



Regulation, Prohibition, and Fantasy: the Case of FanDuel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts

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In the second Republican presidential primary debate of 2016, a moderator asked presidential hopeful Jeb Bush about whether daily fantasy sports should be regulated by the government. While Bush responded that daily fantasy sports “has become something that needs to be looked at in terms of regulation,” New Jersey governor Chris Christie took great umbrage that a question about fantasy sports was being asked.

“Can we stop?” Christie said. “How about this? How about we get the government to do what they’re supposed to be doing: secure our borders, protect our people and support American values and American families. Enough on fantasy football. Let people play, who cares?”¹

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¹ See Travis Waldron, No, Chris Christie, How the Feds Handle Fantasy Sports Is a Big Deal, HUFFINGTON POST (Oct 29, 2015), http://www.huffingtonpost.com/entry/chris-christie-fantasy-sports_us_56324609e4b0631799114717 [https://perma.cc/ZHJ9-4EBU].

While many problems are more pressing than daily fantasy sports (“DFS”), it would seem that the attorney generals of quite a few states disagree with Governor Christie’s “live and let play” philosophy. Increasingly, state officials are seeking measures to prohibit or regulate the market for daily fantasy sports.

Increased scrutiny is quite a logical development. Over the last two years, DFS has grown into a multi-billion dollar industry, with millions of participants playing each week. Daily fantasy games involve different types of online contests where participants create a team of real-life players from various sports using salary cap limitations. Participants then enter these created rosters in cash tournaments to compete with other players for prizes based on how the chosen athletes perform in real-life competitions.

While many companies offer some form of daily fantasy games, the two primary market players are the New York-based FanDuel, and the Boston-based DraftKings. Both companies were established as venture capital-backed startup companies, and between them, they control 95% of the DFS market in the United States. These companies have demonstrated tremendous growth, are both valued at over a billion dollars, and show few signs of slowing down. The expansion of this industry, and the growing calls for some level of governmental regulation,² have resulted in increased scrutiny of DFS in the recent months.

This note will examine the regulation and legality of daily fantasy sports in the United States. It will first provide an in-depth background of daily fantasy sports, examining the game itself, as well as the two major market players and the finances, investments, and partnerships that have allowed DFS to grow so rapidly. The next section will explore the traditional legal justifications for allowing DFS. The third section will examine evolving practical concerns related to the status of DFS. The final section will explore specific states actions connected with DFS, using the states of New York and Massachusetts to explore the growing movement to prohibit or regulate DFS.

² See e.g., Michael Colangelo, Adam Silver calls for regulation of daily fantasy sites, including DraftKings and FanDuel, FIELDISOFGREEN (October 23, 2015), <http://thefieldsofgreen.com/2015/10/23/adam-silver-calls-for-regulation-of-daily-fantasy-sites-like-draftkings-and-fanduel/> [https://perma.cc/4LWN-EVDK]; Dustin Gouker, Amaya Calls For State Governments To Regulate Daily Fantasy Sports In Wake Of DraftKings Leak, LEGALSPORTSREPORT (October 6, 2015), <http://www.legalsportsreport.com/4704/amaya-calls-for-dfs-regulation/> [https://perma.cc/328E-BTXY].

I. WHAT IS DFS?

There are several main disciplines of daily fantasy sports competitions, divided into two primary categories: cash games and tournaments with guaranteed prize pools.³ Individuals participate by creating an account on one of various sites, depositing money into the account, and using the money to buy entry tickets to a variety of DFS contests.⁴ DFS contests utilize a salary cap format. Participants select athletes to fill their rosters, with each user allocated a fixed maximum budget to spend on athletes for their team.⁵ Each athlete has his own cost, with elite athletes having the highest price. Teams gain points depending on the performance of the chosen athlete in real contests, similar to how scoring works for weekly fantasy sports.⁶

There are a variety of games within DFS, and players can choose to participate in a multitude of contest formats. In “Double-up” or “50/50” cash game competitions, as well as variations such as Triple-up and Quadruple-up, participants aim to finish with a point total inside the top 50% of those who entered the particular contest. Players who finish in the top half of the field receive a prize equal to double the entry fee, while the remainder loses their entry fee. Head-to-head competitions pit players against a single opponent, with the highest point team winning the prize. Guaranteed prize pool contests tend to have higher stakes and employ tiered payouts based on the percentile in which one finishes.⁷ Users can pay as little as \$0.25 on

³ See Cash Games vs. Tournaments, ROTOWORLD (Jan. 14, 2016), <http://www.rotoworld.com/articles/nba/48892/425/cash-games-vs-tournaments> [https://perma.cc/AR3E-988K].

