

REAL LIABILITIES FOR FANTASY SPORTS: THE MODERN INADEQUACIES OF OUR ARCHAIC LEGAL FRAMEWORK

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INTRODUCTION

On September 27, 2015, Ethan Haskell, a Content Manager at daily fantasy sports-giant DraftKings, inadvertently published aggregate user data regarding DraftKings' biggest contest, the Millionaire Maker, before some of the National Football League (NFL) games in that contest had been played.¹ The data released revealed which NFL athletes² were the most popular picks among DraftKings' users for the contest.³ Such data is normally not released until all of the games have started and all users' lineups are finalized; viewing it early would provide someone participating in the contest with a huge tactical advantage:⁴ someone like, perhaps Haskell, who won \$350,000 on a competing platform FanDuel for his fantasy NFL predictions that same week.⁵ This story, which received wide national news coverage with many allegations of "insider trading," calls for broader regulation of the daily fantasy sports industry, and the start of an "insider trading" investigation by the New York Attorney General's office.⁶

The fantasy sports industry has grown at a rapid rate, currently pulling in over \$400 million in revenues and a 14% participation rate of the U.S. population.⁷ This paper will examine the often inadequate legal framework

1. Chris Grove, *DraftKings Lineup Leak Rocks Daily Fantasy Sports Industry: Questions and Answers*, LEGAL SPORTS REPORT (Oct. 4, 2015), <http://www.legalsportsreport.com/4548/draftkings-data-leak-faq/> [<https://perma.cc/5B8K-9L4K>].

2. Throughout this paper, "athlete" will be used to describe members of actual professional sports leagues while "participant" and "player" will be used to describe members of fantasy sports leagues.

3. Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html> [<https://perma.cc/DP6L-FPA2>].

4. *Id.*

5. *Id.*

6. See e.g., Grove, *supra* note 1 (explaining the DraftKings leak and what it means); Drape & Williams, *supra* note 3; Darren Rovell, *Commissioners Say Daily Fantasy Not Akin to Gambling, but Needs Regulation*, ESPN (Oct. 27, 2015), http://espn.go.com/chalk/story/_/id/13983597/commishes-say-fantasy-not-gambling-needs-regulation [<https://perma.cc/D8X3-8ELD>] (offering supporting opinions in favor of regulation and against inappropriate use of information in fantasy sports); see also Curt Nickisch, *Fantasy Sports Industry Under Scrutiny After Insider Trading Allegations*, NPR (Oct. 9, 2015), <http://www.npr.org/2015/10/09/447236543/fantasy-sports-industry-under-scrutiny-after-insider-trading-allegations> [<https://perma.cc/9AQ3-SB9S>] (discussing the DraftKings leak and filings by fans of a federal class-action lawsuit alleging fraud).

7. *Industry Demographics*, FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.site->

within which fantasy sports operate and the very real liabilities to which millions of fantasy sports fans and service providers are currently exposed. Part I provides an overview of Fantasy Sports. Part II describes the ultimately failed insider trading investigation. Part III analyzes U.S. gambling regulation, focusing on the current litigation taking place between the New York Attorney General and daily fantasy sports operators. Finally, Part IV offers recommendations to regulate the industry that better reflect societal values than the current skill-chance distinction.

I. OVERVIEW OF FANTASY SPORTS

A. *Development of Fantasy Sports: From the Halls of Academia to Millions of Living Rooms*

Fantasy sports originated at Harvard University in the 1960s.⁸ Bill Gamson, a social psychology research assistant, created a game for his friends scored on baseball statistics where each player received a \$100,000 imaginary budget to “draft” major league baseball athletes to their own fantasy teams.⁹ His game, which had a ten-dollar entry fee, became popular on campus, and Gamson, wanting to distance himself from gambling, named it “the Baseball Seminar.”¹⁰

Daniel Okrent, the generally acknowledged father of fantasy sports,¹¹ saw his statistics professors playing the Baseball Seminar when Okrent was a student at the University of Michigan in 1965.¹² Okrent, with the help of some friends, was inspired to create his own version with a similar drafting process but a more formalized point system that has carried over to the present day: players’ successes are determined by the statistics their fantasy teams generate in eight categories that Okrent determined to best correlate with success in actual baseball seasons.¹³ Okrent’s “Rotisserie Baseball,” named after the rotisserie restaurant where its rules were finalized, is the primary format of season-long fantasy leagues today.¹⁴ Okrent and his friends actually trademarked the term “Rotisserie Baseball” in hopes of

ym.com/?page=Demographics [https://perma.cc/GNW9-HBZG] (last visited Dec. 9, 2015).

8. Geoffrey Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317, 323-24 (2008-2009).

9. *Id.*

10. *Id.*

11. Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW. J. 21, 22-24 (2001).

12. Hancock, *supra* note 8, at 324.

13. Thompson, *supra* note 11, at 22-24.

14. Hancock, *supra* note 8, at 323-24.

someday making money from his invention.¹⁵ However, his unique name was quickly abandoned for the generic, free-to-the-public and catchier term “fantasy.”¹⁶ Now a successful Pulitzer-Prize nominated writer and editor, Okrent does not harbor ill feelings, and he has found recognition as the first person inducted into the Fantasy Sports Hall of Fame.¹⁷

Technological improvements and widespread access to the internet have made fantasy sports a wildly popular phenomenon.¹⁸ Before computers, compiling all of the necessary statistics to judge each fantasy team was a daunting task attractive to academics such as Gamson and Okrent.¹⁹ The internet brought with it websites that track these statistics and “host” leagues, allowing people separated geographically to play together and resulting in easier and more efficient access and the formation of more leagues, as well as greater variety amongst them.²⁰ Today, fantasy sports are wildly popular; they are played by 14% of the U.S. population.²¹

Not surprisingly, as fantasy sports have attracted more participants, they have also received wide support from sports leagues, which have benefited from significant increases in both viewership of games and merchandise sales.²² That is, before fantasy sports, most people used to watch only their few favorite teams, while today, fantasy sports participants watch their fantasy teams’ athletes in games most nights of the week.²³ In addition, an ancillary market has quickly grown around fantasy sports, with participants spending an average of \$46 a year on materials to help with the administration of their teams.²⁴ Fantasy enthusiasts may also purchase fantasy sport insurance²⁵ and retain the services of strategic advisers who,

15. *The Quaz Q&A: Daniel Okrent*, JEFF PEARLMAN, <http://web.archive.org/web/20130106205742/http://www.jeffpearlman.com/the-quaz-qa-daniel-okrent/> [https://perma.cc/3DHA-3YVH] (last visited Jan. 16, 2016).

16. *Id.*

17. *Id. Hall of Fame*, FSTA, <http://fsta.org/hall-of-fame/#1437065319438-f5969457-caf2> [https://perma.cc/2GN6-38X9] (last visited Jan. 16, 2016).

18. Thompson, *supra* note 11, at 23.

19. *Id.*

20. *Id.*

21. *Industry Demographics*, FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.site-ym.com/?page=Demographics> [https://perma.cc/FB6G-L8X4] (last visited Dec. 9, 2015).

22. See Jon Boswell, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1275 (2007-2008) (“Participation in fantasy sports leagues continues to increase the revenues of professional sports leagues by strengthening and expanding fan bases, introducing fans to teams and players from other cities, and increasing attendance.”).

23. Chris Isidore, *How Fantasy Sports Changed the NFL*, CNN MONEY (Sept. 11, 2015), <http://money.cnn.com/2015/09/11/news/companies/fantasy-football/> [https://perma.cc/4TBH-SVKB].

