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DAILY FANTASY SPORTS AND THE PRESIDENTIAL DEBATE

WALTER T. CHAMPION JR.* AND I. NELSON ROSE**

“This is a very complicated case, Maude. You know, a lotta ins, a lotta outs, a lotta what-have-yous. And, uh, a lotta strands to keep in my head, man. Lotta strands in old Duder’s head.”¹

I. INTRODUCTION

The Dude’s dilemma is palpable when applied to ascertaining the legality of Daily Fantasy Sports (DFS). Its legality centers on an interpretation of the Unlawful Internet Gambling Enforcement Act (UIGEA).² One wonders if UIGEA was even meant to be taken seriously, instead of some cosmic joke imagined by the Old Duder himself. “The Act is title VIII of a completely unrelated bill, the SAFE Port Act, HR 4954, dealing with port security.”³ The Act was rammed through Congress by Senate Majority Leader Bill Frist (R.-TN), “apparently without even being proofread.”⁴ “[T]he Republican leadership refused to let members of Congress read the final version, or even

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1. *THE BIG LEBOWSKI* (Working Title Films 1998).
2. 31 U.S.C. §§ 5361–5367 (2016).
3. WALTER T. CHAMPION, JR. & I. NELSON ROSE, *GAMING LAW IN A NUTSHELL* 63 (2012).
4. *Id.*

have the author or anyone else explain what the UIGEA would do.”⁵

Fantasy Sports is the “act of building and competing with imaginary sports teams comprised of real-life athletes.”⁶ “Fantasy Sports is played by fans who pay a fee to enter and compete against each other for valuable prizes [T]he fantasy sports team consists of athletes from different real-world teams The only thing that is real is the statistics generated by the individual athletes” that are combined by computers “to determine which fantasy team has won.”⁷

“Until recently, fantasy sports was season-long . . . [but now] a fantasy league could be started and finished on the same day, . . . [which] led to an explosion of interest in fantasy sports.”⁸

The introduction of daily fantasy games has been as big a boost to the world of fantasy sports as the invention of the under-the-table camera was to T.V. poker. For the last two years, DFS has been the most talked about topic of interest at conferences for gaming operators, such as the Global Gaming Expo (G2E); gaming lawyers, including the International Masters of Gaming Law (IMGL); regulators, the International Association of Gaming Regulators (IAGR); and legislators, the National Council of Legislators from Gaming States (NCLGS).

And that was before the DFS scandal almost pushed Donald Trump off the front page in early October 2015.

As recently as 2014, the two major DFS enterprises, FanDuel and DraftKings, were making money and could brush off with impunity the scattered questions that might arise about the games’ alleged illegality.⁹ In 2014, DFS exploded with “unprecedented massive advertising campaigns.”¹⁰ But a scandal that began at the end of September 2015 brought unexpected scrutiny to the industry including threats from governmental officials to arrest DFS operators “unless they stopped taking players from Nevada and New York.”¹¹

The scandal developed when a DraftKings employee accidentally released

5. *Id.*

6. David O. Klein, *Fantasy Sports: The Rapidly Developing Legal Framework*, LAW360 (Sept. 20, 2015), <https://www.law360.com/articles/704275/fantasy-sports-the-rapidly-developing-legal-framework>.

7. I. Nelson Rose, *Are Daily Fantasy Sports Legal?*, 19 GAMING L. REV. & ECON. 346, 347 (2015).

8. *Id.*

9. I. Nelson Rose, *What Should Daily Fantasy Sports Do Now?*, 19 GAMING L. REV. & ECON. 683, 683 (2015).

10. *Id.*

11. *Id.*

confidential information about the real-world athletes that DraftKings patrons were selecting. That same DraftKings insider then, whether coincidentally or not, won \$350,000 at rival FanDuel.¹² This triggered a Chicken Little alert, as the sky was truly falling for DFS.

The Attorney General (A.G.) of New York wrote two cease and desist letters to DraftKings and FanDuel on November 10, 2015.¹³ The letters demanded that DraftKings and FanDuel immediately stop accepting wagers in New York.¹⁴ The letters stated that the A.G. commenced an investigation with the “inquiry initially center[ing] on allegations of employee misconduct and unfair use of proprietary information.”¹⁵ More importantly, the A.G. concluded that their operations constituted illegal gambling.¹⁶

We believe there is a critical distinction between DFS and *traditional* fantasy sports, which, since their rise to popularity in the 1980’s, have been enjoyed and legally played by millions of New York residents. Typically, participants in traditional fantasy sports conduct a competitive draft, compete over the course of a long season, and repeatedly adjust their teams. They play for bragging rights or side wagers, and the Internet sites that host traditional fantasy sports receive most of their revenue from administrative fees and advertising, rather than profiting principally from gambling. . . .

[T]he sites hosting DFS are in active and full control of the wagering: DraftKings and similar sites set the prizes, control relevant variables (such as athlete “salaries”), and profit directly from the wagering. DraftKings has clear knowledge and ongoing active supervision of the DFS wagering it offers. Moreover, . . . DFS is designed for instant gratification,

12. *Id.* See Joe Drape & Jacqueline Williams, *Fantasy Sports Businesses Have to Defend Practices as Integrity Called into Question*, HOUS. CHRON., Oct. 6, 2015, at C9. The scandal amounts to allegations of insider trading. The two companies “have set up online daily and weekly games in which fans pay an entry fee to a website—anywhere from 25 cents to \$1,000—to play dozens if not hundreds of opponents, with prize pools that can pay \$2 million to the winner.” *Id.*

13. Letter from Kathleen McGee, Chief, Internet Bureau, State of N.Y.: Office of the Att’y Gen., to Jason Robins, CEO, DraftKings, Inc., Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to N.Y. Exec. L. § 63(12) & Gen. Bus. L. § 349 (Nov. 10, 2015) [hereinafter DraftKings Cease and Desist]; Letter from Kathleen McGee, Chief, Internet Bureau, State of N.Y.: Office of the Att’y Gen., to Nigel Eccles, CEO, FanDuel Inc., Notice to Cease and Desist and Notice of Proposed Litigation Pursuant to N.Y. Exec. L. § 63(12) & Gen. Bus. L. § 349 (Nov. 10, 2015) [hereinafter FanDuel Cease and Desist].

14. DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13.

15. DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13.

16. DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13.

stressing easy game play and no long-term strategy.¹⁷

DraftKings and FanDuel characterize the money their patrons pay to participate in fantasy games as “fees.” The A.G. declared that these “fees” meet the definition of gambling under New York state law. He concluded that patrons were making wagers and whether or not they won their bets depended on elements of chance, specifically, on real-world performances of athletes. Prizes were obviously awards of value, since they often included large cash payments. The companies made their revenue by taking a “rake,” or a cut of the wagers.¹⁸

States vary greatly in how they are dealing with the explosion of interest in DFS. While the top law enforcement official in New York is threatening arrest, legislators in eight states, including Maryland, Indiana, and, yes, New York, are expressly making fantasy sports legal.¹⁹ In Texas, it was the Governor who decided that DFS was legal under his state’s law, specifically stating that Texas will place no curbs on fantasy sports.²⁰ And, even after the cease and desist letters, FanDuel maintained its visibility as a marketing presence in New York arenas, which helped it build the lobbying support it needed in the state legislature.²¹

The New York A.G. on November 17, 2015, sought a temporary injunction against FanDuel and DraftKings asserting that they were “‘nothing more than a rebranding of sports betting’ and that they were ‘plainly illegal.’”²² “‘Later that day, FanDuel temporarily suspended New York residents from competing in paid contests. DraftKings continues to operate as usual and allow New Yorkers to play its games.’”²³ FanDuel countered that it “‘has always complied with state and federal law, [and] . . . ‘[w]e look forward to vindicating our position in court next week. We will press on and fight to ensure that your right to play fantasy sports is protected, not just in New York but across

17. DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13.

18. DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13. *See, e.g.*, Complaint at 11, *New York v. DraftKings, Inc.*, No. 453054/2015 (N.Y.S. Nov. 17, 2015) [hereinafter *N.Y. v. DraftKings* complaint].

19. *See, e.g.*, Fantasy Competitions Not Subject to Gaming Prohibitions, MD CODE ANN. CRIM. LAW § 12-114 (2016).

20. Peggy Fikac, *Abbott: No Curbs on Fantasy Sports—But Done State Lawmakers Suggest the Issue Should Be Examined Further*, HOUS. CHRON., Oct. 23, 2015, at A1.

