

actual contestants in a *bona fide* contest for the determination of skill, speed, strength, or endurance.

This interpretation is consistent with a 1994 opinion of the Texas Attorney General's Office construing substantially similar statutory language to that found in subsection 28-1(b)(2) of the Criminal Code. Tex. Att'y Gen. Op. No. LO-94-051, issued June 9, 1994. In that opinion, the Texas Attorney General's office addressed whether a contest which requires an entry fee, pays prizes to winners, and is based on forecasting the outcomes of a number of sporting events constitute illegal gambling under Texas law.[9] The Texas Attorney General's Office concluded that the contest at issue did not fall within the gambling exception and therefore constituted illegal gambling:

> We cannot think of any distinction the words "*actual* contestants" could be intended to make other than that between those actually participating in a contest and able by their performance to affect its outcome, and those merely betting on it. Thus, while the subsection (1)(B) exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace

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[9]*See* Texas Penal Code §47.01(1)(B) (2015), *available at* http://www.statutes.legis.state.tx.us/docs/PE/pdf/PE.47.pdf, which provides, in pertinent part:

> (1) "Bet" means an agreement to win or lose something of value solely or partially by chance. A bet does not include:
>
> * * *
>
> (B) an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]

> those who pay entry fees for a chance to win a prize from forecasting the outcome of the events. (Emphasis in original.) Tex. Att'y Gen. Op. No. LO94-051 at 2.[10]

Although daily fantasy sports contests may involve some degree of skill, such as selecting an athlete for a participant's team based on knowledge of the athlete's historical

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[10]The New York Supreme Court recently made this same distinction when granting the New York Attorney General's motions to enjoin the Contest Organizers from accepting entry fees from New York State consumers for any daily fantasy sports contests which they operate, pending a final determination. *See* Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Decision and Order for Injunctive Relief, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015) (Decisions and Orders). New York law defines "gambling" as follows:

> *A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence*, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. (Emphasis added.) N.Y. Penal Law §225.00(2) (2015), *available at* http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO:.

The New York Attorney General argued that the participants paid entry fees "on events they cannot control or influence, relying on the real-game performance of professional athletes, to win a prize, which amounts to gambling" under New York law. Decisions and Orders, at 5. The New York Attorney General further argued that daily fantasy sports contests are "contests of chance" because the outcome depends substantially on chance and factors not within the participant's control, and that once a team is chosen for a contest, there is no means of altering the outcome. Decisions and Orders, at 6. The court concluded that the language of the statute "is broadly worded and as currently written sufficient for finding that DFS [daily fantasy sports] involves illegal gambling." Decisions and Orders, at 7. The Contest Organizers immediately appealed the court's decision. Notice of Appeal, *People ex rel. Schneiderman v. DraftKings, Inc.*, No. 453054/2015 (N.Y. Sup. Ct., New York County, December 11, 2015); Notice of Appeal, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015). The New York Supreme Court, Appellate Division granted an interim stay of the enforcement of the injunction against FanDuel pending a determination by a full panel. Notice of Entry of Appellate Division Interim Stay Order, *People ex rel. Schneiderman v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct., New York County, December 11, 2015).

Additionally, the Kansas Legislature recently amended its gambling statute, which contains a substantially similar exclusion for "offers of purses, prizes or premiums to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the bona fide owners of animals or vehicles entered in such a contest[,]" to also exclude "a fantasy sports league as defined in this section[.]" Kan. Stat. Ann. §§21-6403(a)(2), (a)(9) (2014), as amended by 2015 Kan. Sess. Laws 835-38, *available at* http://www.sos.ks.gov/pubs/sessionlaws/2015/2015_Session_Laws_Volume_1.pdf.

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performance, match-up against a particular opponent, performance in a particular venue, and/or performance in particular weather conditions, the phrase "actual contestants" as used in subsection 28-1(b)(2) does not apply to those persons who pay entry fees for a chance to win a prize for forecasting the performance of professional or college athletes over whom they have no control or influence. Accordingly, it is my opinion that subsection 28-1(b)(2) does not exempt daily fantasy sports contests from the Illinois gambling provisions.

CONCLUSION

It is my opinion that the daily fantasy sports contests offered by FanDuel and DraftKings clearly constitute gambling under subsection 28-1(a) of the Criminal Code of 2012 and that the exemption set forth in subsection 28-1(b)(2) of the Criminal Code does not apply.

In closing, I note that there is legislation currently pending in each chamber of the Illinois General Assembly which proposes, in part, to create a new Act – the Fantasy Contests Act – and to exempt "fantasy contests as defined under the Fantasy Contests Act" from the general prohibition against gambling. *See* 99th Ill. Gen. Assem., House Bill 4323, Senate Bill 2193, 2015 Sess.[11] Thus, it appears that a number of General Assembly members have reached this same conclusion, as they have agreed to sponsor the foregoing legislation. Absent legislation

[11]House Bill 4323 was referred to the House Rules Committee on November 9, 2015. Senate Bill 2193 was referred to the Senate Assignments Committee on November 3, 2015. Previously-filed legislation proposing to create the Daily Fantasy Sports Regulation Act contained only a short title provision and was referred to the House Rules Committee on April 14, 2015. *See* 99th Ill. Gen. Assem., House Bill 4200, 2015 Sess.

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specifically exempting daily fantasy sports contests from the gambling provisions, it is my opinion that daily fantasy sports contests constitute illegal gambling under Illinois law.

Very truly yours,

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MEMORANDUM

Date: October 16, 2015

To: A.G. Burnett, Chairman, Nevada Gaming Control Board; Terry Johnson, Member, Nevada Gaming Control Board; Shawn Reid, Member, Nevada Gaming Control Board

From: J. Brin Gibson, Bureau Chief of Gaming and Government Affairs
Ketan D. Bhirud, Head of Complex Litigation

Subject: Legality of Daily Fantasy Sports Under Nevada Law

You have requested that our Office research the legality of daily fantasy sports under the Nevada Gaming Control Act and Nevada Gaming Commission Regulations.

Pursuant to NRS 463.0199, the Office of the Nevada Attorney General serves as legal counsel to the Nevada Gaming Control Board and the Nevada Gaming Commission. In particular, the Gaming Division within the Office of the Nevada Attorney General provides legal advice to both regulatory agencies upon request. This memorandum was drafted in response to such a request made by the Nevada Gaming Control Board and is strictly a legal analysis. In developing this analysis, our division has expressly rejected any consideration regarding claims of a double standard for daily fantasy sports as measured against the regulation of traditional sports wagering, the popularity of daily fantasy sports, the general demand for daily fantasy sports products, or the existence or potential for partnerships between daily fantasy sports operators and important industries. Furthermore, while this Office recognizes that there are strong voices on both sides of the policy debate surrounding daily fantasy sports, our goal, above all, is to provide legal advice that shows complete fidelity to the law. We believe this opinion accomplishes that purpose.

QUESTION

Do daily fantasy sports constitute gambling games, sports pools, and/or lotteries under the Nevada Gaming Control Act and Gaming Commission Regulations?

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SHORT ANSWER

In short, daily fantasy sports constitute sports pools and gambling games. They may also constitute lotteries, depending on the test applied by the Nevada Supreme Court. As a result, pay-to-play daily fantasy sports cannot be offered in Nevada without licensure.[1]

ANALYSIS

I. Background

A. General Description of Fantasy Sports

Fantasy sports are 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. Fantasy sports cover a number of actual professional sports leagues, including the NFL, the MLB, the NBA, the NHL, the MLS, NASCAR, as well as college sports such as NCAA football and basketball.