24. *Industry Demographics*, *supra* note 21.

25. Leighton Hunley, *Real Insurance for Fantasy Football*, RISK & INSURANCE (July

much like financial analysts, crunch all the numbers and provide suggestions on optimizing drafts and starting lineups.²⁶ There is even a television series revolving around friends in a fantasy football league which aired for seven seasons.²⁷ The entire industry has been valued at over \$3 billion annually.²⁸

B. *Traditional Fantasy Sports*

Today, fantasy leagues exist for a variety of sports at different levels, including professional and college football, basketball, and hockey.²⁹ While there are many variations from game to game, “traditional fantasy sports” (TFS) are season-long fantasy leagues with a number of operational commonalities.

Most leagues are hosted by online websites and have a “commissioner,” the player who is responsible for gathering each participant’s entry fee and enforcing the rules of the game.³⁰ Participants draft their teams at the beginning of the season, aiming to select athletes that will perform well on a number of predetermined categories (e.g., home runs and stolen bases). Participants generally construct their drafts in one of three ways: (1) an automated draft, where each team is automatically selected by a computer, (2) a round-robin/snake draft, where the last participant to select an athlete in one round gets to pick first in the next, or (3) an auction draft, where each participant receives a budget of credits with which to bid and athletes go to the highest bidder.³¹ TFS drafts are

28. 2014), <http://www.riskandinsurance.com/real-insurance-fantasy-football/> [https://perma.cc/2G8L-9WTL] (“[D]esigned to recover costs for owners whose players experience season-ruining injuries . . . [t]he coverage is intended to replace the league entry fee, plus research expenses such as magazine or online subscriptions [C]overage maximum is \$1,000, including up to \$250 for ancillary research expenses. Owners can insure as many as five players per fantasy team and 10 players per season. . . . The premium per player insured ranges from 9 percent—for a historically healthy player—to 13 percent for an injury-prone player—of the coverage amount, plus taxes and fees.”).

26. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L 1, 24 (2012) (citations omitted) [hereinafter Edelman, *Short Treatise*].

27. *The League*, IMBD, <http://www.imdb.com/title/tt1480684/> [https://perma.cc/TV3D-5FKQ] (last visited Dec. 9, 2015).

28. Nathaniel Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS LAW. J. 79, 82 (Spring 2015) (internal citation omitted).

29. Fantasy leagues even exist outside the sports arena, reaching as far as fantasy Supreme Court leagues for law enthusiasts. FantasySCOTUS, LEXPREDICT, <https://fantasyscotus.lexpredict.com> [https://perma.cc/Z6EQ-QZ4F] (last visited Nov. 29, 2015).

30. Hancock, *supra* note 8, at 325.

31. Complaint at ¶ 22, *Schneiderman v. FanDuel, Inc.*, No. 453056/15 (Sup. Ct. N.Y.

competitive: each athlete may only be drafted once and all resulting teams are unique.³² During the season, participants act as the managers of their fantasy teams and have the ability to alter their weekly lineups in response to events such as injuries and underperformance by benching, trading, dropping and adding athletes.³³

There is a plethora of methodologies for effectively drafting and managing a fantasy league. At the basic level, each participant attempts to gain points while simultaneously blocking her competitors from accruing points. Ultimately, the player who is able to accumulate the most points wins a monetary prize (composed of the entry fees) and—often more importantly—bragging rights. The majority of TFS operators garner most of their revenue from advertising and administrative fees.³⁴

C. *Daily Fantasy Sports: “Fantasy For the A.D.D. Generation”*³⁵

Daily fantasy sports (DFS) are the contests at the center of the current legal controversy. They developed around 2009, in part to capture the market of millennials who think season-long leagues are too lengthy a commitment.³⁶ The two main DFS platforms, and the only platforms on which this comment focuses, are FanDuel and Draft Kings.

As the name suggests, their primary difference from TFS is the time frame: the majority of DFS games last under twenty-four hours.³⁷ This short time frame relieves DFS players of the managerial role shouldered by their TFS counterparts because once a player drafts her team, she cannot alter the lineup.³⁸ Another consequence of the short time frame is the

Cnty. Nov. 17, 2015) [hereinafter NYAG Complaint]; Ehrman, *supra* note 28, at 87; Hancock, *supra* note 8, at 326.

32. *Id.*

33. Hancock, *supra* note 8, at 326.

34. NYAG Complaint, *supra* note 31, at ¶ 27.

35. Ehrman, *supra* note 28, at 82 (citing Jon Bales, *Here’s What It Takes To Make a Living Playing Fantasy Sports*, BUS. INSIDER (Nov. 6 2013), <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11#ixzz2kU0ZUwd1> [https://perma.cc/37CN-3EYB]).

36. “We [the creators of FanDuel] thought, ‘OK, great market, lack of innovation and also really weird that this younger group is not coming in. Why don’t we take something that people love and make it faster? . . . That was really the genesis of the idea, which is: How do we make every day draft day? Everybody says the best day of the year is draft day. That really was the product.” Ehrman, *supra* note 28, at 82 (citing Erik Matuszewski, *Fantasy Sports Luring Wall Street in Its Fastest-Growing Sector*, BLOOMBERG BUSINESSWEEK (Jan. 5, 2014), <http://www.bloomberg.com/news/articles/2014-01-06/fantasy-sports-luring-wall-street-in-its-fastest-growing-sector> [https://perma.cc/24R7-BE6P]).

37. Although some games last up to a week. *Id.*

38. NYAG Complaint, *supra* note 31, at ¶ 38(b).

hindered accuracy of the DFS scoring system. There are several chance circumstances under which the points do not accurately reflect a particular athlete's game performance and thus may not accurately reflect the true winner of a contest.³⁹ These circumstances include: games getting rained out, postponed, suspended or shortened; the sport administrators' failure to correct official game statistics before the DFS platform declares a winner; and trades that occur after a contest is initiated.⁴⁰ Such timing-based discrepancies can largely be avoided in season-long games and chance events in general have less impact when distributed over the course of the season.

The drafting process itself is also different. DFS utilize a "salary cap" draft where each athlete is assigned a fictitious salary, which is correlated to how many points the DFS platform predicts the player will earn in the contest, and each player is given a virtual budget towards drafting her team.⁴¹ This aspect makes the draft uncompetitive (players do not have to compete with each other for draft picks since an unlimited number of players can draft each athlete),⁴² but it also gives each player more latitude in crafting their team unencumbered by chance events like draft pick order. The final major difference between DFS and TFS is the competition format. In TFS, players compete against the fantasy teams of other players in their league.⁴³ DFS games are structured in three ways: (1) head-to-head games, where two players compete against each other and there is one winner; (2) double-ups or 50/50, where the top scoring half of the contestants win prizes; and (3) Guaranteed Prize Pools (GPPs), the largest and most popular event where contestants can submit multiple entries and only the top few contestants win prizes.⁴⁴

The DFS industry is the entrepreneurial sibling of the bragging-rights oriented TFS. DFS are also called "Pay-to-Play" Fantasy Sports⁴⁵ because the DFS sites directly profit from the users' entry fees.⁴⁶ Recently, TFS operators, seeing the success of DFS, have adopted the "pay-to-play" model and host season-long contests with monetary prizes.⁴⁷ However,

39. *Id.* at ¶ 58.

40. *Id.* Such situations are not common problems in TFS, where players have a longer time frame to correct any mistakes. Also, because TFS counts all the points over the course of a season, one chance event will have less of an impact on a player's ultimate score.

41. How It Works, FANDUEL, <https://www.fanduel.com/how-it-works> [<https://perma.cc/VJQ4-Y7Q9>] (last visited Nov. 30, 2015).