21. *See generally* Tim Casey, *FanDuel, Facing Opposition, Maintains Its Visibility in New York*, N.Y. TIMES (Nov. 23, 2015), https://www.nytimes.com/2015/11/24/sports/daily-fantasy-sports-site-facing-opposition-maintains-its-visibility-in-city-arenas.html?_r=0.

22. *Id.*

23. *Id.*

the nation.”²⁴

The New York A.G. and the Chair of the Nevada Gaming Control Board indicated that while season-long fantasy sports depended upon enough skill that the games should not be considered gambling, the same could not be said of DFS.²⁵ One wonders if New York and Nevada would categorize DFS as illegal if it was weekly (as opposed to daily).²⁶ No court has yet decided whether the opponents of DFS are correct in arguing that DFS is a game of chance, not skill, because it involves no long-term strategy.²⁷

II. THE PRESIDENTIAL DEBATE

The response to the DFS scandal²⁸ appears to be mainly based in politics.²⁹ There is no groundswell of opposition to DFS. Legal gambling has exploded across the United States during the last few decades.³⁰ All but a half dozen states operate and promote state lotteries, and casinos are legal in a majority of states. There is so much legal gambling in the United States that to find this one form of gambling, assuming it is gambling, to be unusually dangerous would be startling.

Yet, DFS became one of the few substantive issues raised in the televised Republican Primary Debates. When it was brought up, on October 28, 2015, Governor Chris Christie of New Jersey used the opening to shoot down any discussion of DFS.³¹ He publicly lamented in the debate that “[w]e have \$19 trillion in debt. . . . We have ISIS and al-Qaida attacking us. And we’re talking about fantasy football? Can we stop?”³²

It was a smart move, politically, for Governor Christie. As the Republican governor of the second state to legalize casinos, he has to contend with a

24. *Id.*

25. See DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13.

26. See DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13. See generally Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-play Daily Fantasy Sports*, 22 SPORTS LAW. J. 79 (2015); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201 (2014); Klein, *supra* note 6; Andy Moore, *What Nevada Action Means for Future of Daily Fantasy Sports*, LAW360 (Nov. 3, 2015), <https://www.law360.com/articles/722521/what-nevada-action-means-for-future-of-daily-fantasy-sports>.

27. See DraftKings Cease and Desist, *supra* note 13; FanDuel Cease and Desist, *supra* note 13.

28. See Drape & Williams, *supra* note 12.

29. See generally Peggy Fikac, *Gambling—Attorney General’s Opinion Is Sought on Fantasy Sports*, HOUS. CHRON., Nov. 16, 2015, at B4.

30. CHAMPION & ROSE, *supra* note 3, at 41.

31. David Lightman, *Candidates Challenge Media’s Role in Election: Confrontations, Questions by Panel During Latest Debate Draw Criticism*, HOUS. CHRON., Oct. 30, 2015, at A6.

32. *Id.*

significant portion of his party who believe that gambling and other “sins” should be prohibited by government. Christie himself tried to legalize sports betting at New Jersey’s casinos and racetrack, and is fighting the federal prohibition on expanding sports betting, under the Professional and Amateur Sports Protection Act (PASPA),³³ a fight that is still going on as this is written.³⁴

Neil Irwin of *The New York Times* noted that the Republican Presidential Debate contained a reasonably detailed discussion of whether the government should regulate DFS sites.³⁵ The American voters also discovered that “Jeb Bush’s fantasy football team is undefeated and [that his team] is anchored by the Miami Dolphins quarterback Ryan Tannehill.”³⁶ The debate never raised, let alone answered, the question of how the government manages trade-offs that are inherent in the regulations of much more important issues, including Wall Street, the pharmaceutical industry, or for that matter, sports gambling.³⁷

But Christie does have a point, especially because, except for the UIGEA and PASPA, decisions about gambling have always been left up to the individual states. States have always been able to decide for themselves whether they wanted lotteries, casinos, and other forms of betting to be legal or illegal, and if legal, how they should be regulated. As we know, “[n]o industry in America is as heavily regulated as legalized gambling, including atomic power plants.”³⁸ Although “[t]he federal government has a hand in regulating gambling . . . it is state laws and local ordinances that have the most impact on gaming.”³⁹ More from Neil Irwin on the presidential debate—

Finally, consider the daily fantasy sports industry, which received that comparatively detailed discussion in the debate. Mr. Bush indicated awareness of recent allegations of “insider trading” by employees of services like DraftKings and FanDuel, and said “there should be some regulation.” Chris Christie retorted with a blustery assault on the very idea of

33. 28 U.S.C. §§ 3701–3704 (2016).

34. See generally *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015), *aff’d on reh’g*, 832 F.3d 389 (3d Cir. 2016); I. Nelson Rose, *New Jersey Sports Betting—Court Gets It Wrong. Again.*, 19 GAMING L. REV & ECON. 564 (2015).

35. Neil Irwin, *At Republican Debate, Fantasy Sports Got More Attention than Wall Street*, N.Y. TIMES (Oct. 29, 2015), <https://www.nytimes.com/2015/10/30/upshot/fantasy-sports-got-more-attention-than-wall-street-at-the-gop-debate.html>.

36. *Id.*

37. *Id.*

38. CHAMPION & ROSE, *supra* note 3, at 42.

39. *Id.* at 41.

regulating fantasy sports when there are so many bigger issues.⁴⁰

Irwin noted the irony that the UIGEA, enacted by a republican Congress and President and designed to outlaw Internet gambling, actually helped create the explosion of interest in fantasy sports. DFS “exists only because of [a] provision[] in a 2006 law [(UIGEA)] that was driven by the casino industry’s desire to make online poker websites illegal. It had a clause making fantasy sports an exception to the restrictions, which DraftKings and FanDuel have exploited to build enormous businesses.”⁴¹

So, what is that important about regulating DFS that it becomes an integral part of the Presidential Debates?

Now, the casino industry would like to see those companies regulated as extensively, hoping for what they see as a fairer playing field. The daily fantasy sports companies argue they aren’t a gambling enterprise, so they shouldn’t be regulated as such. Mr. Christie may think the issue trivial compared with bigger issues, but given his familiarity with gambling law, it’s pretty clear why this will become an issue for Congress to resolve—and it will boil down to siding with the daily fantasy sports industry or the casino industry.⁴²

The presidential debate focused on whether DFS is a federal or state problem, and whether it is legal or illegal.

III. GAMBLING ON SPORTS

Gambling on sports is a part of the framework of our American civilization.⁴³ “Contests of speed, strength, and endurance between men, beasts, and machines are a natural subject of wagers, both by participants and onlookers, and the practice dates back to the beginning of human society.”⁴⁴ Legal sports gambling includes horse racing, dog racing, jai alai, and the sports book, among other sporting activities that are permitted by regulation.⁴⁵

40. Irwin, *supra* note 35.

41. *Id.*

42. *Id.*

43. See CHAMPION & ROSE, *supra* note 3, at 27.

44. *Id.*

45. See *id.* at 333–38.

Illegal sports gambling is also a part of our American heritage.⁴⁶ Look no further than the Black Sox scandal of 1919, when the Chicago White Sox purposefully lost the World Series.⁴⁷ Or, look at the tragic life of Jacob “Jack” Molinas:

Jack Molinas was a famous college basketball player at Columbia and a professional basketball player who shaved points in college and with the Fort Wayne Pistons, and was suspended indefinitely from the NBA. He later became a lawyer but continued to pay college ballplayers to shave points and rig games. He was disbarred, went to jail, and was later murdered in what appeared to be a “mob hit.”⁴⁸

Of course, in Jack’s era—“he was expelled from the NBA in 1954 and was murdered in 1974”—there were few legal sports books.⁴⁹

“Until the mid-1970s, sports betting was mostly limited to illegal bookies, who took bets in person or by phone.”⁵⁰ The business of “legal sports betting . . . did not take off until the federal government lowered the wagering tax, and football began being televised into every home in the nation.”⁵¹ “Proponents argue that eliminating legal [sports] betting avenues would send more gamblers to illegal bookies. . . . Legal gambling sometimes complements illegal gambling, not replaces it. . . . [O]pen promotion of legal gambling tends to remove much of the taint from illegal games.”⁵²

With the burgeoning Internet of the 1990s, sports betting saw an unprecedented increase in popularity. The Internet made sports gaming more accessible as it allows bettors to easily access odds and point spreads.⁵³

IV. SPORTS BOOKS AND PASPA

In 1954, Congress imposed a federal excise tax of 10% on all legal and illegal sports wagers.⁵⁴ This tax was so onerous that it made it virtually

46. *See id.* at 23–24.