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. The owners of these simulated teams compete against one another based on the statistical performance of actual players in actual games. The actual players' performance in specific sporting events is converted into "fantasy points" such that each actual player is assigned a specific score. An owner will then receive a total score that is determined by compiling the individual scores of each player in the owner's lineup. Thus, although the owners select lineups, once the lineup has been selected—at least in the context of daily fantasy sports—the owners have basically no ability to control the outcome of the

[1] This conclusion—that daily fantasy sports are gambling—is consistent with how operators of certain daily fantasy sports describe themselves. For example, Jason Robins (the owner, co-founder, and CEO of DraftKings) stated that the concept for DraftKings.com was "almost identical to a casino." Mr. Robins made these comments on Reddit.com, which is an entertainment, social networking, and news website where registered community members can submit content, such as text posts or direct links, making it essentially an online bulletin board system. The website contains a section titled "/r/IAma," which generally translates to "ask me anything." On the thread that he started, Mr. Robins engages in an online discussion about how he and two friends started DraftKings, Inc. *See* https://www.reddit.com/r/IAmA/comments/x5zm/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/. Similarly, DraftKings' has applied for and received licenses to operate in the United Kingdom. http://www.prnewswire.com/news-releases/draftkings-announces-international-expansion-300129047.html . Although there is no question that the gambling laws of the United Kingdom and Nevada are fundamentally different, it is still noteworthy that the licenses in question are for "pool betting" and "gambling software," and that DraftKings does not include either of those terms in its press release. Instead, DraftKings simply states that "the company has been granted a license to operate in the United Kingdom," without identifying the licenses at issue. It appears that DraftKings recognizes the appearance of inconsistency between its position that it should be unregulated in the United States and its decision to submit to gaming regulation in the United Kingdom.

simulated games.[2] Specifically, the owners of the simulated teams have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner has no ability to influence the outcome of a simulated game. At that point, the owner waits to see what happens based upon the performance of the actual players selected.

B. Player Selection

The three most common methods of player selection in fantasy sports are (1) a snake draft; (2) an auction draft; and (3) a salary-cap draft.[3] In a snake draft, owners take turns drafting actual players for their simulated teams. In an auction draft, each owner has a maximum budget to use to bid for players. Competing owners, however, cannot select the same actual players for their simulated teams as other owners. Daily fantasy sports do not generally utilize a snake draft or an auction draft.

In a salary-cap draft, just like in an auction draft, each owner has a maximum budget. Unlike in an auction draft, however, the owners do not bid against each other. Instead, each actual player has a set fantasy salary. Although (with a few exceptions)[4] the owners can select any actual player for their teams, the owners cannot exceed their maximum budget. In this format, generally speaking, competing owners can select the same actual players for their simulated teams as other owners.

C. Types of Simulated Games

Although there are many different types of simulated games offered across the different daily fantasy websites, the simulated games can generally be divided into (1) head-to-head; and (2) tournaments.

In head-to-head simulated games, one owner competes against another owner. The owner with the highest total score will win the entire payout pool.

Tournaments are simulated games that involve more than two owners. Although there are theoretically many different kinds of tournaments, the most common are (1) 50/50; (2) double-up; (3) triple-up/quadruple-up/quintuple-up/etc.; and (4) top-X.

Although 50/50 and double-up simulated games are very similar (and some sites use the terms interchangeably), they are not necessarily identical. In a traditional 50/50 simulated game, an owner's goal is to end up in the top half of total scores. Owners who finish in the top half will equally split the payout pool. As a result, half the owners will lose their entry fee and half the owners will win. The winning owners, however, will not actually "double" their entry fee because the site operator will take a "rake"[5] from every owner who participates. For example,

[2] Given that lineups on some sites do not "lock" until the start of each individual game, the owners have until the tipoff of each individual game to set each particular lineup spot.

[3] Because it is not relevant to daily fantasy sports, dynasty and keeper league options are not discussed.

[4] For example, most sites require owners to select actual players from at least three different actual teams.

[5] A rake is a fee taken by an operator of a game.

in a 100 person, 50/50 simulated game with a $10 entry fee, the 50 highest scoring owners would receive $18, the 50 lowest scoring owners would receive $0, and the site operator would receive $100 as a rake. By contrast, in a double-up simulated game, the site operator might allow 110 owners into the simulated game, while only paying the owners with the top 50 scores. In that scenario, an owner finishing in the top 50 scores would receive $20, an owner finishing in the bottom 60 scores would receive $0, and the operator would take a $100 rake.

Triple-up, quadruple-up, and quintuple-up simulated games are similar to double-up simulated games, except that instead of the opportunity to double their money, the owners have the opportunity to triple, quadruple, or quintuple their money. For example, in a triple-up league, the top third splits the payout pool; in a quadruple-up league, the top fourth splits the payout pool; and in a quintuple-up league, the top fifth of the league splits the payout pool. Similar to a double-up simulated game, site operators generally will pay less than one-third, one-fourth, or one-fifth of the total wagers placed, respectively.

In a top-X simulated game, which can consist of up to thousands of owners, the owners finishing with a total score in the top-X (top 1, top 2, top 3, etc.) will split the payout pool (either evenly or with progressively more based on how high they finish). For example, in a 100 person, top 3 simulated game with a $10 entry fee, the first place finisher might receive $500, the second place finisher might receive $300, the third place finisher might receive $100, and the operator would take a $100 rake.

D. Guaranteed and Non-Guaranteed Simulated Games

Daily fantasy sports operators often offer both simulated games that are guaranteed and simulated games that are non-guaranteed. If a simulated game is guaranteed, the winners will be paid out regardless of how many owners enter the simulated game. If a simulated game is non-guaranteed, the simulated game will be cancelled unless a certain number of owners participate. If a non-guaranteed simulated game is cancelled, the entry fees will be fully refunded.

II. Preliminary Discussion

A. Determinations of Skill Versus Chance Under Nevada Law

In the context of addressing the legality of fantasy sports, the question of whether skill or chance is involved is often deemed important. However, under Title 41 of the Nevada Revised Statutes, the determination of whether an activity involves skill, chance, or some combination of the two, is relevant only when analyzing lotteries. By contrast, 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. This distinction was made crystal clear by the passage of Senate Bill (SB) 9 during the 2015 Nevada Legislative Session, which distinguishes between games of skill, games of chance, and hybrid games of both skill and chance, while recognizing that all three are gambling games.

1. Lottery

Nevada Revised Statute 462.105(1) defines "lottery" as follows:

> 1. Except as otherwise provided in subsection 2, "lottery" means <u>any scheme for the disposal or distribution of property, by chance, among persons who have paid or promised to pay any valuable</u>

> consideration for the chance of obtaining that property, or a portion of it, or for any share or interest in that property upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle or gift enterprise, or by whatever name it may be known.[6]

Accordingly, there are three essential elements for a lottery: (1) prize; (2) chance; and (3) consideration. If any one of these elements is missing, the activity does not qualify as a lottery.

The case of *Las Vegas Hacienda, Inc. v. Gibson*, 77 Nev. 25, 359 P.2d 85 (1961) provides some guidance as to when the element of chance would be satisfied. *Gibson* involved an "offer to pay $5,000 to any person who, having paid 50 cents for the opportunity of attempting to do so, shot a hole in one on its golf course."[7] In that case, where the central question was whether the transaction involved gambling, the Nevada Supreme Court concluded—using a definition of "wager" that is different than what is in our statutes today—that a gaming transaction was not present. After doing so, the Court, in *dicta*, provided a test for determining whether a game is one of chance or skill: "The test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element."[8] This test is commonly known as the "dominant factor test."

Assuming the Nevada Supreme Court were to apply the same test that it outlined in *dicta* in *Gibson*, a game where skill is the dominant factor would not constitute a lottery. That being said, *Gibson* involved a situation where the alleged gamblers ***directly controlled*** the outcome of the event. They were the participants in the underlying sporting event. By contrast, 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. As a result, it is unclear whether a determination of skill versus chance is necessary in determining whether daily fantasy sports are lotteries.

2. Senate Bill 9

Senate Bill 9, which was passed during the 2015 Nevada Legislative Session, explicitly authorizes the Nevada Gaming Commission to adopt regulations, applicable to gaming devices, that "define and differentiate between the requirements for and the outcomes of a game of skill, a game of chance and a hybrid game." Senate Bill 9 further provides definitions for a "game of skill"[9] and a "hybrid game."