42. NYAG Complaint, *supra* note 31, at ¶ 38.

43. Ehrman, *supra* note 28, at 86.

44. *Id.*

45. *Id.*

46. NYAG Complaint, *supra* note 31, at ¶ 52.

47. Marc Edelman, *Yahoo!, CBS, ESPN and the NFL Are Using Pay-To-Play Fantasy*

although TFS' have been simplified by the internet, they are still quite time-consuming and not very profitable. It would be difficult to actively participate in more than a handful of TFS leagues at the same time. DFS have radically altered this landscape by allowing players to compete frequently (even multiple times in the same GPP) for up to \$1 million in a single contest.⁴⁸ A small portion of DFS players utilize highly advanced analytical programs and frequently wager large sums of money in order to profit from this system.⁴⁹

Investors have taken notice of the profitability of DFS. FanDuel and DraftKings, combined, raised almost \$800 million in total as of October 2015.⁵⁰ The identity, or rather money and influence, of these investors is also significant. DFS investors range from Google Capital to Time Warner Investments and NBC Sports Ventures.⁵¹ Furthermore, the very real and major sports leagues have also gotten in on the action. The National Basketball Association, Major League Baseball, National Football Association, and National Hockey League have all invested and/or partnered with FanDuel and DraftKings.⁵² DFS operators have used a significant portion of this money to launch an aggressive advertising campaign with DraftKings and FanDuel reportedly airing an ad on national television every ninety seconds for three weeks straight.⁵³ That publicity, however, has come with an unexpected price, for as one commentator has noted, “[i]ronically, the marketing that has raised so much awareness about these sites has also likely led to more scrutiny.”⁵⁴ To that scrutiny and the ensuing NYAG investigation we now turn.

II. FAILED INSIDER TRADING INVESTIGATION

Following the publication of the Ethan Haskell story, government

Football to Drive Website Traffic in Fall 2014, FORBES (Aug. 13, 2014) <http://www.forbes.com/sites/marcedelman/2014/08/13/yahoo-cbs-espn-and-the-nfl-adopt-pay-to-play-fantasy-football-contests-in-2014-to-drive-user-traffic/#4cc2818f6d37> [https://perma.cc/C4CB-N92U].

48. Grove, *supra* note 1.

49. Ed Miller & Dave Singer, *For Daily Fantasy Sports Operators, the Curse of Too Much Skill*, SPORTS BUSINESS JOURNAL (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx> [https://perma.cc/AJD3-LT8D].

50. Davey Alba, *Does Winning At Fantasy Sports Require Skill or Dumb Luck?*, WIRED (Oct. 17, 2015), <http://www.wired.com/2015/10/does-winning-at-fantasy-sports-require-skill-or-dumb-luck/> [https://perma.cc/Z787-GFGR].

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

regulators and DFS lawyers went through the mechanical steps of a corporate white collar crime investigation. As discussed in this section, although the investigation did not lead to criminal charges, it has raised questions about the integrity of the DFS industry and the adequacy of our existing legal and regulatory framework.

On October 6, 2015, Kathleen McGee, Internet Bureau Chief at the office of the New York Attorney General (“NYAG”), sent nearly identical letters to the CEOs of DraftKings and FanDuel addressing “legal questions relating to the fairness, transparency, and security of DraftKings [and FanDuel] and the reliability of representations your company has made to customers.” She requested a substantial amount of information, including “the employee handbook and company policies on how data is handled and whether the companies set limits on how much employees can win.”⁵⁵ Both DraftKings and FanDuel retained former U.S. attorneys to head their investigations.⁵⁶

On October 19, 2015, DraftKings released the results of their external independent report: Haskell obtained the non-public aggregate user data forty minutes *after* his winning lineup on FanDuel was locked in.⁵⁷ This evidence of “innocence” fell by the wayside, however, for in just a matter of weeks what had started as an investigation into the integrity of FanDuel and DraftKings had turned into a full-out attack on the legality of the DFS business model, with the NYAG asserting that DFS are illegal regardless of whether or not there was any insider trading.⁵⁸ On November 10, Eric Schneiderman of NYAG sent both websites cease-and-desist letters, accusing them of operating illegal gambling operations and telling them to stop taking bets from New York residents.⁵⁹ By November 17, the NYAG filed formal criminal charges against both FanDuel and DraftKings in New

55. Kat Greene, *NY AG Wants Fantasy Sports Data Amid Insider Accusations*, LAW360 (Oct. 6, 2015), <http://www.law360.com/articles/711832/ny-ag-wants-fantasy-sports-data-amid-insider-accusations> [<https://perma.cc/75UX-HM58>].

56. Zachary Zagger, *Scandalized Fantasy Cos. Hire Debevoise, Kirkland, Greenberg*, LAW360 (Oct. 9, 2015), <http://www.law360.com/articles/713126/scandalized-fantasy-cos-hire-debevoise-kirkland-greenberg> [<https://perma.cc/XT5Z-SFBP>].

57. *DraftKings Summary of Findings*, DRAFTKINGS (Oct. 19, 2015), <http://pb-cdn.draftkings.com.s3.amazonaws.com/wp-content/uploads/2015/10/DraftKings-Independent-Summary-of-Findings-GT-FINAL.pdf> [<https://perma.cc/VZZ3-Q5AT>].

58. See e.g., Zachary Zagger, *Daily Fantasy Woes Grow As Leagues Become Targets*, LAW360 (Nov. 23, 2015), <http://www.law360.com/articles/730744/daily-fantasy-woes-grow-as-leagues-become-targets> [<https://perma.cc/6QTN-9RJV>] (reporting that the NYAG is trying to shut down Draft Kings Inc. and Fan Duel Inc. under the theory that they are illegal under state gambling laws).

59. Y. Peter Kang, *NY AG Deems DraftKings, FanDuel Illegal Gambling*, LAW360 (Nov. 10, 2015), <http://www.law360.com/articles/725909/ny-ag-deems-draftkings-fanduel-illegal-gambling> [<https://perma.cc/N2TK-BL8U>].

York Supreme Court.⁶⁰

It is unclear why the NYAG abandoned the inquiry into the integrity of fantasy sports; it may be because the legal teams of DraftKings and FanDuel sent over conclusive evidence of unquestionably fair conduct. Maybe the NYAG strategically chose to focus on the overall regulatory scheme instead of employee misconduct, although that would not explain why it dropped insider trading charges and retained fraudulent advertising charges.

Perhaps, the NYAG perceived insurmountable hurdles in satisfying the elements of traditional insider trading. The Security Exchange Commission's Rule 10b-5 (the generally applicable anti-fraud rule) is limited to "the purchase or sale of any security," which would not appear to encompass paying to participate in a DFS Contest.⁶¹ Even if the NYAG could get past that initial hurdle, Rule 10b-5 has further specific requirements that DFS employees may not satisfy, including a showing of fiduciary duty, materiality and loss causation.⁶²

While the exact reasoning of the NYAG is unclear, it is clear that any expectation by FanDuel and DraftKings that their cooperation with the NYAG's investigation would result in their benefit was for naught. Instead, they are now defending the very legality of their entire business model.