47. *See* PATRICK K. THORNTON, LEGAL DECISIONS THAT SHAPED MODERN BASEBALL 77–108 (2012).

48. CHAMPION & ROSE, *supra* note 3, at 332.

49. *Id.*

50. *Id.* at 315.

51. *Id.*

52. *Id.* at 332.

53. Trippiedi, *supra* note 26, at 203.

54. 26 U.S.C. § 4401 (1954) (amended 1982); CHAMPION & ROSE, *supra* note 3, at 315.

impossible for even the preeminent sports handicappers to win on a consistent basis.⁵⁵ Licensed sports books were limited to Nevada, at the time. But a 10% tax would have to be passed on to the bookies' patrons; it was actually economically impossible for Nevada state-licensed sports books to absorb that high of a tax and still make a profit.⁵⁶

Sports books make their profit from the statistical advantage they have over their patrons. The most common wager is a multiple of \$11 to win \$10. If the sports book succeeds in having the same amount of money wagered on both sides of a match, it is guaranteed to make a profit. For example if Patron A bets \$11 on his team and Patron B bets \$11 on the opposing team, the sports book now has \$22, but the sports book pays the winner, whoever he may be, only \$21, his original \$11 bet back and his \$10 in winnings. The sports book keeps the additional \$1.⁵⁷

A 10% tax on wagers meant the bookies had to pay the federal government \$2.20 on the two wagers' total of \$22.00. Since the sports book only made \$1 in revenue, it could not afford to pay more than twice that amount in federal taxes.

Congress, in 1974, "lowered the federal excise tax on sports wagers to 2%,"⁵⁸ and then lowered it again in 1983 for legal sports books to 0.25%.⁵⁹ "Football [] became the prime at-home spectator sport with the start of Monday Night Football in 1970."⁶⁰ After that, sports books became numerous, prosperous, and a profit-enticement for casinos.⁶¹ In fact, the independent sports book disappeared, being unable to compete against the massive high-tech sports-betting environment established by industry leaders, like Caesars Palace.

In 1992, President George H.W. Bush signed PASPA into law,⁶² which

55. CHAMPION & ROSE, *supra* note 3, at 315.

56. *Id.* at 316.

57. *Id.*

58. *Id.* at 317.

59. *Id.* at 318. Illegal bookies still have to pay 2%.

60. *Id.*

61. *Id.*

62. Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (1992). See Chil Woo, Note, *All Bets Are Off: Revisiting the Professional and Amateur Sports Protection Act*, 31 CARDOZO ARTS & ENT. L.J. 569, 569 (2013).

placed a moratorium on sports books, but included the “Las Vegas loophole,” which granted immunity to this legislation for states like Nevada, which allowed sports wagering before October 2, 1991.⁶³ “New Jersey was given one year to legalize sports books for its casinos, but the State Legislature failed to act.”⁶⁴ PASPA specifically prohibits any state or tribe from creating any new sports gambling.⁶⁵ “Although there is some dispute, it appears that the following states were grandfathered-in under PASPA: Delaware, Montana, Nevada, New

Mexico, North Dakota, Oregon, Washington and Wyoming.”⁶⁶

Does PASPA apply to fantasy sports, particularly DFS?

The Delaware State Lottery had offered sports parlay cards, where players would have to predict the winners of three separate events in 1991. This was not a financial success. However, it did mean that Delaware had legal sports betting during the period delineated in PASPA. A few years ago, Delaware decided to reintroduce sports betting, but this time on individual sports events. In *Office of the Commissioner of Baseball v. Markell*,⁶⁷ the Third Circuit Court of Appeals looked into an exception in PASPA⁶⁸ which made a distinction between sports wagering schemes that were merely authorized and those that were actually conducted.⁶⁹ In *Markell*, the court agreed with professional and collegiate sports leagues⁷⁰ that the implementation of the new Delaware Sports Lottery Act⁷¹ violated PASPA.⁷² “Because single-game betting was not ‘conducted’ by Delaware between 1976 and 1990, such betting is beyond the

63. CHAMPION & ROSE, *supra* note 3, at 319.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Office of the Comm’r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009).

68. 28 U.S.C. § 3704(a)(2) (2016).

69. *See Markell*, 579 F.3d at 296–304.

70. *Id.* at 304. *See generally* O’ Bannon v. NCAA, 802 F.3d 1049 (9th Cir. 2015). The college sports league indicated in *Office of the Commissioner of Baseball v. Markell* was of course the NCAA. In *O’ Bannon v. NCAA*, the 9th Circuit, on September 30, 2015, held that the NCAA rules barring

compensation to student-athletes for the use of their names, images and likenesses were subject to antitrust laws. *See also* Complaint & Jury Demand – Class Action Seeking Injunction and Individual Damages at 2, *Jenkins v. NCAA*, No. 14CV01678 (D.N.J. Mar. 17, 2014) (*Jenkins v. NCAA* is a major antitrust lawsuit against the NCAA: “Defendants have entered into what amounts to cartel agreements with the avowed purpose and effect of placing a ceiling on the compensation that may be paid to these athletes for their services. Those restrictions are pernicious, a blatant violation of the antitrust laws, have no legitimate pro-competitive justification, and should now be struck down and enjoined.”).

71. DEL. CODE ANN. tit. 29, §§ 4801–4838 (2016).

72. *Markell*, 579 F.3d at 304.

scope of the exception in § 3704(a)(i)(1) of PASPA and thus prohibited under the statute's plain language."⁷³

"In November 2011[,] New Jersey voters [overwhelmingly] approved amending their State Constitution to allow sports betting."⁷⁴ However, *Markell* stated that since PASPA is not ambiguous, the argument that a state's sovereign status allows implementation of its own proposed betting scheme is "unpersuasive."⁷⁵ PASPA unmistakably prohibits state-sponsored gambling, under 28 U.S.C. §3702, subject to certain exceptions, as listed in 28 U.S.C. §3704. So, the only way a state can legalize true sports betting is to have PASPA declared unconstitutional.

"Through PASPA, Congress has 'altered the usual constitutional balances' with respect to sports wagering."⁷⁶ Even without this attack on states' rights, PASPA itself openly discriminates against some states in favor of others. The authors have stated that "[i]t is difficult to see how PASPA can stand, since Congress has allowed almost a dozen exceptions to its supposedly complete ban on state-authorized sports betting, and is the only federal law that prevents a state from changing its public policy toward gambling."⁷⁷

The professional and amateur sports leagues sought to enjoin New Jersey from giving effect to its law that authorized sports books at the state's casinos and racetracks. The first time a federal court of appeals examined the New Jersey law, in *National Collegiate Athletic Ass'n v. Governor of New Jersey*,⁷⁸ the court found that PASPA, by its terms, prohibits states from authorizing by law sports gambling, and the 2014 New Jersey Law did exactly that.⁷⁹

To get around PASPA, Governor Christie and the New Jersey legislature decided to take the court at its word. Instead of authorizing sports gambling, they enacted a law that purportedly repealed all of the criminal laws involving betting on sports events, so long as those bets were made and accepted at state-licensed casinos and racetracks. This, of course, is ridiculous. And, so far, the federal courts have not bought it. The trial court and the first panel on the court of appeals noted that "only casinos and racetracks would now be

73. *Id.*

74. CHAMPION & ROSE, *supra* note 3, at 320.

75. *Markell*, 579 F.3d at 303.

76. *Id.*

77. CHAMPION & ROSE, *supra* note 3, at 321.

78. *NCAA v. Governor of N.J.*, 799 F.3d 259 (3d Cir. 2015).