Importantly, Senate Bill 9 does not comment on or address whether games of skill fall within the Gaming Control Act. Rather, it starts from the premise that they do. To the extent

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[6] (Emphasis added).
[7] *Gibson*, 77 Nev. at 27, 359 P.2d at 86.
[8] *Id.* at 30, 359 P.2d at 87.
[9] "Game of skill" for the purposes of Senate Bill 9 is defined as "a game in which the skill of the player, rather than chance, is the dominant factor in affecting the outcome of the game as determined over a period of continuous play." With this definition, the Nevada Legislature has arguably codified the "dominant factor test" as articulated in *Gibson*, although, as noted, such a test will have limited applicability in the context of the Gaming Control Act.

there was any doubt whether Nevada regulators had jurisdiction over gambling games that incorporate skill in determining their outcome, Senate Bill 9 extinguishes that doubt.

3. Gambling Games and Sports Pools

Despite the foregoing, arguments have been made that games of skill, where skill is the dominant factor, are outside of the jurisdiction of the Nevada Gaming Control Board and Commission. These arguments, however, ignore Nevada's statutory requirements.

Nevada Revised Statute 463.160 makes it unlawful for any person to deal, operate, carry on, conduct, maintain or expose for play in Nevada any gambling game without first obtaining a gaming license. "Gambling game" is defined in NRS 463.0152 as:

> [A]ny game played with cards, dice, equipment *or any* mechanical, electromechanical or *electronic device* or machine for money, property, checks, credit or any representative of value, including, *without limiting the generality of the foregoing*, faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, *any banking or percentage game* or any other game or device approved by the Commission, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player, or games operated by charitable or educational organizations which are approved by the Board pursuant to the provisions of NRS 463.409.[10]

In essence, under NRS 463.160, a gambling game is (1) any game played with cards, dice, equipment or any device or machine for any representative of value;[11] (2) any banking game; (3) any percentage game; or (4) any other game or device approved by the Nevada Gaming Commission. This broad definition makes no distinction between games of skill and games of chance. Therefore, while a determination that an activity is a game of skill is relevant to determining whether that activity is a lottery, it is not relevant to determining whether that activity constitutes a gambling game. Similarly, NRS 463.0193, which defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering," makes no distinction between games of skill and games of chance. Indeed, it has long been noted that there is a strong element of skill involved in sports wagering.

It is important to note that while Nevada gaming regulators clearly have authority to regulate games of skill, the present analysis does not concede the argument that daily fantasy sports are predominately skill-based. As Dr. Timothy Fong, Associate Clinical Professor of Psychiatry and Biobehavioral Sciences at the David Geffen School of Medicine at UCLA and Executive Director of the UCLA Gambling Studies Program, states in regards to fantasy football:

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[10] (Emphasis added.)

[11] The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash." NRS 463.01862.

> Very simply, it's gambling, [it's putting] money on an event with a certain outcome in the hopes of winning more money. To call it anything else is really just not accurate. That link hasn't really been made by the players and the public—that what I'm doing is no different than playing blackjack or craps or betting on sports in Vegas casinos.[12]

The debate about whether daily fantasy sports are predominately driven by skill or chance is not settled. Nonetheless, the distinction between skill and chance is of limited significance under Title 41 of the Nevada Gaming Control Act, other than when analyzing lotteries.

B. UIGEA Did Not Legalize Fantasy Sports

As this Memorandum is written solely to analyze daily fantasy sports under Nevada law, it takes no position on the legality of daily fantasy sports under federal laws, such as the Professional and Amateur Sports Protection Act of 1992.[13] That being said, a point of clarification is in order because there are some operators and commentators who have taken the position that the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA")[14] 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.

Specifically, in its first section under the subheading "Rule of construction," UIGEA states: "No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States."[15] Thus, it is clear that UIGEA neither made legal nor illegal any form of gambling within the United States. UIGEA simply provides "[n]ew mechanisms *for enforcing* gambling laws on the Internet," which Congress deemed necessary as it believed "traditional law enforcement mechanisms [were] often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders."[16] This conclusion is consistent with those of prominent commentators, including one of the leading attorneys representing daily fantasy sports operators, who stated, "The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA."[17]

Former Representative Jim Leach, the congressman who drafted UIGEA, when asked whether the 2006 legislation makes daily fantasy sports operations legal, responded, "[t]he only unique basis provided fantasy sports by UIGEA is its exemption from one law enforcement mechanism where the burden for compliance has been placed on private sector financial

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[12] Ramon Ramirez, *The Dark Secret About Fantasy Football No One Is Talking About*, THE KERNAL (August 30, 2015), *at* http://kernelmag.dailydot.com/issue-sections/features-issue-sections/14172/is-fantasy-football-addictive/ (internal commentary omitted).

[13] PL 102–559, October 28, 1992, 106 Stat 4227.

[14] 31 U.S.C.A. §§ 5361-5367.

[15] 31 U.S.C.A. § 5361(b).

[16] 31 U.S.C.A. § 5361 (a)(4) (emphasis added).

[17] Anthony N. Cabot & Louis V. Csoka, Fantasy Sports: One Form of Mainstream Wagering in the United States, 40 J. Marshall L. Rev. 1195, 1201 (2007).

firms."[18] He continued, "[b]ut it is sheer chutzpah for a fantasy sports company to cite the law as a legal basis for existing. Quite precisely, UIGEA does not exempt fantasy sports companies from any other obligation to any other law." He concluded, "There is no credible way fantasy sports betting can be described as not gambling . . . [o]nly a sophist can make such a claim."[19]

In short, UIEGA is irrelevant to determining the legality of daily fantasy sports under Nevada law.

III. Analysis of the Legality of Daily Fantasy Sports Under Nevada Law

A. Daily Fantasy Sports Are "Sports Pools" Under NRS 463.0193

Nevada Revised Statute 463.0193 defines a "sports pool" as "the business of accepting wagers on sporting events or other events by any system or method of wagering." In order to determine if daily fantasy sports operators are operating a sports pool, one must determine (1) whether a wager is present; (2) whether the wagering is done on sporting events or other events by any system or method of wagering; and (3) whether daily fantasy sports operators are in "the business" of accepting wagers.

Daily fantasy sports meet all of these requirements and, thus, constitute "sports pools" under Nevada law. This conclusion is consistent with the views of one of the leading attorneys representing daily fantasy sports operators, who stated that "fantasy sports" was "a significant evolution in the realm of sports betting."[20]

1. Wagers on Sporting Events or Other Events by Any System or Method of Wagering

a. Wagers

i. Wagers Are Present in Daily Fantasy Sports

Nevada Revised Statute 463.01962 defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."[21]

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[18] Tim Dahlberg, *"Former congressman says DFS is "cauldron of daily betting," at* http://cdcgamingreports.com/former-congressman-says-dfs-is-cauldron-of-daily-betting/.

[19] *Id.*

[20] Anthony N. Cabot & Louis V. Csoka, The Games People Play: Is It Time for A New Legal Approach to Prize Games?, 4 Nev. L.J. 197, 215 (2004).

[21] *See* Bo J. Bernhard & Vincent H. Eade, *Gambling in a Fantasy World: An Exploratory Study of Rotisserie Baseball Games*, 9 UNLV GAMING RESEARCH & REVIEW JOURNAL 29 (2004) (In his exploratory review of fantasy baseball, Dr. Bo Bernhard, Executive Director of the International Gaming Institute and Professor at the William F. Harrah College of Hotel Administration, concluded that, "[i]f we broadly define gambling as an activity that risks something of value . . . on an event whose outcome is uncertain [essentially Nevada's definition of "wager"] (such as the whims of a professional baseball season), fantasy baseball clearly qualifies.").