III. THE GAMBLING FRAMEWORK

DFS originated in only 2009,⁶³ but are now, in 2016, "an active topic for lawmakers, regulators, or law enforcement officials in almost two dozen states."⁶⁴ Most states, including New York, utilize some version of the common law gambling definition, which prohibits "activities in which a person pays consideration—usually cash—for the opportunity to win a prize in a game of chance."⁶⁵ This section focuses on the litigation

60. *Id.*

61. ARTHUR R. PINTO & DOUGLAS M. BRANSON, UNDERSTANDING CORPORATE LAW 431 (Lexis Nexis 4th ed. 2013).

62. *Id.*

63. Ehrman, *supra* note 28, at 82.

64. *DFS State Watch: Monitoring Daily Fantasy Sports Action in State Government*, LEGAL SPORTS REPORTER (last updated Jan. 20, 2016), <http://www.legalsportsreport.com/dfs-state-watch/> [<https://perma.cc/Y37Z-7LYL>].

65. Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Game of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 384 (2008-2009) (citing Darrell W. Bolen, *Gambling: Historical Highlights and Trends and Their Implications for Contemporary Society*, in GAMBLING AND SOCIETY 7 (William R. Eddington ed., 1976)).

currently taking place in New York; however similar arguments around this common law definition can be expected in other jurisdictions. The federal gambling framework, as shown in the second part of this section, relies heavily on state law and unfortunately does not offer any more protection or predictability in the fantasy sports industry.

A. *The New York Fight*

On December 11, 2015, the NYAG got an early victory in its litigation against FanDuel and DraftKings: NY Supreme Court Judge Manuel J. Mendez granted the NYAG a preliminary injunction, ordering both companies to immediately shut down in New York, “finding their daily fantasy sports contests likely constituted gambling under state law.”⁶⁶ This victory was short-lived, however, since the NY Appeals Court stayed the preliminary injunction, allowing both companies to operate as the litigation continues.⁶⁷

DraftKings’ and FanDuel’s legal fight with the NYAG is likely to continue for a lengthy period of time. There is a lot at stake for the well-lawyered DFS operators: millions of dollars in lost potential revenue from customers in its largest market, New York, as well as the over \$200 million dollars being sought by the NYAG in punitive damages and restitution.⁶⁸ While the ultimate verdict on the legality of DFS is unclear, an analysis of New York’s gambling statutes reveals that TFS and DFS are not materially different activities, and they should be treated similarly. If DFS are found to be gambling under New York law, the same fate should befall TFS.

1. It is unclear whether DFS constitute illegal gambling Under New York Law.

The New York Attorney General has charged FanDuel and Draft Kings with nine violations of New York state law in the Supreme Court of the State of New York’s New York County.⁶⁹ The primary allegations at issue, on which the case hinges, are those of illegal gambling and fraud. Unfortunately for the NYAG, these two arguments cut against each other;

66. Zachary Zagger, *New York Appeals Court Halts Injunction In Daily Fantasy Action*, LAW360 (Jan. 11, 2016), <http://www.law360.com/articles/745155/ny-appeals-court-halts-injunction-in-daily-fantasy-action> [<https://perma.cc/Q9WV-XQBX>].

67. *Id.*

68. Joe Drape, *New York Wants Fantasy Customers Repaid*, N.Y. TIMES (Jan. 1, 2016), <http://www.nytimes.com/2016/01/02/sports/revise-complaint-seeks-return-of-money-bet-on-fantasy-sports.html> [<https://perma.cc/AR5A-E9LK>].

69. NYAG Complaint, *supra* note 31, ¶¶ 115-58.

the first charge alleges DFS are games of chance, while the second charge accuses DFS operators of overstating just how much chance is involved in DFS.⁷⁰

The New York State penal code provides definitions of “gambling” and its relevant parts, “something of value” and “contest of chance”:

“Gambling.” A person engages in gambling when he [1] stakes or risks something of value [2] upon the outcome of a contest of chance or a future contingent event not under his control or influence, [3] upon an agreement or understanding that he will receive something of value in the event of a certain outcome.⁷¹

“Something of value” means any money or property, any token, object or article exchangeable for money or property, or any form of credit or promise directly or indirectly contemplating transfer of money or property or of any interest therein, or involving extension of a service, entertainment or a privilege of playing at a game or scheme without charge.⁷²

“Contest of chance” means any contest, game, gaming scheme or gaming devise in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.⁷³

TFS and DFS leagues where any money is involved⁷⁴ both satisfy the first and third elements of this gambling statute: participants risk some amount of money upon the understanding that they will receive a larger sum of money in the event that they accumulate the largest amount of points in their fantasy contest. FanDuel and DraftKings have argued that they do not fall within this language because players are merely paying “entry fees” to compete in contests for prizes.⁷⁵ However, New York common law has consistently interpreted “something of value” broadly. As the NYAG points out in its memorandum for a preliminary injunction, in *People v. Miller*, the court found that charging moviegoers the price of a movie ticket for the chance to win a randomly drawn cash prize fell under

70. *Id.*

71. NY PENAL LAW § 225.00(2) (Consol. 2016).

72. NY PENAL LAW § 225.00(6) (Consol. 2016).

73. NY PENAL LAW § 225.00(1) (Consol. 2016).

74. This analysis focuses on TFS leagues where money is exchanged for the sake of a more appropriate comparison to DFS. However, free leagues may actually also fall under this broad statutory language, should a court decide that reputational advantage is “something of value.” In *People v. Miller*, a penny was deemed something of value, albeit for the first factor, demonstrating how broadly the statute has been interpreted. 271 N.Y. 44, 47, 2 N.E.2d 38, 39 (1936) (citing *People v. Runge*, 3 N.Y. Crime Rep. 885 (1885)).

75. Memorandum of FanDuel Inc. In Opposition To Plaintiff’s Motion For a Preliminary Injunction at 21, *Schneiderman v. FanDuel*, No. 453056/15 (Sup. Ct. N.Y. Cnty. Nov. 17, 2015) [hereinafter FanDuel Memo].

the gambling statute.⁷⁶ Movie tickets are undoubtedly entry fees and moviegoers “risked” very little, in comparison to DFS participants, as they still got to see a film with those tickets regardless of whether or not they won the prize. Consequently, the defendants’ argument should fail here.

The entire gambling charge will therefore rest on the New York judiciary’s interpretation of the second factor: whether DFS games are contests of chance. Here, the state and the defendants disagree on the appropriate legal test. The NYAG is promoting a “material element test,” and concludes that DFS fails because chance is a *significant factor* in determining the outcome.⁷⁷ The defendants argue that a “dominating element test” should be employed and conclude that DFS passes because skill, rather than chance, is the *most important factor* in determining the outcome.⁷⁸ Given the language of the statute, the NYAG’s position appears more convincing. The statute defines “contest of chance” as one where the “outcome depends in a *material* degree upon an element of chance” and specifically points out that this provision applies even if skill of participants is also a factor.⁷⁹

Even if the court decides to utilize the government’s proposed “material element test,” it is still unclear whether it will find that DFS constitutes gambling. This is a frustrating characteristic of gambling regulations. “[T]here’s no universal test for quantifying the distribution of skill and chance in outcomes of a given game. It’s fundamentally a matter of opinion There’s not some simple mathematical threshold between ‘chance’ and ‘skill’ that can help make a determination.”⁸⁰ The difficulty in quantifying the skill involved has not stopped FanDuel and DraftKings from retaining experts to conduct studies purporting to demonstrate that skill in fact controls the outcome of DFS contests.⁸¹ Given the aforementioned lack of a mathematical threshold on this matter, it is unlikely that these expert findings will carry much weight in the ultimate decision.

Both sides have put forward strong arguments as to the proper test. On the one hand, the short time frame of DFS certainly makes chance very important in some games, like where athletes score significantly higher or lower than their average statistics or when weather impacts scoring. “Any

76. Memorandum of Law in Further Support of the NYAG’s Motion for a Preliminary Injunction 23-27, *Schneiderman v. FanDuel*, No. 453056/15 (Sup. Ct. N.Y. Cnty. Nov. 23, 2015) [hereinafter NYAG Memo]. See *People v. Miller*, 271 N.Y. 44, 48 (1936).