79. *Id.* at 261. "The issue presented in this appeal is whether SB 2460, which the New Jersey Legislature enacted in 2014 (the '2014 Law') to partially repeal certain prohibitions on sports gambling, violates federal law. 2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J. Stat. Ann. §§ 5:12A-7 to -9. The District Court held that the 2014 Law violates . . . ('PASPA')." *Id.* The Appeals Court affirms. *Id.*

exempt from the state's anti-gambling laws.”⁸⁰ “[I]t is impossible to believe that sports betting in Atlantic City casinos would be unregulated.”⁸¹ In short, “[d]oes anyone really believe that the New Jersey Division of Gaming Enforcement, a part of the State Attorney General's office, would allow known organized crime figures to take bets on sports events on the floors of Atlantic City casinos?”⁸²

V. THE WIRE ACT AND IGBA

The Wire Act⁸³ was enacted in 1961 to aid the states in enforcing their public policy, at the time, of nearly complete prohibition of all forms of gambling.⁸⁴ The Mob was the monopoly supplier of “the Wire,” a telegraph that gave illegal bookies instant race results.⁸⁵ It was essential for bookmakers that they knew the results of horseraces before their patrons.⁸⁶ So A.G. Robert F. Kennedy, Jr. got Congress to cut “the Wire” as part of his war on organized crime.

Decades later, the DOJ used the Wire Act in its fight against Internet gambling.⁸⁷ In *United States v. Cohen*,⁸⁸ the court of appeals determined that Internet gambling on sporting events fall within the Wire Act. It declared that the only way that cross-border Internet gambling could not fall under the Wire Act would be if the bet was legal in both the operator's and the bettor's jurisdictions.⁸⁹ Even then, it might be illegal if the telephone or other wire carrying the wagering information passed through a state where such gambling was illegal.

For years, the DOJ used the Wire Act to intimidate operators, bettors, and payment processors for all forms of Internet gambling. In part, this was out of necessity. The federal government cannot make an activity illegal unless there has been an Act of Congress. There are no federal common law crimes.⁹⁰

80. Rose, *supra* note 34, at 568.

81. *Id.*

82. *Id.*

83. 18 U.S.C. §§ 1081–1084 (2016).

84. See CHAMPION & ROSE, *supra* note 3, at 50.

85. *Id.*

86. See generally THE STING (Universal Pictures 1973). It was every gamblers' dream to be able to know who had won the race before making their bets, as showcased in *The Sting*.

87. CHAMPION & ROSE, *supra* note 3, at 50–51.

88. *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001), *cert. denied*, 536 U.S. 922 (2002).

89. See *Cohen*, 260 F.3d at 74–75.

90. “*United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812) . . . held that the federal courts could not recognize and punish common-law crimes in the absence of a specific federal statute.”

Further, criminal statutes must be strictly construed.⁹¹ Unfortunately for federal prosecutors, the Wire Act, on its face, prohibits bets on sports contests. There is only passing reference to other forms of gambling, and it seemed a stretch to try to apply the Wire Act to, say, Internet poker.

On Friday, April 15, 2011, or “Black Friday,” indictments were issued by the United States Attorney for the Southern District of New York against the founders and principals of the largest online poker operators then taking bets from the U.S. Significantly, the indictments did not mention the Wire Act at all. “Instead, the U.S. Attorneys relied on the Illegal Gambling Businesses Act [(IGBA)]⁹² and the more recently passed Unlawful Internet Gambling Enforcement Act (UIGEA).”⁹³ This was an indication that the DOJ itself had worries about the reach of the Wire Act.

In a Christmas gift of major proportions, the DOJ announced, on December 23, 2011, or “White Friday,” that from then on it “would only apply the Wire Act to interstate sports betting.”⁹⁴ The DOJ announced

that it had re-evaluated and was reversing its position that the Wire Act covers all gambling of any kind. With the Wire Act now limited to bets on sports events, prosecutors have to find that there is a violation of a specific state law, and an organization involved in interstate commerce, to create a federal crime.⁹⁵

The question is whether the Wire Act⁹⁶ conflicts with UIGEA⁹⁷ since it “appears to permit intermediate out-of-state routing of electronic data associated with lawful lottery transactions that otherwise occur in-state.”⁹⁸ In a Memorandum Opinion, the U.S. Attorney General asked

whether the Wire Act and UIGEA prohibit a state-run lottery

Lewis v. United States, 523 U.S. 155, 179 (1998) (Scalia, J., concurring).

91. United States v. Bass, 404 U.S. 336, 347 (1971) (requiring all ambiguity in criminal statutes to be construed in favor of accused).

92. 18 U.S.C. § 1955 (2016).

93. CHAMPION & ROSE, *supra* note 3, at 51.

94. *Id.*

95. CHAMPION & ROSE, *supra* note 3, at 35. See Whether Proposals by Illinois and New York to Use the Internet and Out-of-state Transaction Processors to Sell Lottery Tickets to In-state Adults Violate the Wire Act, 35 Op. O.L.C. 1, 1 (2011).

96. 18 U.S.C. §§ 1081–1084 (2016).

97. 31 U.S.C. §§ 5361–5367 (2016).

98. 35 Op. O.L.C. at 1.

from using the Internet to sell tickets to in-state adults where the transmission using the Internet crosses state lines, and whether these statutes prohibit a state lottery from transmitting lottery data associated with in-state ticket sales to an out-of-state transaction processor either during or after the purchasing process.⁹⁹

The A.G.'s answer was "that interstate transmissions of wire communications that do not relate to a 'sporting event or contest,' 18 U.S.C. §1084(a), fall outside of the reach of the Wire Act."¹⁰⁰ So, for DFS to now fall under the Wire Act, it must not only be gambling that is illegal either where the operator or bettor are located; it also must be sports "bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest."¹⁰¹

Another possible federal act that might affect DFS is the IGBA.¹⁰² Internet gambling does appear to come within the reach of the IGBA, if, but only if, it is illegal under state law or violates the Wire Act.¹⁰³ But, that begs the question of whether DFS is illegal. IGBA § 1955 "bars only those activities that involve illegal gambling under applicable state law and that meet the statutory definition of a business."¹⁰⁴ At the end of the day, it can be truly said that "[t]he Wire Act is still the main weapon the federal government uses against illegal sports betting on the Internet."¹⁰⁵

VI. UIGEA

The UIGEA¹⁰⁶

scares all of the . . . American market, [but] the law actually does only two things. It creates [a] new crime . . . the business of gambling and accepting funds . . . in connection with an unlawful Internet gambling transaction. And it called upon federal regulators to . . . requir[e] money transferors to identi-

99. *Id.*

100. *Id.*

101. 18 U.S.C. § 1084(a).

102. 18 U.S.C. § 1955 (2016).

103. CHAMPION & ROSE, *supra* note 3, at 48.

104. *Id.*

105. *Id.* at 339.

106. 31 U.S.C. §§ 5361–5367 (2016).

fy and block transactions to unlawful gambling websites.¹⁰⁷

These final regulations¹⁰⁸ went into effect on January 19, 2009, and “require[d] banks . . . to do due diligence when setting up new commercial accounts.”¹⁰⁹

The UIGEA expressly does not change state or federal substantive law; it is merely, as the name implies, an enforcement statute. But it was rushed through so quickly that it has actually led to an expansion of Internet gaming. Some forms, including fantasy sports . . . are expressly excluded from the UIGEA. Others, including contests of skill and games with free alternative means of entry, have expanded, since they are not considered gambling.¹¹⁰

The UIGEA included an express exemption for fantasy games, which it defined as not being a “bet or wager.”¹¹¹

There has always been a latest new thing in gaming. But those are coming faster and faster, usually in completely unpredictable ways. Internet gambling, especially online poker, is still being fought over in state legislatures. But the real growth area, a couple of years ago, was social casino games. Today it is daily fantasy sports.¹¹²

The UIGEA¹¹³ does not make DFS betting legal per se.¹¹⁴ The industry leaders beg to differ: “Fantasy sports is considered a game of skill and received a specific exemption from the [UIGEA]. FanDuel uses exactly the same rules as any other season long fantasy sports format, the only difference

107. CHAMPION & ROSE, *supra* note 3, at 63–64.

108. Prohibition on Funding of Unlawful Internet Gambling, 12 C.F.R. § 233 (2016); Prohibition on Funding of Unlawful Internet Gambling, 31 C.F.R. § 132 (2016).

109. CHAMPION & ROSE, *supra* note 3, at 64.

110. *Id.*

111. 31 U.S.C. § 5362. See generally Geoffrey Hancock, Note, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317 (2009).

112. Rose, *supra* note 7, at 346.

113. §§ 5361–5367.