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Although its holding came prior to the enactment of NRS 463.10962—and, thus, may no longer be applicable—the Nevada Supreme Court stated in *State v. GNLV Corporation*,[22] that:

> a "wager" exists when two or more contracting parties have mutual rights in respect to the money wagered and each of the parties necessarily risks something, and has a chance to make something upon the happening or not happening of an uncertain event. A prize differs from a wager in that the person offering the prize must permanently relinquish the prize upon performance of a specified act. In a wager, each party has a chance of gain and takes a risk of loss.[23]

With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.[24] If an owner wins, the owner gets money back. If an owner loses, the owner loses the bet made. When owners play against each other, some will win and some will lose. Thus, because owners risk money on an occurrence for which the outcome is uncertain, wagers are present.[25]

This determination is consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO states "You are ***playing against other players***, we simply act as the 'points tally' and 'money distributor.'"[26] The DraftKings CEO also states that DraftKings' "concept is a mashup between poker and fantasy sports. Basically, you pick a team, ***deposit your wager***, and if your team wins,

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[22] *State v. GNLV Corp.*, 108 Nev. 456, 834 P.2d 411 (1992). *GNLV* was a case where GNLV Corp. dba The Golden Nugget Hotel and Casino (the "Golden Nugget") ran a program known as the "24 Karat Club." The "24 Karat Club" was a program in which enrolled patrons automatically received a fifty-cent ticket each time the last dollar of a total of $75.00 was placed in certain designated slot machines. After the patron wagered the 75th dollar, the slot machine dispensed a ticket worth fifty cents toward the purchase of a "gold certificate. Gold certificates could be redeemed for gaming tokens, cash, room rental, food, beverages or merchandise. The slot machines dispensed the fifty-cent tickets ***irrespective of gains or losses resulting from the play involved*** in each $75.00 increment. On that record, the Nevada Supreme Court held that because the Golden Nugget's distribution of the tickets was required by the contract between the Golden Nugget and its "24 Karat Club" members, it was not dependent upon the result of a legitimate wager. As a preliminary matter, *GNLV* was decided before the enactment of NRS 463.01962 (the statute defining the term "wager"). More importantly, in *GNLV*, the patrons were neither competing against one another for the tickets nor receiving tickets based upon the outcome of an uncertain event. By contrast, in daily fantasy sports, the owners are competing against one another. As a result, each owner has a risk of loss depending on the outcome of their simulated team's performance. Thus, although the Nevada Supreme Court found that wagers were not present in *GNLV*, wagers are present in daily fantasy sports regardless of whether one uses the new statutory definition of wager or applies the holding in *GNLV*.

[23] *Id.* at 458, 834 P.2d at 413 (1992) (internal citations omitted).

[24] Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

[25] 463.0152.

[26] *See* https://www.reddit.com/r/IAmA/comments/x5zrn/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).

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you get the pot."[27] Additionally, the DraftKings CEO repeatedly refers to the payments on his sites as "wagers" and "bets," and the activity as "betting."[28]

Similarly, the DraftKings website uses the following image on its website for its pages for fantasy football, weekly fantasy football, fantasy college football, weekly fantasy college football, weekly fantasy golf, daily fantasy basketball, fantasy college basketball, weekly fantasy basketball, weekly fantasy college basketball, and weekly fantasy hockey:[29]

That image is identified on each of those webpages, through alternative text ("alt text")[30] with a phrase that includes the word "betting" (i.e., "fantasy golf betting," "weekly fantasy basketball betting," "weekly fantasy hockey betting," "weekly fantasy football betting," "weekly fantasy college football betting," "weekly fantasy college basketball betting," "Fantasy College Football Betting," "daily fantasy basketball betting," and "Fantasy College Basketball Betting"). Although it is unclear why this image is identified using the alt text "betting,"—whether it is because these sites are trying to draw Internet search traffic from gamblers, because "betting" is how the sites internally discuss their product, or for some other reason—it appears that although the sites' representatives publicly state that they do not believe daily fantasy sports involve "wagers" or "bets," they do use the terms "betting" and "wagering" when they are not dealing with law enforcement agencies.

ii. *Las Vegas Hacienda, Inc. v. Gibson* Is Inapposite

There have been some who suggest that wagers are not present in daily fantasy sports because of the Nevada Supreme Court's 1961 decision in *Las Vegas Hacienda, Inc. v. Gibson*.[31] Those people are mistaken. To begin with, *Gibson* was decided several years before the gaming statutes at issue in this Memorandum were enacted. Because of that, the Court did not have the

[27] *Id.* (emphasis added).
[28] *Id.*
[29] *See e.g.*, https://www.draftkings.com/fantasy-football, https://www.draftkings.com/weekly-fantasy-golf, and https://www.draftkings.com/daily-fantasy-basketball.
[30] Alt text (alternative text) is a word or phrase that can be inserted as an attribute in an HTML (Hypertext Markup Language) document to tell website viewers the nature or contents of an image. The alt text appears in a blank box that would normally contain the image.
[31] 77 Nev. 25, 26, 359 P.2d 85, 86 (1961).

benefit of those statutes in making its determination. As a result, *Gibson* applies a common law understanding of "wager" and "gambling" that differs from our current statutory framework.

Gibson involved a golf course that offered to pay $5,000 to any person who shot a hole-in-one after paying 50 cents for the opportunity to attempt to do so. From the record, it is unclear whether (1) the patron paid 50 cents for the opportunity to play a round of golf and, incidentally, would be awarded a prize if he or she sank a hole-in-one; or (2) the patron paid the 50 cents solely for the opportunity to try and shoot a hole-in-one. Regardless, a patron eventually shot a hole-in-one and the golf course refused to pay, arguing that a person cannot sue for recovery of money won in gambling. The Court held for the patron by determining the debt was a contractual debt rather than a gambling debt. As part of its analysis, the Court distinguished between "prizes" and "wagers." In doing so, the Court stated:

> A prize or premium differs from a wager in that in the former, the person offering the same has no chance of gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss. . . . In a wager or a bet, there must be two parties, and it is known, before the chance or uncertain event upon which it is laid or accomplished, who are the parties who must either lose or win. In a premium or reward there is but one party until the act or thing or purpose for which it is offered has been accomplished. A premium is a reward or recompense for some act done; a wager is a stake upon an uncertain event. In a premium it is known who is to give before the event; in a wager it is not known until after the event. The two need not be confounded.[32]

Even applying these outdated elements from *Gibson*, wagers are present in daily fantasy sports. Assuming that in a wager, "each party interested therein has a chance of gain and takes a risk of loss" and "there must be [at least] two parties . . . who must either lose or win," daily fantasy sports involve wagers because owners in daily fantasy sports all have a chance of gain and take a risk of loss based upon who wins and who loses. Additionally, even accepting that a prize "is a reward or recompense for some act done" and a wager "is a stake upon an uncertain event," does not change the conclusion. In the case of daily fantasy sports, the primary "act" at issue is that of choosing a lineup. The completion of this "act" will not, in itself, result in any prize. The payouts in daily fantasy sports are not awarded to owners who simply set a lineup, they are awarded to the owners whose lineups receive the highest total score (which is dependent upon the *uncertain* outcomes associated with sporting events). Accordingly, even applying *Gibson*, wagers are present in daily fantasy sports.

Moreover, the Court stated that its holding was based upon the absence of a statute providing otherwise.[33] Every statute addressed in this Memorandum was enacted after *Gibson* was decided. That distinction is important to remember, because a strict application of *Gibson* in the modern day could lead to the absurd result of removing large categories of gambling from the

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[32] *Id.* at 28-29, 359 P.2d at 86-87.

[33] *Id.* at 27, 359 P.2d at 86 ("It is generally held, in the absence of a prohibitory statute, that the offer of a prize to a contestant therefor who performs a specified act is not invalid as being a gambling transaction."). Additionally, NRS 463.01962, which defines a "wager" was added to the Nevada Revised Statutes in 1997. As a result, any cases, including *Gibson*, that defined the term "wager" prior to 1997 are no longer mandatory or persuasive.

control of the Nevada Gaming Control Board and Commission and, moreover, could render null a number of Nevada gaming statutes and regulations that take precedence over common law.

b. On Sporting Events or Other Events by Any System or Method of Wagering

Although it seems obvious that the wagers in question are being placed on sporting events, some discussion of this element is necessary as certain commentators have suggested that because the wagers at issue are not being placed upon the *outcome* of a particular sporting event, the wagers do not fall within the requirement that they be placed on sporting events or other events. That interpretation not only belies common sense, but is also contradicted by an analysis of the Gaming Control Act and Regulations.

To begin with, that interpretation is inconsistent with Nevada's historic understanding of sports pools. For example, Nevada has been regulating "proposition bets" or "prop bets" for decades.[34] A prop bet is a wager on the occurrence or non-occurrence of some event during the course of a sporting event. Examples of prop bets include whether a particular quarterback will pass for more or less than 300 yards, whether a particular basketball player will score more or less than 25 points, and whether a particular pitcher will pitch more or less than 10 strikeouts. Through the use of "parlay cards," the State has also regulated combinations of prop bets. Specifically, Regulation 22.090(1) states: "As used in this section, 'parlay card wager' means a wager on *the outcome of* a series of 3 or more games, matches, or similar sports events *or on a series of 3 or more contingencies incident* to particular games, matches or similar sports events."[35] As a result, it is clear that Nevada intended to regulate wagers on both (1) the outcomes of particular sporting events; and (2) contingencies incident to particular sporting events.