77. *Id.* at 6 (citing *People v. Miller*, 271 N.Y. 44, 48 (1936)).

78. FanDuel Memo, *supra* note 75, at 72.

79. NY PENAL LAW § 225.00(1) (Consol. 2016) (emphasis added).

80. Alba, *supra* note 50.

81. FanDuel Memo, *supra* note 75, at 9 (“The Empirical Evidence”).

one of those factors, standing alone, can fundamentally alter the outcome of a DFS wager and introduce indelible and unavoidable elements of chance into any DFS contest. That is particularly apparent because the margin of victory in a DFS contest is often measured in fractions of points.”⁸² On the other hand, the fact that chance will impact the outcome of *some* games does not make all DFS games contests of chance. The top few percent of players in DFS contests win an overwhelmingly large portion of the prize money, which suggests that chance is certainly not the determinative factor—and perhaps not even a significant factor—when you analyze the activity as a whole.⁸³

Ironically, this fact, which supports the legality of DFS under most gambling statutes, threatens to make the industry unprofitable. DFS has advertised itself to look like illegal gambling because that is what will draw in consumers.⁸⁴ As Joshua Brustein, a reporter for Bloomberg Business, explains:

To get to the size their investors are expecting requires a continuous stream of new [and unskilled] players lured by ever-increasing prize pools with the help of muscular advertising campaigns. These ads never spell out a simple truth about daily fantasy competitions: 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.⁸⁵

Various commentators have pointed out this fact in articles with titles like “*You Aren’t Good Enough to Win Money Playing Daily Fantasy Sports*” and “*For Daily Operators, the Curse of Too Much Skill.*” The NYAG’s complaint concedes that few skilled players win more often and actually charges DFS platforms with fraudulent conduct for “misrepresenting the likelihood of a casual player will win a jackpot

82. NYAG Memo, *supra* note 76, at 9 (citing Nov. 17, 2015 Affidavit of Vanessa Ip Pertaining to DraftKings, Inc., No. 453054/15, D.I. 43 (“Ip DK Aff.”) ¶ 48).

83. “A recent study in Sports Business Daily found that over the first half of this year’s Major League Baseball season, 91 percent of daily fantasy sports player profits were won by just 1.3 percent of the players. In fact, on average, the top 11 players paid \$2 million in entry fees and made profits of \$135,000 each while accounting for 17 percent of all entry fees.” Drape & Williams, *supra* note 3 (citing Miller & Singer, *supra* note 49).

84. Joshua Brustein, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESS (Sep. 10, 2015), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> [https://perma.cc/CV23-2RBD].

85. *Id.* at 2.

[sic].”⁸⁶ This charge, confusingly followed by another fraud charge for “misrepresenting the degree of skill implicated in the games,”⁸⁷ strongly cuts against the NYAG’s factual analysis of “contest of chance.” The fact that a small number of players can consistently win prizes is not conclusive evidence that outcomes are determined by skill, but it is strong evidence that outcomes also are not determined by chance.⁸⁸

2. TFS Are Materially Similar to DFS

In its initial complaint, the NYAG argued that DFS are games of chance and, as such, are materially different from TFS games of skill.⁸⁹ A comparison of the two activities reveals otherwise,—at least with regards to the relevant criteria on which the NYAG has relied to bring his charge. In a later memorandum, the NYAG has ceased using the legality of TFS as a baseline argument, instead focusing on the differing roles of operators in each activity. However, this distinction fails to account for the burgeoning market around TFS.

The NYAG has stated that TFS are more reliant on skill for three main reasons: (1) longer time frame, (2) competitive drafts, and (3) the managerial role of participants.⁹⁰ However, the season-long nature of TFS makes individual chance events less important, as their impact will be distributed amongst the statistics of many weeks. DFS contests will be more impacted by singular chance events and scoring discrepancies, since there are fewer games in each contest. Nevertheless, the short time frame actually helps DFS players be more responsive to chance events since they have until moments before games start to choose their lineups. “Part of the skill element is trying to gauge uncertainty and use it to your advantage.”⁹¹ A DFS player can limit her exposure to speculated injuries and forecasted bad weather, while a TFS player will be constrained by draft-day picks.

86. NYAG Complaint, *supra* note 31, at ¶ 144(b).

87. *Id.* at ¶ 144(c).

88. FanDuel and DraftKings argue that the consistent winners are thus evidently “skilled” at the DFS contests. It may be that these top winners are misusing insider information, as these statistics were collected before both platforms prohibited their employees from participating in contests, and it is unclear what percentage of winners were employed by the two websites. These suggestions are unlikely to be explored in the New York litigation, as a result of the failed insider trading investigation.

89. Cease & Desist Letter, STATE OF NEW YORK OFFICE OF THE ATTORNEY GENERAL (Nov. 10, 2015), <http://www.law360.com/articles/725909/ny-ag-deems-draftkings-fanduel-illegal-gambling> (click on “letter” under documents in right panel) [<https://perma.cc/XAB9-BCNA>] [hereinafter Cease & Desist Letter].

90. *See*, NYAG Memo, *supra* note 76.

91. Ehrman, *supra* note 28, at 107.

The competitive draft, which the NYAG argues is more indicative of skill, actually leaves TFS players more exposed to chance throughout the season. Since each athlete can only get drafted once in a competitive draft, the pool of un-drafted “free-agents” is made up of low-scoring athletes. If a TFS player’s top round draft picks get injured early in the season, she will be unable to counteract those chance events. This demonstrates the narrow scope of the “managerial” role touted by the NYAG as evidence of skill in TFS. Theoretically, TFS participants have the opportunity to alter their lineups every week but, practically, they will be forced to make limited changes unless they want to bet on low-scoring free-agents. Finally, the short time frame of DFS also makes it harder for disinterested players to compete. In TFS, someone can utilize an auto-draft or rely on a snake/round-robin draft to equalize everyone’s teams and then make minimal changes to his or her lineup each week. In DFS, players have to set a brand new lineup each time they play, and the salary cap draft greatly expands the amount of various strategic choices they can make.

In a later memorandum, the NYAG has backed away from its previous comparisons of TFS and DFS, stating that the legally relevant distinction rests simply on the different ways that these activities handle money.⁹² DFS is an activity in which the operators take a cut of the participants’ entry fees, much like gambling “bookies,” while TFS operators generally offer free or cheap, administrative fee-based, services.⁹³ In a parenthetical buried in that memorandum, the NYAG reveals why this factual difference is significant: New York law does not prohibit social gambling.⁹⁴ The gambling statute defines gambling broadly, but all related criminal charges stem from engaging in the business of gambling. So, while TFS may fall under New York’s definition of gambling, no entrepreneurs have made as much money from it as the defendants in DFS and caught the NYAG’s attention as potential defendants.

While it is true that no operator has monetized TFS to the extent that FanDuel and DraftKings have monetized DFS, many of the operators have in fact created pay-to-play contests with prizes in a format identical to that of FanDuel and DraftKings.⁹⁵ Furthermore, the entire market of products

92. Memorandum of Law in Opposition to Defendants’ Motion for an Interim Stay, 36-37, No. 453054/15 (Sup. Ct. N.Y. Cnty., Dec. 22, 2015).

93. *Id.*

94. “[S]ee Penal Law § 225.00(3) (exempting ‘gamb[ing] at a social game of chance’).” *Id.* at 36.