114. Rose, *supra* note 7, at 346.

is that our games last only one day or one week.”¹¹⁵ Pertinent definitional language under UIGEA is that a bet or wager does not include “participation in any fantasy or simulation sports game.”¹¹⁶ “But, the argument that the UIGEA preempts all other federal and state anti-gambling laws” runs counter to the UIGEA opening section.¹¹⁷ The UIGEA’s Rules of Construction state that “[n]o provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States.”¹¹⁸ These Rules of Construction clearly state that the UIGEA “was not intended to change any other anti-gambling law.”¹¹⁹ “The UIGEA and its regulations created a safe harbor for operators of legal gambling, like state lotteries.”¹²⁰

There’s a conflict between the Wire Act¹²¹ and the UIGEA.¹²² The Wire Act applies to all forms of gambling, if a wire crossed a state boundary.¹²³ “But the UIGEA expressly state[s] that if a bet is made and received inside a single state where that bet is legal under state law, it does not matter if a wire happens to cross into and out of another state.”¹²⁴ To resolve this conflict, the DOJ

announced, in its December 2011 Christmas gift, that state lotteries are now allowed to sell individual lottery tickets online; they are also allowed to use out-of-state payment processors.¹²⁵ “More importantly, it allowed the states to legalize every form of Internet gambling, except sports betting,” so long as the bettor and operator were both located in a state where the bets were legal.¹²⁶ Further, there are few federal statutes that would bar interstate or even international betting that is legal on both ends.

115. *Legal*, ULTIMATE FANTASY SPORTS, <http://www.ultimatefantasysports.me/why-is-it-legal> (last visited May 15, 2017).

116. § 5362 (1)(E)(ix).

117. Rose, *supra* note 7, at 347.

118. § 5361(b).

119. Rose, *supra* note 7, at 347.

120. I. Nelson Rose, *The UIGEA and the Law of Unintended Consequences*, 19 GAMING L. REV. & ECON. 504, 505 (2015).

121. 18 U.S.C. §§ 1081–1084 (2016).

122. 31 U.S.C. §§ 5361–5367.

123. 18 U.S.C. § 1084(a); Rose, *supra* note 120.

124. Rose, *supra* note 120.

125. *Id.* See Whether Proposals by Illinois and New York to Use the Internet and Out-of-state Transaction Processors to Sell Lottery Tickets to In-state Adults Violate the Wire Act, 35 Op. O.L.C. 1, 1 (2011).

126. Rose, *supra* note 120. See Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701–3704 (2016) (prohibits states from legalizing sports betting).

The UIGEA “[a]s an act to prevent online gaming . . . was a miserable failure.”¹²⁷ But fantasy sports have always been a headache for local law enforcement. The games often involve large amounts of cash. Yet they are so complicated that it appears they might have enough skill to prevent a jury from convicting the operators. Once Congress had acted, state and federal prosecutors could turn their attention to easier targets. This is especially true because the UIGEA’s carve-out for fantasy sports demands that the fantasy sports league follow rules regarding prizes, reliance on skill, and outcomes based on team events.¹²⁸ Law enforcement was satisfied with this arrangement for years, as long as the fantasy sports were season-long. But as usually happens with legal gaming, once one form of gambling is made legal, operators will push the boundaries of the law. In this case, by inventing DFS.

VII. DFS VS. TRADITIONAL FANTASY LEAGUES

Traditional fantasy sports leagues (TFS) consist of fans who “own” teams and draft players.¹²⁹ The question is whether the UIGEA carve-out for TFS also applies to DFS.¹³⁰ In DFS, every single team may own the same players; although there is skill in manipulating the salary cap,¹³¹ there is less strategy in the drafting of players (as opposed to TFS).¹³² TFS is seasonal and legal; DFS is daily (or weekly) which, to some people, is the sea change that transforms it into illegal betting.¹³³ In a season-long fantasy league, team owners can trade players and unexpected injuries and other chance events tend to even out among players over the course of months-long seasons.¹³⁴

DFS, like typical fantasy sports games, allow participants to choose real-world professional players in a given sport who will then compete against other DFS participants based on the players’ actual performance in key statistical categories.¹³⁵ “Unlike typical fantasy sports games, which are based

127. Rose, *supra* note 120.

128. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix)(I)–(II) (2016); Jason M. Aivaz, *So You’re Telling Me There’s a Chance? Fantasy Sports Versus State and Federal Gaming Prohibitions*, 18 GAMING L. REV. & ECON. 875, 879 (2014).

129. Trippiedi, *supra* note 26, at 207 (footnote omitted).

130. *Id.* at 219.

131. All fantasy games put limits on how “money” players, acting as the owners of teams, have to pay “salaries” to the real-world athletes they pick for their fantasy teams. Without these limits, every player would choose the same top real-world athletes.

132. *See* Trippiedi, *supra* note 26, at 201.

133. *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587, at *1 (N.D. Ill. Oct. 9, 2013).

134. *See generally* Ron Sanchez, *The Ins and Outs of Fantasy Sports: Daily Fantasy Sports, Gambling or Not?*, 20 GAMING L. REV. & ECON. 327 (2016).

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

on a sport's entire season, FanDuel's games are based on only one day's worth of performances."¹³⁶

TFS leagues

allow participants to "manage" virtual teams of professional players in a given sport throughout a sport's season and to compete against other fantasy sports participants based upon the actual performance of those players in key statistical categories. Fantasy sports have become extremely popular in recent years. They have earned a place in modern popular culture and are the subject of countless newspaper and magazine articles, books, [I]nternet message boards and water-cooler conversations. The enormous popularity of fantasy sports can be attributed in part to the services offered on [I]nternet websites The websites provide a platform for real-time statistical updates and tracking, message boards and expert analysis.

Fantasy sports leagues allow fans to use their knowledge of players, statistics and strategy to manage their own virtual team based upon the actual performance of professional athletes through a full season of competition. . . .

[T]he websites operate as follows. Participants pay a fee to purchase a fantasy sports team The purchase price provides the participant with . . . "real time" statistical information. . . .

The purchase price also covers the data-management services necessary to run a fantasy sports team. . . . [T]he participants "draft" a slate of players and track the[ir] performance . . . in key statistical categories throughout the season. Participants are grouped into "leagues" of as many as twelve teams and compete not only against the members of their own leagues, but . . . also . . . against the winners of the other leagues.¹³⁷

136. *Id.*

137. *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *1 (D.N.J. June 20, 2007) (citation omitted). See generally Zachary C. Bolitho, Note, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports*

Industry, 67 OHIO ST. L.J. 911 (2006); Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201 (2002); Matthew G. Massari, Note, *When Fantasy Meets Reality: The Clash Between On-line Fantasy Sports Providers and Intellectual Property Rights*, 19 HARV. J.L. & TECH. 443 (2006); and Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS LAW.

In *Langone v. Kaiser*,¹³⁸ plaintiff Christopher Langone sued under the Illinois Recovery Loss Act¹³⁹ and sought “to recover money that Defendants Patrick Kaiser and FanDuel, Inc., allegedly won playing fantasy sports games on the [I]nternet.”¹⁴⁰ “Langone allege[d] that FanDuel’s ‘daily’ fantasy sports games are illegal gambling under Illinois law.”¹⁴¹

Langone alleges that FanDuel requires participants in its fantasy sports games to pay an “entry fee” of \$5, \$10, \$25, \$50 or \$100 and to play in groups or “leagues” of two, five, or ten participants. Potential winnings are greater for leagues with higher entry fees and greater numbers of players, but the potential winnings are predetermined for any given league. FanDuel takes a “commission” of ten percent of the entry fees. The remaining 90 percent of the entry fees for a given league constitutes the prize for the participant who wins the league.¹⁴²

“Commissions,” in of themselves, do not make a “wager” illegal.¹⁴³

“FanDuel acts as the conduit for transmission of the prize to the winner, but FanDuel does not risk any of its money in producing the prize money.”¹⁴⁴

By contrast, here, FanDuel risks nothing when it takes entry fees from participants in its fantasy sports games. The prize that FanDuel is obligated to pay is predetermined according to the number of participants in a given league, and never exceeds the total entry fees. FanDuel does not place any “wagers” with particular participants by which it could lose money based on the happening of a future event (i.e., the performance of certain athletes), but merely provides a forum for the participants to engage each other in fantasy sports games. . . . [T]he forum FanDuel creates requires fantasy

J. 21 (2001).

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

139. 720 ILL. COMP. STAT. 5/28-8 (2016).

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

141. *Id.*

142. *Id.* (citations omitted).

143. *Id.* at *6.