Notably, NRS 463.0193, which defines "sports pool," not only fails to use the word "outcome," but instead specifically broadens its definition by adding the words "by any system or method of wagering." This is in contrast to the definition of "pari-mutuel system of wagering," which only includes wagers on "the *outcome* of a race or sporting event."[36] As a result, the Nevada Legislature has, in some places, distinguished between betting on the outcome of particular sporting event and simply betting generally on the sporting event "by any system of method of wagering."[37] The logical, and likely only, conclusion is that Nevada's regulation of sports pools includes (1) wagering on the outcome of particular sporting events; (2) wagering on any activity that takes place during particular sporting events; and (3) wagering on combinations of the outcomes of and/or activities that take place during particular sporting events.

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[34] *See, e.g.*, Nev. Gaming Comm'n Reg. 22.060(4).
[35] Nev. Gaming Comm'n Reg. 22.090(1) (emphasis added).
[36] NRS 464.005(5) (emphasis added).
[37] It should be noted, however, that although the absence of the term "outcome" within the definition of "sports pool" precludes a conclusion that the definition only prohibits wagering on the final score of sporting events, the inverse is not necessarily true. Even if the definition of "sports pool" had included the word outcome, one could find that "outcome" includes contingencies incident to particular sporting events.

2. Business of Accepting Wagers

If it is accepted that the daily fantasy sports operators are "accepting wagers on sporting events or other events by any system or method of wagering," there seems to be no dispute that they are in the business of doing so.[38] With perhaps some limited exceptions, the daily fantasy sports operators are not operating their sites solely for recreation or amusement; they are operating the sites as businesses to make money.

B. Daily Fantasy Sports Are "Gambling Games"

There are, generally speaking, four types of gambling games outlined in NRS 463.0152: (1) games played with cards, dice, equipment or any device or machine for any representative of value; (2) banking games; (3) percentage games; and (4) other games or devices approved by the Nevada Gaming Commission.[39] These four categories are not necessarily mutually exclusive.

1. Daily Fantasy Sports Are Games Played with Cards, Dice, Equipment, Devices or Machines for Any Representative of Value

The first type of gambling game included in NRS 463.0152's definition has two elements. First, it must be a "game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine." Second it must be played "for money, property, checks, credit or any representative of value." Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Game Played with Cards, Dice, Equipment, Device, or Machine

Although the term "electronic device" is not defined by the Gaming Control Act, other Nevada statutes have defined a computer to be an electronic device.[40] That definition is consistent with the general understanding of what an electronic device is. As a result, daily fantasy sports, which cannot possibly be played except online using computers and/or mobile phones, meet the first element requiring that the activity be a "game played with cards, dice, equipment or any mechanical, electromechanical or electronic device or machine."

b. Played for Money or Any Representative of Value

The Gaming Control Act defines a "representative of value" as "any instrumentality used by a patron in a game whether or not the instrumentality may be redeemed for cash."[41] With some exceptions, the daily fantasy sports owners pay money to play the simulated games and compete with each other based on their total scores.[42] If an owner wins, the owner gets money back. Thus, daily fantasy sports meet the second requirement that the activity in question must be played "for money, property, checks, credit or any representative of value."

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[38] NRS 463.0193.
[39] NRS 463.0152.
[40] *See* NRS 205.4735 and 360B.410.
[41] NRS 463.01862.
[42] Generally speaking, daily fantasy sports operators all offer pay-to-play games. Some, however, also offer free-to-play games.

2. Daily Fantasy Sports Are Probably Not Banking Games

Nevada Revised Statute 463.01365 defines a "banking game" as "any *gambling game* in which players compete against the licensed gaming establishment,[43] rather than against one another."[44] Nevada Revised Statute 463.0152 defines a "gambling game" to include "any *banking game*."[45] As a result, these definitions are circular and there is ambiguity as to what the statutes mean. It is worth noting that Black's Law Dictionary defines a "banking game" as a "gambling arrangement in which the house (i.e., the bank) accepts bets from all players and then pays out winning bets and takes other bettors' losses."[46]

A logical reconciliation of these statutes (and the traditional definition of "banking game") is to define a banking game as a game in which (1) participants compete against the operator of the game (rather than the other participants) using representatives of value; and (2) calculation of the payout to any given participant is, generally speaking, not based upon the representatives of value used by any other participants.[47] That interpretation is consistent with the Nevada Supreme Court's statement that craps, roulette, and black jack are examples of banking games.[48]

Generally speaking, daily fantasy sports operators do not directly wager against the owners. Instead, the owners wager against each other by placing a bet and competing for the highest scores, with the operator paying out to the highest scorers. If that is true, in those circumstances, daily fantasy sports do not constitute banking games as the payouts to each owner are directly related to the payouts to other owners based upon other owners' simulated teams' performances. That being said, if a particular operator were to allow owners to wager directly against the operator, then that particular simulated game would be a banking game.

3. Daily Fantasy Sports Are Percentage Games

The third type of gambling game included in NRS 463.0152's definition is a percentage game, which has two elements. First, it must be a game "where patrons wager against each

[43] Although this statute could arguably be read to exclude from its definition any games offered by a non-licensee, that interpretation would lead to an absurd result. The Nevada Legislature could not possibly have intended to only restrict the type of games offered by licensees, leaving the rest of the public free to offer banking games. Additionally, given that the term "banking game" appears twice in the definitions of NRS 463, and only once has this limiting language, there is additional reason to reject that interpretation.

[44] (Emphasis added.)

[45] (Emphasis added.)

[46] BANKING GAME, Black's Law Dictionary (10th ed. 2014).

[47] We can imagine situations in which various banking games might have some sort of cumulative payout. For example, an establishment might offer blackjack but (directly or indirectly) take some percentage of each hand played and place it into a cumulative payout pool that is awarded to one or more participants based upon the occurrence of some event. That tying of some wagers with the operator to wagers with other players would not remove the game from what is contemplated by the definition of "banking game."

[48] *Hughes Props., Inc. v. State*, 100 Nev. 295, 297, 680 P.2d 970, 971 (1984).

other."[49] Second, "the house takes a percentage of each wager as a 'rake-off.'"[50] Daily fantasy sports meet both these elements and, as a result, constitute gambling games.

a. Patrons Wager Against Each Other

The Gaming Control Act defines a "wager" as "a sum of money or representative of value that is risked on an occurrence for which the outcome is uncertain."[51] As was explained in Section III.A.1.a above, because the daily fantasy sports owners pay money to play the simulated games and receive money based upon which of them has the highest total scores, the owners risk money on an occurrence for which the outcome is uncertain. As a result, wagers are present and daily fantasy sports meet the requirement that "wagers" be present.

b. The House Takes a Percentage of Each Wager as a "Rake-off"

Although the specifics of how each rake is calculated differs and the rake may be a flat fee (and, as a result, the actual percentage taken in any given simulated game would vary depending upon the number of owners) the daily fantasy sports operators all make their profit by directly or indirectly taking some percentage of the wagers in each simulated game.

This conclusion is also consistent with how certain daily fantasy sports operators describe themselves. For example, in the online discussion described above, the DraftKings CEO explains that "In our case, you win the total wager amount of all the people who had teams in that contest. If there were 10 people and each put in $10 dollars, you'd win $100 (*minus 10% which goes to us*)."[52]

4. Daily Fantasy Sports Have Not Been Approved by the Commission

As the Nevada Gaming Commission has not approved daily fantasy sports, analysis of these types of gambling games is unnecessary. Daily fantasy sports are not games or devices approved by the Nevada Gaming Commission.