95. Marc Edelman, *Yahoo!, CBS, ESPN and the NFL Are Using Pay-To-Play Fantasy Football to Drive Website Traffic in Fall 2014*, FORBES (Aug. 13, 2014) <http://www.forbes.com/sites/marcedelman/2014/08/13/yahoo-cbs-espn-and-the-nfl-adopt-pay-to-play-fantasy-football-contests-in-2014-to-drive-user-traffic/#4cc2818f6d37> [<https://perma.cc/VMG7-Y5B9>].

supporting TFS (for example, fantasy football insurance) is exposed to charges like “promoting gambling” for “profiting from unlawful gambling activity.”⁹⁶ This distinction is not a silver bullet and only underlines how reliant actors in fantasy sports are dependent on prosecutorial discretion.

B. *Inadequacy of Federal Regulation*

DraftKings and FanDuel have heavily relied on a federal statute to justify their legality. However, federal gambling regulations rely on state law definitions.⁹⁷ Thus, federal law cannot save DFS from liability in New York or other states. Some commentators have said Federal Law will at least protect fantasy sports from federal chargers where state law allows them to operate.⁹⁸ The following analysis challenges this contention and identifies two federal statutes in particular that are potential sources of concern: the Illegal Gambling Business Act and the Unlawful Internet Gambling Enforcement Act.⁹⁹

1. The Illegal Gambling Business Act (IGBA) of 1970

Congress enacted the IGBA in 1970 in an effort to curb organized crime and target gambling operations of major proportions.¹⁰⁰ Most

96. NY PENAL LAW § 225.05 (Consol. 2016).

97. Unlawful Internet Gambling Enforcement Act of 2006 Overview, FEDERAL DEPOSIT INSURANCE CORPORATION (July 30, 2010), <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> [<https://perma.cc/A7JR-479C>].

98. Edelman, *Short Treatise*, *supra* note 26, at 95 (“The UIGEA exception for fantasy sports does not make fantasy sports legal because they may still violates other state or federal laws; it merely guarantees that the government will not prosecute fantasy sports under the act.”).

99. This is not an exhaustive discussion of all of the relevant federal statutes but instead a focus on the two statutes most often referenced in media coverage of DFS. For a more thorough analysis of potential legal issues for fantasy sports see Marc Edelman’s *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*. 3 HARV. J. SPORTS & ENT. L. 1 (2012).

100. “The legislative history is remarkably clear that the passage of this statute was driven by the desire to crack down on organized crime.” *United States v. DiCristina*, 726 F.3d 92, 103 (2d Cir 2013). “While gambling may seem to most Americans to be the least reprehensible of all the activities of organized crime, it is gambling which provides the bulk of the revenues that eventually go into usurious loans, bribes of police and local officials, ‘campaign contributions’ to politicians, the wholesale narcotics traffic, the infiltration of legitimate businesses, and to pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime.” *United States v. DiCristina*, 886 F. Supp. 2d 164, 203 (E.D.N.Y. 2012) (citing 115 Cong. Rec. 10,043 (Apr. 23, 1969) (President Nixon’s Message to Congress)).

“kitchen table” poker games are not subject to this legislation.¹⁰¹ The IGBA does not make gambling a federal crime, nor does it even define gambling. Instead, it criminalizes participating (owning, financing, managing or directing) in a gambling business.¹⁰² A gambling business is defined as one which: (1) violates state or local law; (2) involves five or more persons; and (3) is in continuous operation for a period in excess of thirty days *or* has a gross revenue of \$2,000 in any single day.¹⁰³ This statute provides a nonexclusive list of gambling activities, including bookmaking and conducting lotteries,¹⁰⁴ and also provides a carve-out for “game[s] of chance” run by tax-exempt organizations.¹⁰⁵

In 2012, the United States District Court for the Eastern District of New York interpreted the carve-out language to mean that the IGBA only prohibited games of chance.¹⁰⁶ However, this decision was overturned by the Second Circuit, which held that the IGBA does not create its own definition of gambling, but rather relies explicitly on state law: “the question of whether skill or chance predominates in poker is inapposite to this appeal. The language of the statute is clear that it contains only three requirements, all set forth in *subsection (b)(1)*.”¹⁰⁷

Accordingly, the application of the IGBA to fantasy sports will hinge on state law. Operators of both TFS and DFS platforms would be in violation of this statute in states that decide their operations are illegal gambling under section (b)(1)(i). Online hosts of both activities are major corporations with over five employees, and therefore satisfy (b)(1)(ii). TFS platforms are all “operated in excess of thirty days,” since they last the entirety of a sport season and DFS platforms take in significantly more than “\$2,000 in any single day,” fulfilling the requirements of (b)(1)(iii).

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

The UIGEA was passed as “midnight drop” legislation, attached to a bi-partisan and unrelated national security bill that senators could not vote

101. *Id.*

102. 18 U.S.C. § 1955(a) (1994).

103. *Id.* §1955(b)(1).

104. *Id.* §1955(b)(4).

105. *Id.* §1955(e).

106. *See* DiCristina, 886 F. Supp 2d at 235 (“Neither the text of the IGBA nor its legislative history demonstrate that Congress designed the statute to cover all state gambling offenses. Nor does the definition of “gambling” include games, such as poker, which are predominated by skill. The rule of lenity compels a narrow reading of the IGBA, and dismissal of defendant’s conviction.”).

107. DiCristina, 726 F.3d at 100.

against at the last minute.¹⁰⁸ Legislative history indicates that the bill's proponents were worried about the proliferation of crime online and the addictiveness and accessibility of online gambling, particularly to college-aged and underage demographics.¹⁰⁹ Other supporters of the bill included legal gambling establishments that did not want to face competition, religious and social conservatives worried about moral decay, and professional sports leagues opposed to sports betting.¹¹⁰ Some more skeptical commentators posit that the UIGEA was primarily motivated by domestic economy concerns since off-shore online gambling operators were taking millions of dollars out of the U.S. economy.¹¹¹

Like the IGBA, the UIGEA does not criminalize or define gambling. Both acts supplement existing state regulations and rely on those definitions.¹¹² Both the IGBA and the UIGEA attack commercial gambling, but while the IGBA focuses on large scale gambling operators, the UIGEA attacks the mechanism by which online gambling is funded.¹¹³ The act has broad coverage: “[n]o person engaged in the business of betting or wagering may knowingly accept” specified financial instruments “in connection with the participation of another person in unlawful Internet gambling.”¹¹⁴ Unlawful internet gambling is defined as placing, receiving, or otherwise knowingly transmitting a bet or wager via the Internet in

108. “Legislators were smart to attach a relatively controversial bill to one destined to ensure national security.” Dana Gale, *The Economic Incentive Behind the Unlawful Internet Gambling Enforcement Act*, 15 CARDOZO J. INT’L & COMP. L. 533, 539 n.44 (2007) (internal citations omitted).

109. Thompson, *supra* note 11, at 25; S. REP. NO. 106-121, at 13-16 (1999) (internal citations and footnotes omitted).

110. Gale, *supra* note 108, at 545.

111. *Id.* at 546 (“If the stated intent reflected the true motivations of legislators, the Act would not have carved out exceptions for specific American gambling entities. These carve-outs, when combined with the absence of any articulated means for treating gambling problems, indicate that the Act ‘looks to be more focused on keeping gaming revenue within U.S. borders.’”) (internal citations omitted).