144. *Id.* at *7.

sports participants to compete against each other in leagues with the result that they know specifically to whom they have lost.¹⁴⁵

Langone failed in his attempt to compare DFS to a horse-racing wager.¹⁴⁶ And, under the Loss Recovery Act, Langone could only prevail if FanDuel was the “winner” with respect to any particular “loser.”¹⁴⁷

In *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*,¹⁴⁸ the court held that the “[p]ublic domain lists of major league baseball players, and their statistics, lacked the originality element [required] for copyright protection.”¹⁴⁹ Subsequently, players were precluded from claiming that a producer of fantasy baseball games violated the players’ copyright by using their names and sports event data in its games.¹⁵⁰ In short, the Eighth Circuit saved fantasy baseball. In *C.B.C. Distribution and Marketing, Inc.*, attorney Virginia Seitz, the same Virginia Seitz who as an Assistant A.G., gave Internet gamblers their 2011 Christmas gift, and argued for the MLB players “that fantasy games were no different than board games that use the players’ identities.”¹⁵¹ The appeals court found that “C.B.C.’s use of names and statistics in its fantasy baseball production was in fact for a commercial purpose and did not infringe on the players’ right of publicity.”¹⁵²

“Where fantasy leagues are permitted, it is often because there is an im-

145. *Id.* at *6 (citation omitted).

146. *Id.* at *7.

147. *Id.*

148. *C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 443 F.Supp. 2d 1077 (E.D. Mo. 2006), *aff’d* 505 F.3d 818 (8th Cir. 2007).

149. WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* 469 (2d ed. Supp. 2014). See PATRICK K. THORNTON, *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media: Baseball’s Battle for the Box Score: A Constitutional Question*, in *LEGAL DECISIONS THAT SHAPED MODERN BASEBALL* 233–50 (2012). See generally Stacey B. Evans, Note, *Whose Stats Are They Anyway? Analyzing the Battle Between Major League Baseball and Fantasy Game Sites*, 9 *TEX. REV. ENT. & SPORTS L.* 335 (2008); Richard T. Karcher, *The Use of Players’ Identities in Fantasy Sports Leagues: Developing Workable Standards for Right of Publicity Claims*, 111 *PENN. ST. L. REV.* 557 (2007); Gary P. Quiming, Comment, *Playing by the Rules of Intellectual Property: Fantasy Baseball’s Fight to Use Major League Baseball Players’ Names and Statistics*, 29 *UNIV. HAW. L. REV.* 301 (2006); David G. Roberts, Jr., Note, *The Right of Publicity and Fantasy Sports: Why the C.B.C. Distribution Court Got It Wrong*, 58 *CASE W. RES. L. REV.* 223 (2007); Salvatore Vetrini, Comment, *Balancing Individual and Societal Interests Under the First Amendment: How the Eighth Circuit Saved Fantasy Baseball*, 29 *PACE L. REV.* 199 (2008).

150. See *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d at 824.

151. THORNTON, *supra* note 149, at 248.

152. *Id.* at 249. See *C.B.C. Distribution & Mktg., Inc.*, 505 F.3d at 822–23.

PLICIT understanding that it is a game of skill and not a form of gambling.”¹⁵³ “Many states have at least implicitly declared that fantasy leagues are predominantly contests of skill and not gambling. The UIGEA has had the real-world practical impact of setting standards for what fantasy games are permitted, even though it expressly states that it does not change any substantive law.”¹⁵⁴ Remember, the UIGEA explicitly exempts participation in any fantasy sports game.¹⁵⁵

This section marks the first time that Congress has included an explicit fantasy sports exemption in any Federal anti-gambling Statute. While Congress has intensified its assault on Internet gambling . . . it has also gone out of its way to explicitly ensure operators of [traditional] fantasy sports Websites that they have nothing to fear.¹⁵⁶

VIII. IS DFS ILLEGAL?

The easy answer is “probably not.”¹⁵⁷ If the UIGEA¹⁵⁸ is the controlling federal law, then DFS may not be illegal.¹⁵⁹ But, it has been said that UIGEA¹⁶⁰ “did not make fantasy sports betting legal.”¹⁶¹ DFS is fantasy sports on steroids that allows a league to start and finish on the same day, “using statistics generated by real-world contests on that day.”¹⁶² “The UIGEA is designed to go after online gaming that is already illegal under some other federal or state anti-gaming law.”¹⁶³

What is gambling? For one, “contests of skill are almost never illegal.”¹⁶⁴ “Gambling requires prize, consideration, and chance. If any one of those

153. CHAMPION & ROSE, *supra* note 3, at 288.

154. *Id.* at 289.

155. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(E)(ix) (2016).

156. Jon Bosewell, Note, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CORDOZO ARTS & ENT. L.J. 1257, 1263 (2008).

157. *See generally* Rose, *supra* note 7.

158. 31 U.S.C. §§ 5361–5367.

159. *See generally* Rose, *supra* note 7.

160. §§ 5361–5367.

161. Rose, *supra* note 7, at 346.

162. *Id.* at 347.

163. *Id.*

164. *Id.* at 348.

elements are absent the activity can still be regulated, but not under the anti-gambling laws.”¹⁶⁵ A game determined entirely by skill is not gambling even though the prize might still be cash, “but the consideration is no longer considered as a bet.”¹⁶⁶ “Paying to play a contest of skill is an entry fee, not a wager.”¹⁶⁷ The crux of the issue is whether a daily fantasy game has enough skill elements to keep it out of the realm of sports betting.¹⁶⁸ “The question will be determined entirely by state law.”¹⁶⁹

Each state is different. For example, in the state of Washington, legislation was proposed to legalize DFS.¹⁷⁰ “Most states use the dominant factor test to distinguish between games of chance and games of skill.”¹⁷¹ However, under Washington law, a game is a game of chance if the outcome depends in “material degree” on chance, notwithstanding that skill may still be a factor.¹⁷² Proponents will argue that DFS is simply fantasy sports played over a shorter period; whereas, critics of DFS assert that the shorter period allows for less time to exercise skill and thus increases the possibility that the outcome will be (more) determined by mere chance.¹⁷³ DFS appears to be legal under current

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Kirk A. Soderquist, Christopher R.M. Stanton & Robert P. Saka, *No Game-changer for Fantasy Sports in Washington State*, LAW360 (Mar. 23, 2015), <https://www.law360.com/articles/634703/no-game-changer-for-fantasy-sports-in-washington-state>.

Senate Bill 5284 and companion House Bill 1301 were introduced in January 2015. As originally proposed, the bills would amend Washington law to legalize fantasy sports games using a definition of fantasy sports games that tracks the definition in the UIGEA.

The Washington State Senate Committee on Commerce and Labor held the first hearing on Senate Bill 5284 in February of 2015. At the hearing, it became clear that there were problems with the bill when Sen. Pam Roach, the principal sponsor of Senate Bill 5284, stated that she wished to amend the proposed language for the bill.

Sen. Roach explained that the amended version of the bill would, unlike the UIGEA, make a distinction between season-long fantasy sports and daily fantasy sports. Specifically, under the language she intended to propose, season-long fantasy sports games would be legal but daily fantasy sports games would be illegal.

Id.

171. *Id.*

172. WASH. REV. CODE § 9.46.0225 (2016).

173. Soderquist, Stanton & Saka, *supra* note 170.

federal laws and should be legal in the majority of states since it will probably be categorized as a game of skill (just like season-long fantasy sports).¹⁷⁴ Just having to explain the complicated rules to a jury will make convictions for illegal gambling unlikely. The UIGEA in 2006 did not expect that less than ten years later DFS would be the multibillion-dollar industry it is now. Those “who embraced the UIGEA carve-out, never anticipated that it could be used for daily fantasy sports.”¹⁷⁵ Nor did they anticipate that DFS in 2015 would be the fastest growing segment of online gambling.¹⁷⁶ “The question at the heart of these matters is the role of chance vs. skill in fantasy contests.”¹⁷⁷

The National Collegiate Athletic Association (NCAA), on August 27, 2015, wrote cease and desist letters to DraftKings and FanDuel asking “that you immediately cease offering your NCAA related college football games and refrain from introducing further games involving NCAA or conference sports competition.”¹⁷⁸ In their letters, the NCAA asserted that they were “committed to good faith discussions” over DFS’s plans to expand their games to cover college sports.¹⁷⁹ The NCAA noted that “[e]xpansion of your games to cover college sports competition and students is not as simple as using your current professional game framework to a new market.”¹⁸⁰ In a later letter, dated October 20, 2015, the NCAA wrote again to DraftKings and FanDuel to withdraw their offer of “discussions on the impact of your products on college

As of the date of this update, no further progress has been made with respect to Senate Bill 5284. And the companion house bill has not been officially referred to committee. Given the level of interest in and funding for daily fantasy sports, it is likely that there will be significant resistance to any legislation making a distinction between daily and season-long fantasy sports. Since Washington authorities already take the position that all fantasy sports are illegal, they are unlikely to push for new legislation on the issue. And the Fantasy Sports Trade Association may prefer to have no new legislation in Washington rather than legislation making a distinction between the daily and season-long versions of the game. Under these circumstances, Washington State is unlikely to make progress on legalizing fantasy sports games any time soon.