C. Some Daily Fantasy Sports Could Be Considered Lotteries Depending on How a Court Resolves the Question of Whose Skill Is at Issue and the Amount of Skill Involved in the Particular Simulated Game at Issue

If, for some reason, daily fantasy sports are not otherwise determined to be gambling games or sports pools, they could constitute lotteries, which—with limited charitable exceptions—are prohibited by Article IV, Section 24 of the Nevada Constitution. A lottery is a scheme for the disposal of property *by chance*, among persons who have paid consideration, for the chance of obtaining all or a portion of said property.[53] Essentially, a lottery involves the common law elements of gambling: (1) prize; (2) chance; and (3) consideration. Because all of

[49] *Id.* ("Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a 'rake-off.'").
[50] *Id.*
[51] NRS 463.01962.
[52] *See* https://www.reddit.com/r/IAmA/comments/x5zm/we_quit_our_jobs_to_pursue_a_dream_of_starting_a/ (emphasis added).
[53] NRS 462.105.

the daily fantasy sports at issue involve consideration to play and a prize, the sole issue is whether a particular simulated game is determined predominantly by skill or by chance.[54]

As a preliminary matter, there may not need to be a determination of skill. As skill is generally understood when analyzing a lottery, the skill at issue is the skill of the individuals determining the actual outcome of the event. With daily fantasy sports, although the owners select a lineup for their simulated team, the owners have no ability to control how many points their simulated teams receive from an actual player's performance. The actual players in the actual games control their own performance. As a result, after an owner places a bet and sets a final lineup, the owner simply waits to see what happens based upon the performance of the actual players involved. Given that the owners' skills do not determine the outcome of the simulated games, there may be no skill involved as that term is traditionally understood in the context of lotteries. If that is the case, then daily fantasy sports constitute lotteries and are prohibited in Nevada.

If a court rejects that interpretation and decides to analyze the skill of the owners in picking their lineups, then an analysis of whether a particular simulated game is determined predominantly by skill or chance is required. There are some daily fantasy sports in which the element of chance clearly predominates. These include simulated games in which the owners are assigned a random slate of players for their virtual teams. As there is no skill involved in these games, they would be considered unlawful lotteries. By contrast, the vast majority of daily fantasy sports require some level of skill on the part of the owners. Because the level of skill involved is a question of fact, each individual simulated game must be examined by a finder of fact, who will determine this issue on a case-by-case basis.

CONCLUSION

Upon extensive review of pay-to-play daily fantasy sports, we conclude that they constitute sports pools under NRS 463.0193 and gambling games under NRS 463.0152. Daily fantasy sports may also constitute illegal lotteries under NRS 462.105(1) depending on the legal question of whose skill is being assessed and the factual question of whether skill or chance is dominant. If the skill being assessed is that of the actual players rather than that of the fantasy sports team owners, then daily fantasy sports constitute illegal lotteries. If the skill being assessed is that of the owners, then there is a factual question as to whether the skill in selecting lineups predominates over chance.

Throughout the foregoing analysis, the holdings and dicta of the *Gibson* and *GNLV* cases are distinguished from the facts, law, and context of the current matter. It is particularly noteworthy that both of these gaming cases were decided before the definition of "wager" was codified in NRS 463.01962. *Gibson*, in particular, was decided in 1961, at the most nascent stage of the Nevada Gaming Control Act and before the passage of the statutes at issue. As a result, the *Gibson* court had to rely upon traditional common law principles of gambling rather than our current statutory and regulatory framework. Consequently, the *Gibson* decision must be considered not against the backdrop of 2015, but within the historical milieu of 1961.

In summary, pay-to-play daily fantasy sports constitute sports pools and gambling games under Nevada law. They may also constitute lotteries, depending on the test applied by the

[54] *Gibson*, 77 Nev. at 30, 359 P.2d at 87.

Nevada Supreme Court. As a result, daily fantasy sports cannot be offered in Nevada without licensure.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 19, 2016

The Honorable Myra Crownover
Chair, Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78711-2910

Opinion No. KP-0057

Re: The legality of fantasy sports leagues under Texas law (RQ-0071-KP)

Dear Representative Crownover:

You ask for an opinion on two questions involving fantasy sports leagues.[1] Specifically, you ask whether

1. [d]aily fantasy sports leagues such as DraftKings.com and FanDuel.com are permissible under Texas law, and

2. [whether i]t is legal to participate in fantasy sports leagues where the house does not take a "rake" and the participants only wager amongst themselves.

Request Letter at 1.

I. Factual Background

To begin, a brief description of what we understand you to mean by "fantasy sports leagues" is necessary.[2] Fantasy sports leagues allow individuals to simulate being a sports team owner or manager. Generally, an individual assembles a team, or lineup, often under a salary limit or budget, comprising actual players from the various teams in the particular sports league, i.e., National Football League, National Basketball League, or National Hockey League. Points are

[1] *See* Letter from Honorable Myra Crownover, Chair, House Comm. on Pub. Health, to Honorable Ken Paxton, Tex. Att'y Gen. at 1 (received Nov. 12, 2015), https://www.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs ("Request Letter").

[2] The forthcoming description of fantasy sports play is compiled generally from the October 16, 2015, Memorandum from the Nevada Attorney General's Office, to which you refer, concerning the legality of daily fantasy sports. *See generally* Memorandum from J. Brin Gibson, Bureau Chief of Gaming & Gov't Affairs & Ketan D. Bhirud, Head of Complex Litig., Nev. Att'y Gen., to A.G. Burnett, Chairman Nev. Gaming Control Bd. & Nev. Gaming Control Bd. Members Terry Johnson & Shawn Reid (Oct. 16, 2015), http://gaming.nv.gov/modules/showdocument.aspx?documentid=10487 ("Nev. Att'y Gen. Memo").

gamered for the individual's "team" based on the actual game performance of the selected players, and scoring is based on the selected player's performance in the game where actual performance statistics or measures are converted into fantasy points. Each participant "owner" competes against other owners in the fantasy league. In a traditional fantasy sports league, play takes place over the course of an entire sports season, tracking the performance of selected players for the duration of the season. In contrast, in daily fantasy sports leagues, play tracks players' performances in single games on a weekly basis. With respect to both types of fantasy games, once a participant selects his or her players as the team or "lineup," they have no control over the players' performance in the actual game or the outcome of the actual game. The participant waits for the outcome, and his or her point levels are determined by the performance of the players on game day. Individuals pay a fee to participate in a league, which fees fund the pot of money used to pay out to the participants as their earned points direct. In play on the Internet sites for DraftKings and FanDuel, a portion (ranging from 6% to 14%) of the fees collected are not paid out to the participants but are retained by the gaming site. The "commissioner" running a traditional fantasy sports league may or may not retain a portion of participants' entry fees.

Turning to the law, article III, section 47(a) of the Texas Constitution provides, "[t]he Legislature shall pass laws prohibiting lotteries and gift enterprises in this State," subject to certain exceptions.[3] In accordance with article III, section 47(a), the Legislature has prohibited a variety of gambling activities through chapter 47 of the Penal Code.[4] In Texas, a person commits a criminal offense if the person "makes a bet on the partial or final result of a game or contest or on the performance of a participant in a game or contest."[5] The answer to your first question turns on whether participants make a bet. Under chapter 47, a "bet" means "an agreement to win or lose something of value solely or partially by chance."[6] And a bet specifically excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill, speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or aircraft entered in a contest[.]"[7] Lastly, it is a defense to prosecution if, among other things, "no person received any economic benefit other than personal winnings,"[8] which cannot be true if the house takes a "rake."

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[3]TEX. CONST. art. III, § 47(a); *see City of Wink v. Griffith Amusement Co.*, 100 S.W.2d 695, 701 (Tex. 1936) (articulating as elements necessary to constitute a lottery (1) the offering of a prize, (2) by chance, and (3) the giving of consideration for an opportunity to win the prize).

[4]*See* TEX. PENAL CODE §§ 47.01–.10; *see also Owens v. State*, 19 S.W.3d 480, 483 (Tex. App.—Amarillo 2000, no pet.) (recognizing the Legislature's adoption of chapter 47 pursuant to article III, section 47).

[5]TEX. PENAL CODE § 47.02(a)(1).

[6]*Id.* § 47.01(1).

[7]*Id.* § 47.01(1)(B).

[8]*Id.* § 47.02(b)(2).