112. *See Sanabria v. United States*, 437 U.S. 54, 70, 98 S.Ct. 2170, 2182 (1978) (“Congress did not assimilate state gambling laws per se into the [IGBA] . . . nor did it define discrete acts of gambling as independent federal offenses.”) (internal citations and footnotes omitted); *see also*, *Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 116 (3d. Cir. 2009) (“[T]he [UIGEA] . . . does not itself outlaw any gambling activity, but rather incorporates other Federal or State law related to gambling.”) (internal citations and footnotes omitted).

113. Unlawful Internet Gambling Enforcement Act of 2006 Overview, FEDERAL DEPOSIT INSURANCE CORPORATION (July 30, 2010), <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> [https://perma.cc/UC58-ZT4X].

114. 31 U.S.C. § 5363.

violation of some pre-existing federal, state, or tribal law.¹¹⁵ Both individuals and financial institutions may be found liable under this act.¹¹⁶

The UIGEA contains a carve-out for fantasy sports that was lobbied for by the Major League Baseball Players Association and incorporated in an earlier version of the bill after “extensive discussions” with groups including fantasy sports league interests, institutions of higher education, Internet service providers, the National Football League, the National Collegiate Athletic Association, and the National Association of Attorneys General.¹¹⁷ The news media has collectively deemed this to be conclusive evidence of the legality of fantasy sports.¹¹⁸ DFS operators have also used this in support of their own legality.¹¹⁹ Legislative history reflects that the fantasy sports carve-out here is a narrow one. The Senate report on this amendment, for example, explicitly states that this carve-out is not intended to legalize fantasy sports nationally, given their highly fact-dependent status under state law. The report specifically recognizes that some state may consider fantasy sports to be gambling.¹²⁰

The carve-out operates by exempting fantasy sport games that meet the listed conditions from the definition of a bet or wager.¹²¹ One of these conditions is that “[a]ll 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.”¹²² TFS prize pools are almost always determined by the amount of fees paid by the participants. Even if the host website collects fees, the ultimate prize is the remaining money that all participants contributed. This provision is

115. 31 U.S.C. § 5362(10).

116. See e.g., *United States v. Lyons*, 740 F.3d 702, 729 (1st Cir. 2014) (convicting the defendant on ten counts of violating the UIGEA); see also 31 C.F.R. § 132.2 (clarifying liability for financial institutions under the UIGEA).

117. S. REP. NO. 106-121, at 9 (1999).

118. See e.g., Brustein, *supra* note 84 (“Making money from fantasy sports is perfectly legal. A federal law restricting sports gambling has an exemption for games of skill, which fantasy games fit into.”); Drape & Williams, *supra* note 3.

119. *Playing on DraftKings Is 100% Legal in the USA*, DRAFTKINGS, <https://www.draftkings.com/help/why-is-it-legal> [<https://perma.cc/3LJX-TXB3>] (last visited Dec. 9, 2015); *Is FanDuel Legal*, FANDUEL, <https://fanduel.zendesk.com/hc/en-us/articles/210202858-Is-FanDuel-legal-> [<https://perma.cc/9S29-XK9F>] (“Fantasy Sports is considered a game of skill and received a specific exemption from the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA).”) (last visited Dec. 9, 2015).

120. S. REP. NO. 106-121, at 27 (1999). Note that this Senate report pertains to an earlier version of the UIGEA - the Internet Gambling Prohibition Senate Bill of 1999 - which did not ultimately pass. Nevertheless, this language still holds true as the UIGEA ultimately hinges on state law definitions of gambling.

121. 31 U.S.C. § 5362((1)(A)).

122. 31 U.S.C. § 5362((1)(A)(I)).

troublesome for all TFS participants and their financial institutions. DFS large tournaments, in which prizes are guaranteed, are in compliance with this provision, but the remainder of their games run afoul of it, a point made obvious by the fact that only one type of game is categorized as “Guaranteed Prize Pool”.¹²³ If that labeling were not enough, FanDuel’s support website explains exactly how they miss the carve-out: “if the league is not completely filled by the start of the game then all entries on that league are voided and the entry fees returned to the users accounts. The one exception to this is the large field tournaments, where the contest and prize pool are typically guaranteed, regardless of the number of entrants.”¹²⁴ Oddly enough, DFS platforms comply with the provision where it is most expensive to do so: “[i]f a site says it is going to offer a \$1 million prize for a tournament with a \$20 entry fee, it has to pay out whether it attracts 60,000 players or 30,000. Falling short can be very expensive.”¹²⁵

Another stringent and applicable condition is that “*ALL* winning outcomes” must “reflect the relative knowledge and skill of the participants.”¹²⁶ It is unclear how courts will apply this to fantasy sports. TFS contains season-long managerial roles for participants, which reflect relative knowledge and skill. However, TFS also allows for auto-drafting, which may not amount to the sufficient amount of skill. It is likely that this inquiry will be highly fact-driven. For instance, a TFS league winner who used an auto-draft, did not alter his or her lineup all season and ended up winning at the end of a football season full of surprises would be violating the text of this statute. Yet, that same league may fit within the exception if a more active, knowledgeable participant won. This statutory language is not clear enough to give the many financial participants heavily invested in fantasy sports confidence or guidance.

IV. REGULATORY ALTERNATIVES

TFS and DFS are legally vulnerable because of the unpredictable character of gambling regulation. The skill-chance distinction can lead to fifty different regulatory frameworks with further variations based on each particular contest. This section examines the origins of the skill-chance distinction, demonstrates how poorly it matches regulators’ goals and

123. Ehrman, *supra* note 28, at 86.

124. *FanDuel Support*, FANDUEL, <https://fanduel.zendesk.com/hc/en-us/articles/210203578-What-happens-if-my-entry-doesn-t-get-matched-or-not-all-the-spots-are-filled-in-a-multi-person-game-> [https://perma.cc/G3P3-S3FT] (last visited Dec. 9, 2015)

125. Brustein, *supra* note 84.

126. 31 U.S.C. § 5362(1)(A)(II) (emphasis added).

suggests an alternative framework based on dollar amount spent per person.

A. *History of Skill-Chance Distinction*

Risk-taking has been called a “distinctively American value,” and gambling has not always been prohibited on our shores.¹²⁷ In fact, lotteries, card games, horse race bets, and the like were all popular ways to raise money for public funds before the institution of modern tax regimes.¹²⁸ For example, revenue from lotteries, which often acted like modern day bond offerings, was used to support colonial troops during the Revolutionary War and to improve the Erie Canal.¹²⁹

Gambling, however, goes back much further than the American colonies. Anthropological studies have discovered the ubiquitous presence of various forms of gambling in all societies during all eras of history.¹³⁰ The drawing of lots, one of the oldest forms of gambling, is found throughout the Bible: “Moses divided land among Israel’s twelve tribes by choosing lots, and the Bible describes Roman soldiers casting lots for the robes of Christ following his crucifixion.”¹³¹ Back then, people viewed the outcome of such a lottery not as a mere chance occurrence but rather as the revelation of the will of some supernatural force or deity.¹³²

By the nineteenth century, the outcomes of lotteries had lost the image of divinity for American Puritans, who began to publicly and profoundly disapprove of gambling.¹³³ This disapproval centered around the perceived immorality of allowing individuals to gain something in exchange for nothing - “of earning fortune by mere *chance*” - in direct opposition to the Puritan worth ethic.¹³⁴ Religious reformers continued speaking out against the evils of gambling and their sentiments regarding the basic distinction of skill and chance steadily spread amongst Christian adherents. In 1959,

127. Christine Hurt, *Regulating Public Morals & Private Markets: Online Securities Trading, Internet Gambling, and the Speculation Paradox*, 86 B.U. L. REV. 371, 372 (2006) (citation omitted).