Id.

174. See Ehrman, *supra* note 26, at 81.

175. Rose, *supra* note 120.

176. *Id.*

177. Aivaz, *supra* note 128, at 876.

178. Letter from NCAA to FanDuel Inc. and DraftKings, Inc. (Aug. 27, 2015) (on file with author).

179. *Id.*

180. *Id.*

sports.”¹⁸¹ The NCAA changed its position on the basis that

[s]uch a meeting is inappropriate at this time in light of the fact that your enterprises appear to be under investigation by the Federal Bureau of Investigation and Congress and several states and their attorneys general appears to be looking into your business platform, offering and policies for their compliance with the law.¹⁸²

In their complaint against DraftKings and FanDuel, the State of New York through its A.G., Eric Schneiderman, sought to “enjoin DraftKings from continuing to operate an unlawful gambling business in New York.”¹⁸³ The complaint takes exception to DFS advertisements and accuses it of offering “a way to bet on existing sporting events.”¹⁸⁴ The complaint continues that “[t]he speed of DraftKings’ games, the size of their jackpots, and the degree to which the games are sold as winnable have ensnared compulsive gamblers and threaten to trap populations at greater risk for gambling addiction, particularly male college students.”¹⁸⁵ The complaint alleges that DFS created a new business model for online sports gambling.¹⁸⁶ It also argues that “DFS represents a clear departure from season-long fantasy sports.”¹⁸⁷ Furthermore, the complaint summarizes that “an increasing number of states” have apparently answered “no” to the question of whether DFS is a legal business (e.g., Washington State, Michigan, Georgia, and New York).¹⁸⁸

IX. STATE LEGISLATION

Governor Chris Christie did not win the GOP nomination and will never be president. But he does appear to have been correct about the issue of DFS

181. Letter from NCAA to FanDuel Inc. and DraftKings, Inc. (Oct. 20, 2015) (on file with author).

182. *Id.*; David Purdum, *NCAA Prohibits DraftKings, FanDuel from Advertising During Championships*, ABC NEWS (Oct. 21, 2015), <http://abcnews.go.com/Sports/ncaa-prohibits-draftkings-fanduel-advertising-championships/story?id=34637993>.

183. *N.Y. v. DraftKings* complaint, *supra* note 18, at 3.

184. *Id.* at 2.

185. *Id.*

186. *Id.* at 8.

187. *Id.*

188. *Id.* at 21–22.

and presidential politics. His statement in the October 28, 2015, Republican Primary Debates proved to be prescient, though not necessarily in the way he intended.¹⁸⁹ In fact, his statement can be seen as a self-fulfilling prophecy: “We have \$19 trillion in debt. We have people out of work. We have ISIS and al-Qaida attacking us. And we’re talking about fantasy football? Can we stop?”¹⁹⁰ Although his emphasis was on how unimportant DFS is compared with issues like Islamic terrorism, his plea at the end, “Can we stop?” has come true. Discussion of DFS on the federal level has almost completely disappeared, in part because Governor Christie, helped by the inane comments by Jeb Bush about his fantasy team, made the issue embarrassing. Following that debate, there has been no discussion by any presidential candidate, in debates or

otherwise, on the federal government’s role in fantasy sports. But that has not meant that the issue has disappeared at the state level. The easiest way to end the controversy is for state legislatures to expressly declare DFS legal or illegal. No one claims that state lotteries are games of skill. But once they are made legal, sometimes requiring an amendment of the state constitution, the question of skill versus chance becomes irrelevant.

On August 4, 2016, Governor Andrew Cuomo signed a bill legalizing DFS. Senate Bill 8153 was the result of massive lobbying by FanDuel and DraftKings.¹⁹¹ Senate Bill 8153 not only sets up a system of registration, regulation, and taxation, it allows those and other DFS operators to continue to take players while the system is being put in place.¹⁹²

The new law focuses mainly on consumer protection. But it will also raise revenue for the state, through what amounts to a \$50,000 registration fee and a tax of 15% on gross gaming revenue.¹⁹³ The requirements to obtain registration as well as the registration fee and tax will help keep out fly-by-night operators. Of course, these will also be barriers protecting the duopoly of FanDuel and DraftKings from having to face competition.

New York thus becomes the seventh state since DFS was raised at the Republican Presidential Debate to expressly legalize fantasy sports. “Colora-

189. See Lightman, *supra* note 31.

190. *Id.*

191. See Glenn Blain, *Daily Fantasy Sports Sites Bet Nearly \$800G on Push to Make Games Legal in New York*, N.Y. DAILY NEWS (Aug. 7, 2016), <http://www.nydailynews.com/news/national/daily-fantasy-sports-sites-bet-800g-legal-push-article-1.2741112>.

192. See S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2015).

193. “Section 1407 imposes a 15% State tax on each registrant’s interactive fantasy sports gross revenue for the privilege of conducting interactive fantasy sports contests in New York State, as well as an additional 0.5% tax that is not to exceed \$50,000 annually.” *Id.*

do, Indiana, Massachusetts, Mississippi, Missouri, Tennessee and Virginia—also have passed laws clarifying the legality of fantasy sports and setting consumer protection regulations.”¹⁹⁴ Prior to the debate, only the Maryland General

Assembly, its legislative body, had considered the issue worthy of debate and legalization.

The New York State Legislature dealt with the tricky question of whether DFS is predominantly chance by simply declaring it a contest of skill. The first words of the new law read:

Legislative Findings and Purpose.

1. The legislature Hereby Finds and Declares that:

(A) Interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization.¹⁹⁵

Although passage of the new law makes DFS officially not gambling, it does not end the ongoing suits against FanDuel and DraftKings. Technically, the New York A.G. is not bound by the legislature’s declaration that DFS is a contest of skill. Senate Bill 8153 does not protect DFS operators from being charged with crimes for activities that took place prior to its passage. A court could conceivably find that the defendants were violating New York’s state anti-gambling laws for years. But that is extremely unlikely, especially since the state had chosen to go the civil rather than the criminal route when it moved to close down DFS.

But, FanDuel and DraftKings still have to defend against the charges of insider trading and misleading customers. *The New York Times* quoted Attorney Eric Schneiderman as saying that “he will enforce the new law. The amended lawsuit will continue against DraftKings and FanDuel alleging consumer fraud and false advertising for prior operations in New York.”¹⁹⁶

194. Michael Virtanen, *Governor Signs Law to Allow Daily Fantasy Sports in New York*, U.S. NEWS (Aug. 3, 2016), <https://www.usnews.com/news/business/articles/2016-08-03/governor-signs-law-to-allow-daily-fantasy-sports-in-new-york>.

195. N.Y. S.B. 8153 § 1400.

196. Virtanen, *supra* note 194.

California may be the next to follow. If that happens, if the nation's largest state joins New York, the first state to actively go against DFS, then the battle will be effectively over, at least on the state level.

California's DFS bill passed through the Assembly Governmental Organization Committee in a 17 to 1 vote.¹⁹⁷ Assembly Bill 1437 would authorize California companies to offer Internet DFS after obtaining licenses issued by the California DOJ.¹⁹⁸ The summary of the Assembly Committee on Governmental Organization's Hearing on the proposed Internet Fantasy Sports Game Protection Act stated that the Act "would require a person or entity to apply for, and receive, a license from the [DOJ] prior to offering an Internet fantasy sports game for play in California."¹⁹⁹ Furthermore, "[t]he bill would require the department to issue a license to a person or entity that applies for a license if the person or entity satisfies specified requirements, including, among others, that the applicant is of good character, honesty, and integrity."²⁰⁰ The bill also requires "a person to register with a 'licensed operator' prior to participating in an 'Internet fantasy sports game' on an 'authorized Internet Web site.'"²⁰¹ The licensed operator must "ensure that a registered player is eligible to play on an authorized Internet Web site, and to implement appropriate data security standards to prevent access by a person whose age and location have not been verified."²⁰² California's plan seems to be the perfect solution to the question of what should be a state's reaction to the DFS controversy.