II. Standard of Review

These questions require us to examine competing statutory provisions. The courts have developed time-honored canons for reconciling tension within a statute. According to the United States Supreme Court,

> canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.[9]

This cardinal canon is best implemented by examining the plain contextual meaning of a statute—not by improperly removing a snippet from the statutory context.[10] A court "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous."[11]

In the attorney general opinion process, we cannot resolve factual issues.[12] But we can assume facts if requested, as you have here.[13]

III. Analysis

A. Paid Daily Fantasy Sports

Your first question is whether paid daily fantasy sports leagues constitute illegal gambling. Answering your question requires determining whether paid daily fantasy leagues constitute betting on the performance of a participant in a game (thus constituting illegal gambling) or instead are, in and of themselves, bona fide contests for the determination of skill (thus constituting no bet and no illegal gambling). Paid daily fantasy league participants are wagering on "the performance of a participant in a game or contest."[14] If that act constitutes a bet under the statute, then the

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[9] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (citations omitted).

[10] *See Cascos v. Tarrant Cty. Democratic Party*, No. 14-0470, 2015 WL 6558390, at *5 (Tex. Oct. 30, 2015) (reversing a court of appeals when its opinion "improperly takes a snippet of language out of its statutory context"); *In re Mem'l Hermann Hosp. Sys.*, 464 S.W.3d 686, 701 (Tex. 2015) ("Proper construction requires reading the statute as a whole rather than interpreting provisions in isolation.").

[11] *See Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 256 (Tex. 2008).

[12] Tex. Att'y Gen. Op. No. KP-0046 (2015) at 4 (noting that attorney general opinions do not resolve disputed fact questions).

[13] *See* Request Letter 1 ("Please assume the following facts, as more fully explained in an October 16, 2015 memo from the Nevada attorney general's office to the Nevada Gaming Control Board.").

[14] TEX. PENAL CODE § 47.02(a)(1).

activity is illegal gambling. Participants in a daily fantasy sports league pay a fee to participate,[15] only a portion of which is included in the pot of funds that are paid out to the winning "owners." By proffering this fee, players agree to win or lose something of value—a portion of the pot.[16] The dispositive question then is whether the win or loss is determined solely or partially by chance. Proponents of daily fantasy sports games argue that skill is required to predict which players will have the best performance for their position in any particular game.[17] This may well be true. However, Texas law does not require that skill predominate. Instead, chapter 47 requires only a partial chance for there to be a bet.[18] Texas courts have confirmed this plain language in the statute.[19] And this office has previously concluded that "the plain language of section 47.01(1) . . . renders irrelevant the matter of whether poker is predominantly a game of chance or skill. . . . If an element of chance is involved in a particular game, it is embraced within the definition of 'bet.'"[20]

It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. The participant's skill in selecting a particular player for his team has no impact on the performance of the player or the outcome of the game. In any given week:

- a selected player may become injured or be ejected and not play in all or a portion of the game—such as an injury to a third-string quarterback causing a team to rotate

[15]We understand that some daily fantasy sports contests charge no fee to participate and pay nothing to the winners. Brief from James Ho, Gibson Dunn, to Honorable Ken Paxton at 2, 8, 9 (Dec. 21, 2015) ("GibsonDunn Brief") (on file with the Op. Comm.). Participation in such contests involves no consideration and no bet, and as a result cannot constitute illegal gambling in Texas. *See City of Wink*, 100 S.W.2d at 701.

[16]TEX. PENAL CODE § 47.01(9) (defining a "thing of value" to generally mean "any benefit").

[17]*See* GibsonDunn Brief at 18–25; Brief from Reid Wittliff, ZwillGen, to Honorable Ken Paxton at 6–7 (Dec. 18, 2015) ("ZwillGen Brief") (on file with the Op. Comm.).

[18]*See* TEX. PENAL CODE § 47.01(1) (a "bet" means "an agreement to win or lose something of value solely or partially by chance").

[19]*See Odle v. State*, 139 S.W.2d 595, 597 (Tex. Crim. App. 1940) ("The legal meaning of the term 'bet' is the mutual agreement and tender of a gift of something valuable, which is to belong to one of the contending parties, according to the result of the trial of chance or skill, or both combined." (quoting *Melton v. State*, 124 S.W. 910, 911 (Tex. Crim. App. 1910), *Mayo v. State*, 82 S.W. 515, 516 (Tex. Crim. App. 1904), and Words and Phrases, Second Series, Vol. 1, p. 433); *State v. Gambling Device*, 859 S.W.2d 519, 523 (Tex. App.—Houston [1st Dist.] 1993, writ denied) ("[I]t is the incorporation of chance that is the essential element of a gambling device, not the incorporation of a particular proportion of chance and skill.").

[20]Tex. Att'y Gen. Op. No. GA-0335 (2005) at 3–4.

three different players at quarterback in one half[21] or a batter charging the mound after getting hit by a pitch and getting corrected and then ejected;[22]

- a selected player may perform well or perform poorly against the opponent that week, perhaps due to weather conditions—such as a defensive tackle diving on a football after a blocked field goal attempt, only to allow the other team to recover the ball and score the game-winning touchdown;[23]

- a selected player's performance may be impacted by the state of the game equipment (say, the underinflation of a football or the presence of cork inside a baseball bat)[24] or facilities (such as the air conditioning system in a basketball arena failing, causing the star player for a team aptly named "Heat" to suffer temperature induced legs cramps and be carried off the court);[25] and

- a selected player's performance may be impacted by a call of refereeing officials—such as a catch that all individuals not wearing stripes believe to constitute a touchdown being ruled an incompletion with instant replay.[26]

The list goes on. All of these random circumstances, especially if they occur after the participants' selections are locked in, amount to chance and do not involve any skill on the part of the participant. Chance happens, especially on game day. "That's why they play the game."[27] Based

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[21]John Werner, *Everybody hurts: Another QB injured, Bears stumble in home finale, 23-17*, WACO TRIB., (Dec. 6, 2015), http://www.wacotrib.com/sports/baylor/football/everybody-hurts-another-qb-injured-bears-stumble-in-home-finale/article_4e581922-a55e-5289-a7c7-dfa43ca15a5a.html.

[22]*See* Thomas Neumann, *Nolan Ryan-Robin Ventura fight anniversary—13 things you should know*, ESPN.com, (Aug. 4, 2015), http://espn.go.com/mlb/story/_/id/13375928/nolan-ryan-robin-ventura-fight-anniversary-13-things-know.

[23]Daniel Hajek, *Cowboys' Leon Lett On 'One Of The Worst Days Of My NFL Career,'* NAT'L PUB. RADIO, (Nov. 27, 2015), http://www.npr.org/2015/11/27/457565031/cowboys-leon-lett-on-one-of-the-worst-days-of-my-nfl-career.

[24]Ian Rapoport, *More details on the investigation of Patriots' deflated footballs*, NFL.com, (Feb. 1, 2015), http://www.nfl.com/news/story/0ap3000000466783/article/more-details-on-the-investigation-of-patriots-deflated-footballs; Rick Weinberg, *Sammy Sosa gets caught with corked bat*, ESPN.com, (Aug. 4, 2004), http://www.espn.go.com/espn/espn25/story?page=moments/33.

[25]Royce Young, *Spurs: AC back up and running*, ESPN.com, (June 6, 2014), http://www.espn.go.com/nba/playoffs/2014/story/_/id/11042810/san-antonio-spurs-say-air-conditioning-their-arena-repaired.

[26]Brandon George, *Was it a catch? Controversial Dez Bryant play reversed*, DALLAS MORNING NEWS, (Jan. 11, 2015), http://www.sportsday.dallasnews.com/dallas-cowboys/cowboysheadlines/2015/01/11/was-it-a-catch-controversial-dez-bryant-play-reversed.