128. *Id.* at 394.

129. *Id.*

130. Cabot, *supra* note 65 (citing Darrell W. Bolen, *Gambling: Historical Highlights and Trends and Their Implications for Contemporary Society*, in *GAMBLING AND SOCIETY* 7 (William R. Eddington ed., 1976)).

131. *Id.* at 385 (internal citations omitted).

132. *Id.* (citing Reuven Brenner & Gabrielle A. Brenner, *Gambling Speculation: A Theory, A History, And a Future of Some Human Decisions* 1 (1990)).

133. White Paper on Daily Fantasy Sports, MASSACHUSETTS GAMING COMMISSION 11-12 (Jan. 11, 2016), available at <http://massgaming.com/wp-content/uploads/MGC-White-Paper-on-Daily-Fantasy-Sports-1-11-16.pdf> [https://perma.cc/6E4D-E5WY]. [hereinafter MA White Paper].

134. *Id.* at 11.

gambling was described at the American Baptist Convention as “the redistribution of a people’s wealth according to *chance* rather than according to the receiver’s contribution to society.”¹³⁵

Interestingly, just as the topic of regulating fantasy sports took on fervor after reports of “insider trading,” gambling legislation seems to have made significant headway after middlemen made lotteries a profitable business with increasing rates of fraud.¹³⁶ The skill-chance distinction, originating from Puritan morals, ultimately made its way into American legislation where it has remained through the modern day. “A consequence of legislating this moral judgment has been the legal contortions of many forms of betting to demonstrate their reliance on skill, as opposed to chance.”¹³⁷ FanDuel and DraftKings are not the first defendants to utilize this “skill” argument. A very similar and unpredictable legal battle previously took place around various forms of poker, with some courts deeming it illegal gambling but others legal games of skill.¹³⁸

B. *Mismatch Between Regulatory Language and Goals*

As the prior analysis has shown, the skill-chance distinction is a poor regulatory tool offering little legal predictability. Moreover, two hypothetical individuals help illustrate why the skill-chance distinction is not even the truly relevant issue in this debate:

JANICE is an accountant who joined her office TFS league.¹³⁹ She does not watch, or even like, sports; she joined the league for the chance to win money and socialize with her coworkers. She picked her team using an auto-drafter, or in an arbitrary manner, perhaps based on the names she liked the most in a snake draft.

135. *Id.* Other religious leaders, for instance Elder Dallin H. Oaks of the Church of Latter-Day Saints, used rather more inflammatory words to highlight this distinction: “Whatever encourages men to take from one another without giving value in return serves the cause of Satan.”

136. Cabot, *supra* note 65, at 387 (“In response to the rise in fraud and subsequent loss of public support, state after state began to ‘abolish lotteries and prohibited private parties from selling tickets.’”) (internal citations omitted).

137. MA White Paper, *supra* note 133, at 12.

138. See, e.g., Cabot, *supra* note 65, at 401-02, n.106 (pointing out that in Massachusetts video poker was deemed an illegal game of chance by the federal First Circuit Court of Appeals, but a legal game of skill by the state Court of Appeals)(citing *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995); *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406-07 (Mass. Appl. Ct. 1991)).

139. Janice is borrowed from the character of “Janice from Accounting” from a satirical news show featuring a discussion of DFS. *Last Week Tonight With John Oliver* (Nov. 15, 2015), available at <https://www.youtube.com/watch?v=Mq785nJ0FXQ> [<https://perma.cc/D68B-K3JS>].

Janice ends up as the winner of her league after a particularly surprising season; she gets to keep the \$200 office pool.

SAM is a full-time professional DFS player.¹⁴⁰ He has degrees in math and economics, work experience in data science, and a successful history in online poker. He spends between eight and fifteen hours a day working on DFS. He has created custom-built predictive models and has a technique for identifying unpopular but effective athletes. He plays about a 1,000 contests a week during NFL season and has made \$2 million so far this year.

Sam relies on skill to win and profit from DFS. Janice has, to the great annoyance of her football enthusiast colleagues, won on chance. Janice's league is directly violating the UIGEA.¹⁴¹ While it is unclear how Sam will be treated under New York or federal law, it is clear that he is less culpable than Janice under a regime that allows games of skill but not chance. Yet, Sam, the objectively skilled player, is the person who is troublesome to regulators and commentators; Sam is being accused of exploiting a loophole intended for Janice. This hypothetical scenario suggests that the real issue troubling regulators is not the lack of skill involved in DFS, but rather the presence of high-profiting middlemen, or the business of fantasy sports.

C. *Removing the Skill-Chance Distinction*

Our nation's archaic gambling framework has resulted in "a public policy position that seems to assert that gambling is bad/illegal, except when it is not."¹⁴² The NYAG has targeted DFS operators for profiting, in the same way some TFS operators profit, from an activity with at least the same amount of chance as TFS. Lawmakers and regulators ought to remove the legally baseless and confusing skill-chance distinction from our statutes and replace it with language that better articulates societal goals. A new, more accurate and sensible definition of gambling is badly needed. One noteworthy suggestion, from the Massachusetts Gaming Commission, is to define gambling as an "economy activity characterized by a payment by a player for an opportunity to win an award based on the outcome of a future event, which is not otherwise regulated."¹⁴³

140. Sam is an exaggerated version of Saahil Sud, who was featured in a Bloomberg Business article on the difficulty of winning money on DFS websites. Brustein, *supra* note 84.

141. 31 U.S.C. § 5362((1)(A)(II) ("*[A]ll* winning outcomes" must "reflect the relative knowledge and skill of the participants.") (emphasis added).

142. MA White Paper, *supra* note 133, at 19.

143. *Id.*

Such an overhaul of our statutes nationwide will undoubtedly take a lengthy period of time, during which millions of fantasy sports enthusiasts will be left in legal limbo. Congress could mediate this issue by enacting a clear and broad carve-out for fantasy sports up to a certain dollar amount per person, much like the IGBA left “kitchen table” poker alone but criminalized commercial poker providers.¹⁴⁴ Such a statute would offer much needed clarity and protection to players of fantasy sports, while allowing individual states to regulate the business of fantasy sports as they see fit. Massachusetts regulators, for example, have expressed interest in exploring various consumer protection measures but otherwise allowing large operations like FanDuel and DraftKings.¹⁴⁵

The NYAG echoes many Americans by arguing TFS are not a seriously questioned activity.¹⁴⁶ As the legal analysis section of this comment demonstrates, the unquestioned status of TFS is not because our laws make it unequivocally legal, but rather because it has been popularly accepted as part of American culture. If this behavior is indeed condoned, Congress ought to pass a federal statute explicitly condoning it and setting clear parameters, rather than leaving millions of fans and a sizable part of our economy exposed to the whims of local prosecutors.

CONCLUSION

Fantasy sports, particularly DFS, are a relatively new phenomenon that our current laws do not adequately address. The failed New York Insider Trading investigation and the unclear status of TFS and DFS under our federal and state laws reveal that this area of social and economic activity requires regulatory attention. Legislators ought to consider moving away from a skill-chance distinction and towards a more uniform federal law in order to reflect societal values accurately and provide protection and legal predictability to millions of Americans.

144. “The intent of . . . [the IGBA] is not to bring all illegal gambling activity within the control of the federal government, but to deal only with illegal gambling activity of major proportions.” H.R. REP. 91-1549, at 53 (1970).

145. See generally MA White Paper, *supra* note 133 (pointing out issues such as age verification, funds protection and game integrity as areas of concern).

146. Cease & Desist Letter, *supra* note 89.