The federal government is technically not bound by the decisions of the state legislatures, even official findings that DFS is a contest of skill. For example, Nevada and the federal government do not agree on the definition of "lottery." Nevada's state constitution still prohibits lotteries, yet the state legislature has authorized the games of keno and bingo to be played throughout the state's licensed gaming facilities. Today, players can buy a year's worth of keno tickets in advance. The federal Internal Revenue Service (IRS) considers those advance keno tickets as lotteries, which are subject to different tax laws from casino gaming winnings. There is no requirement that the IRS

197. Jeremy B. White, *Daily Fantasy Sports Legislation Passes California Committees*, SACRAMENTO BEE (Jan. 6, 2016), <http://www.sacbee.com/news/politics-government/capitol-alert/article53376325.html>.

198. *Id.*

199. *Internet Fantasy Sports Game Protection Act: Hearing on Assemb. B. 1437 Before the Assemb. Comm. on Governmental Org.*, 2015–2016 Reg. Sess. 1 (Cal. 2016).

200. Assemb. B. 1437, 2015–16 Reg. Sess. 2 (Cal. 2015).

201. *Id.*

202. *Id.*

and the state of Nevada agree on a legal definition of “lottery.”

If there is a conflict between how DFS is interpreted under state and federal laws, which federal statutes will come into play? PASPA would, on its face, be the most likely, since it prohibits states from legalizing new forms of sports betting. A state like New York might declare DFS to be a contest of skill, but a federal court is free to disregard that the state is actually legalizing sports betting. But, this is unlikely to happen because the suits will never be brought. Prosecutors have no interest in pursuing operators of games that have been expressly made legal by state legislatures. And no one else with standing is likely to bring suit. The sports leagues, which are expressly given the power to sue states under PASPA, are almost universally enthusiastic supporters of DFS. Only the NCAA has publicly opposed fantasy sports. And, it is easy to exclude collegiate athletic matches from fantasy leagues.

The interesting issue is whether any federal prosecutor would want to bring charges or seek injunctions under the Wire Act. Again, the federal government is not technically bound by state law. The Wire Act, in particular, does not care whether the sports wagers are legal or not. However, the UIGEA expressly allows bets across state lines, so long as the bets are legal on both ends. And the DOJ itself, at its highest levels, has declared that the state can offer online gambling, such as state lotteries, and not violate the Wire Act. The DOJ did not say that the UIGEA overrules the Wire Act when it comes to sports betting. But, it does indicate that it is not likely that a federal prosecutor would attempt to prevent two state-licensed DFS operators in different states from pooling their players. Of course, both states would also have to expressly allow such pooling.²⁰³

X. CONCLUSION

So, Governor Chris Christie was right: DFS was not an issue worthy of discussion in the presidential debates. But it is a very hot topic at the state level. And, the next Congress should clarify PASPA, the Wire Act, and the UIGEA. Or, at least the next A.G. should expand the Christmas gift to make it clear that it is up to the states, alone, to decide what to do about DFS.

The crux of the problem as it stands now is how much skill is involved in DFS? Since a salary cap is a part of the mix, the authors would respectfully argue that there is significant skill in choosing the appropriate team mem-

203. For a further discussion on the interplay between federal and state laws on cross-border betting, see generally I. Nelson Rose, *New Jersey and England Agree to Pool Players—Can They Do That?*, 20 GAMING L. REV. & ECON. 470 (2016).

bers.²⁰⁴ Experts in salary caps are not called “capologists” for nothing.²⁰⁵ It is truly a science and equally as demanding skill-wise as traditional fantasy leagues. The sports leagues are now also supporting DFS for obvious reasons: “Fantasy

players will continue to watch a game to the end, even if one team is wiping out the other, because they want to know how their individual fantasy team players do. More viewers mean more advertising revenue.”²⁰⁶

DFS operators and their “allies in the professional sports organizations and mass media companies, have the resources to fight these [legal] battles throughout the entire nation.”²⁰⁷ The NCPG (National Council on Problem Gambling) recently recognized that DFS is not going away. The NCPG issued its Fantasy Sports Consumer Protection Guidelines,²⁰⁸ which acknowledged the viability of DFS contests and envisioned these guidelines as “a collaborative effort endorsed by all stakeholders of Internet-based Fantasy Sports contests, including operators, investors, professional sports teams and leagues, regulators, consumer protection advocates, contest customers and the public.”²⁰⁹

So far, states that have expressly legalized intrastate DFS by statute have not been successfully challenged under any federal law. The UIGEA expressly allows intrastate gambling, even if the wire means of communication happens to cross through another state. It is doubtful whether a court would uphold a violation of the Wire Act, given such a clear mandate by Congress, and the federal DOJ’s acceptance of intrastate Internet gambling in its Christmas gift official opinion.

States legalizing DFS have also, so far, not been stopped under PASPA. PASPA was designed to prevent the spread of state-licensed sports books and state lotteries offering parlay bets. Season-long fantasy sports existed at the time PASPA was passed, and nobody thought the Act applied. It is doubtful that a court would find DFS so different from the traditional fantasy games that it would declare DFS a form of sports betting under PASPA.

So, as usual, it is up to the states to decide. New York says it is illegal;

204. *See* WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL* 97 (4th ed. 2009).

205. WALTER T. CHAMPION, JR., *SPORTS LAW: CASES, DOCUMENTS, AND MATERIALS* 280 (2d ed. 2014).

206. Rose, *supra* note 7, at 348.

207. I. Nelson Rose, *End Game for Daily Fantasy Sports?*, 19 *GAMING L. REV. & ECON.* 634 (2015).

208. NCPG, *NATIONAL COUNCIL ON PROBLEM GAMBLING FANTASY SPORTS CONSUMER PROTECTION GUIDELINES* (2015).

209. *Id.*

Utah disallows all gaming; Indiana states that it is legal and has proposed regulations; and Texas, through Governor Greg Abbott declares that DFS is unequivocally legal. And, Governor Abbott should know when it comes to Texas, since he was their former A.G. and former Associate Justice of the Texas Supreme Court.²¹⁰ It is true that Texas A.G. Ken Paxton has declared DFS illegal, but he has his own problems.²¹¹

DraftKings sued Ken Paxton on March 4, 2016,²¹² and FanDuel strategically exited the Texas market (at least for the time being).²¹³ DraftKings alleges that the A.G.'s opinion letter is "the opening volley in [his] . . . campaign . . . to distort Texas law and drive lawful DFS operators out of the state."²¹⁴ Since each state has a different political, social, historical, and cultural context, it makes sense that the states should have the final say in determining the legality of DFS.

210. In October, Governor Abbot gave a cold shoulder to the idea of state regulations targeting DFS. He did agree that fraud should be prosecuted but there are existing laws to deal with any wrongdoing. Regardless, Texas A.G. Ken Paxton issued an opinion indicating that DFS is illegal under Texas Law. Ken Paxton, however, is currently under indictment for securities fraud (which can be construed to be a form of gambling). DFS supporters call his opinion overreaching and a misinterpretation of Texas Law. *See generally* The Legality of Fantasy Sports Leagues Under Texas Law (RQ-0071-KP), No. KP-0057, Tex. Op. Att'y Gen. (Jan. 19, 2016); Peggy Fikac & Nick Moyle, *Paxton: Daily Fantasy Sports Illegal in Texas—AG's Nonbinding Opinion Says Online Leagues Prohibited* *Because They Depend on Chance*, HOUS. CHRON., Jan. 20, 2016, at B1.

211. Fikac & Moyle, *supra* note 210.

212. *See* Petition for Declaratory Judgment, DraftKings, Inc. v. Paxton, No. DC-16-02593 (D. Tex. Mar. 4, 2016).

213. *See id.* at Ex. B. "Settlement Agreement and Release" (between Texas Attorney General and FanDuel), which stipulates that no later than May 2, 2016, FanDuel will include Texas on the list of states where contestants may not deposit funds while physically located in that state. *Id.* at 4.

214. Petition for Declaratory Judgment, *supra* note 212, at 5.