[27]Bud Montet, *Random Shots*, MORNING ADVOC., Dec. 30, 1965, at 2C (attributing quote to University of Kentucky basketball coach Adolph Rupp), *see* THE BIG APPLE, *That's why they play the games* (sports adage), http://www.barrypopik.com/index.php/new_york_city/entry/thats_why_they_play_the_games.

on the facts you ask us to assume, the argument that skill so predominates that chance is minimal is nonetheless an admission that chance is an element and partial chance is involved.[28] Accordingly, odds are favorable that a court would conclude that participation in daily fantasy sports leagues is illegal gambling under section 47.02 of the Penal Code.[29]

Two providers of daily fantasy sports leagues nonetheless contend that participation in such leagues is not gambling because the statutory exception to the definition of "bet" excludes "an offer of a prize, award, or compensation to the actual contestants in a bona fide contest for the determination of skill[.]"[30] Specifically, they contend the element of skill so predominates in daily fantasy sports as to render chance immaterial and that the fantasy league participants are the actual contestants. While Texas courts have yet to address the actual-contestant exclusion from the definition of "bet," this office addressed that matter in 1994. The question presented involved participants paying an entry fee for a chance to win prizes in a contest to forecast the outcome of approximately 150 sporting events, which required "using the skills necessary to analyze relevant data, including, but not limited to, point differentials as published in newspapers of general circulation, weather conditions, injuries or other factors."[31] We noted that the Practice Commentary to the statute indicated the actual-contestant exclusion "is intended to exclude only awards and compensation earned by direct participation in the contest—the pole-vaulter's cup, the pro football player's salary—not the receipt of a wager made on its outcome."[32] We concluded that, although the "exclusion may embrace athletes actually competing in the sporting events you refer to, it does not embrace those who pay entry fees for a chance to win a prize from forecasting the outcome of the events."[33] Moreover, the other types of contests in the actual-contestant exclusion (speed, strength, or endurance or to the owners of animals, vehicles, watercraft, or

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[28]The attorneys general in Nevada and New York have reached the conclusion that there is sufficient chance to violate the "material chance" standard in their state laws. *See* Nev. Att'y Gen. Memo at 9, 15–16; Letter from Kathleen McGee, Chief, New York Attorney General's Internet Bureau, to Jason Robins, CEO, DraftKings, Inc., (Nov. 10, 2015) at 1, http://ag.ny.gov/pdfs/Final_NYAG_DraftKings_Letter_11_10_2015.pdf ("DraftKings' customers are clearly placing bets on events outside of their control or influence, specifically on the real-game performance of professional athletes. Further, each DraftKings wager represents a wager on a 'contest of chance' where winning or losing depends on numerous elements of chance to a 'material degree.'"). *See also New York v. DraftKings, Inc.*, No. 453054-2015; at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7, 10 (N.Y. Sup. Ct. Dec. 11, 2015) (orders determining that the payment of an entry fee to participate in daily fantasy sports is risking a thing of value and, under New York statutes, constitutes illegal gambling and granting preliminary injunction and temporary restraining order against defendant in each action).

[29]Likewise, entities that promote daily fantasy sports league gambling could possibly violate section 47.03 of the Penal Code by operating a gambling place or becoming a custodian of a bet. *See* TEX. PENAL CODE § 47.03(a).

[30]TEX. PENAL CODE § 47.01(1)(B). *See* GibsonDunn Brief at 17; ZwillGen Brief at 4.

[31]Tex. Att'y Gen. Op. No. LO-94-051, at 1.

[32]*Id.* at 2.

[33]*Id.*

aircraft) inform the nature of what the Legislature means with the term "skill."[34] Following this office's 1994 opinion, the Illinois Attorney General recently concluded that Illinois's similar statutory actual-contestant exclusion does not apply to participants of daily fantasy sports leagues.[35]

Subsection 47.01(1)(B), and our interpretation of it, remains unchanged. For example, if a person plays in a golf tournament for an opportunity to win a prize, he or she is within the actual-contestant exclusion to the definition of betting. If instead the person does not play in that tournament but wagers on the performance of an actual contestant, he or she is gambling under Texas law. To read the actual-contestant exception as some suggest would have that exception swallow the rule.[36]

B. Season-Long Fantasy Sports

The same framework applies to traditional fantasy sports leagues, but the outcome may differ depending on whether the house takes a rake. Payment of a fee to participate in the league constitutes an agreement to win or lose something of value, and the outcome depends at least partially on chance, thus involving a bet. However, traditional fantasy sports leagues often differ from daily fantasy sports leagues in that any participation fee is not retained by the "commissioner" of the traditional fantasy sports league and is instead paid out wholly to the participants. And section 47.02 contains a defense to prosecution when "(1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risks of losing and the chances of winning were the same for all participants."[37] Thus, to the extent play in a traditional fantasy sports league satisfies the above three elements, the participants in such league may avail themselves of the defense to prosecution.

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[34]*See Ross v. St. Luke's Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015) (applying doctrine of *ejusdem generis* to hold that the a broad term in a list was constrained by the meaning of the remaining, narrower terms).

[35]*See* Ill. Att'y Gen. Op. No. 15-006 (Dec. 23, 2015) at 10–13 (Letter from Honorable Lisa Madigan, Ill. Att'y Gen. to Honorable Elgie R. Sims, Jr. Ill. State Rep., Dist. 34, and Honorable Scott R. Drury, Ill. State Rep., Dist. 58).

[36]*See Long v. Castle Tex. Prod. Ltd. P'ship*, 426 S.W.3d 73, 81 (Tex. 2014) ("[C]ourts are to avoid interpreting a statute in such a way that renders provisions meaningless." (quotation marks omitted) (alteration in original)). One paid daily fantasy sports operator also contends that the payment of entry fees to participate in fantasy leagues are not bets. *See* ZwillGen Brief at 4. The New York court rejected this argument, holding that the entry fees were "something of value" under New York law and thus constituted a bet. *New York v. DraftKings, Inc.*, No. 453054-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015), *New York v. FanDuel Inc.*, No. 453056-2015, at 7 (N.Y. Sup. Ct. Dec. 11, 2015). We agree with the New York court that the labelling of the consideration as an entry fee does not transform its character as consideration for the opportunity to win a prize.

[37]TEX. PENAL CODE § 47.02(b); *see* Tex. Att'y Gen. Op. No. GA-0611 (2008) at 5 (acknowledging that the term "and" is usually used in a conjunctive sense).

In present form, which has remained unchanged for purposes of this analysis since its codification in 1973,[38] the Legislature has seen fit to prohibit betting on the performance of individuals in games or contests but to not prohibit actual contestants in contests of skill from receiving compensation or prizes.[39] Under this statutory framework, odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling, but that participation in traditional fantasy sport leagues that occurs in a private place where no person receives any economic benefit other than personal winnings and the risks of winning or losing are the same for all participants does not involve illegal gambling. It is within the province of the Legislature, and not this office or the courts, to weigh the competing policy concerns necessary to alter this framework to legalize paid daily sports fantasy leagues.

[38] *See* Act of May 24, 1973, 63d Leg., R.S., ch. 399, Sec. 1, § 47.01–.02, 1973 Tex. Gen. Laws 883, 965–66.

[39] TEX. PENAL CODE §§ 47.01(1)(B), .02(a)(1).

SUMMARY

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

Though participating in a traditional fantasy sports league is also illegal gambling under section 47.02, participants in such leagues may avail themselves of a statutory defense to prosecution under section 47.02(b) of the Penal Code when play is in a private place, no person receives any economic benefit other than personal winnings, and the risks of winning or losing are the same for all participants.

Very truly yours,

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Chair, Opinion Committee

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Assistant Attorney General, Opinion Committee

Appendix D

Site	College Football	College Hoops	Golf	MMA	NASCAR	Soccer	eSports
Daily MVP	No	No	No	No	No	No	No
Draft Ops	No	No	No	Yes	No	No	No
DraftDay	Yes	No	Yes	No	No	No	No
DraftKings	No	No	Yes	Yes	Yes	Yes	Yes
DraftPot	Yes	Yes	Yes	No	Yes	Yes	Yes
FanDuel	No	No	No	No	No	No	Yes*
Fantasy Aces	Yes	No	Yes	No	No	No	No
Fantasy Feud	Yes	Yes	Yes	No	Yes	No	No
FantasyDraft	No	No	Yes	No	No	No	No
FantasyScore	No	No	No	No	No	No	No
Star Fantasy Leagues	No	No	No	No	No	No	No
StarsDraft	No	No	Yes	No	No	No	No
Yahoo	No	No	No	No	No	Yes**	No

*via AlphaDraft
**via MondoGoal