⁴ DFS sites run a variety of promotions, encouraging users to deposit more money on their site with a promise of “matching funds.”

⁵ See Adam Kilgore, Daily Fantasy sports Websites find riches in Internet Gaming law loophole, THE WASHINGTON POST (March 27, 2015), https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html [https://perma.cc/4XBA-E8GA].

⁶ Players receive “fantasy points” for accumulating stats such as yards gained, points scored, number of catches, number of touchdowns, number of runs batted in, etc. See Michael Nelson, *How to make a killer daily fantasy sports roster on DraftKings and FanDuel*, VENTUREBEAT (September 10, 2015), <http://venturebeat.com/2015/09/10/how-to-make-a-killer-daily-fantasy-sports-football-roster-on-draftkings-and-fanduel/> [https://perma.cc/BYQ2-YPXZ].

⁷ See Stephen Perez, Daily Fantasy Strategy, SPORTING NEWS (February 12, 2015), <http://www.sportingnews.com/fantasy-nba-news/4635471-daily-fantasy-sports-dfs-strategy-how-to-play-5050-h2h-gpp-win-cash-prizes-one-day-draft-kings-tips> [https://perma.cc/2Y6N-6F5G].

DraftKings and \$1 on FanDuel to play their games, and both websites offer games with entry fees of up to \$10,600 for significantly larger payouts.

II. THE DAILY FANTASY SPORTS INDUSTRY

DFS is a recent phenomenon and has grown extremely rapidly. One of the first sites to offer daily fantasy was Instant Fantasy Sports, established in 2007.⁸ The service's co-founder explained that the game was inspired by the format of online poker, with the goal being to take "the time frame of season-long fantasy sports leagues and shrink it."⁹

Gambling on sports is highly prevalent, with estimates that Americans spent over 95 billion dollars (much of it illegal) wagering on professional and college football in 2015.¹⁰ Traditional, season-long fantasy sports users (such as standard ESPN Fantasy Football leagues) have grown at an estimated 25% rate since 2011, with The Fantasy Sports Trade Association detailing that an estimated 57 million individuals played fantasy sports in the United States and Canada in 2015.¹¹ These numbers reveal the market potential for DFS, and Eilers Research CEO Todd Eilers estimated "daily games will generate around \$2.6 billion in entry fees [in 2015] and grow 41% annually, reaching \$14.4 billion in 2020."

This tremendous growth has spurred investors eager to capitalize on the developing market. Venture capitalists and media companies have made significant investments in FanDuel and DraftKings, investing well over \$300 million into each company over the last year. FanDuel raised \$361 million from media conglomerates such as NBC Sports, Time Warner, and

⁸ See Ezra Galston, *Game Over: Why Daily Fantasy has already been won*, BREAKINGVC.COM (July 15, 2015), <http://www.breakingvc.com/2015/07/15/game-over-why-daily-fantasy-has-already-been-won/> [https://perma.cc/5UM7-MXK9].

⁹ See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, NEW YORK TIMES MAGAZINE (January 6, 2016), http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0 [https://perma.cc/MF4H-LTWU].

¹⁰ See Thomas Barrabi, *Legalized Sports Gambling?*, INTERNATIONAL BUSINESS TIMES (September 9, 2015), <http://www.ibtimes.com/legalized-sports-gambling-americans-bet-95-billion-nfl-college-football-season-mostly-2089606> [https://perma.cc/FV68-JV5D].

¹¹ See *Membership Information*, FANTASY SPORTS TRADE ASSOCIATION, <http://fsta.org/membership/membership-information/> [https://perma.cc/ZWP5-76XT].

Comcast Ventures.¹² Rival DraftKings has kept pace, raising over \$375 million, including a \$300 million investment by Fox Sports.¹³

These groups are not the only companies partnering with or investing in DFS. Increasingly, professional sports leagues have found themselves doing the same.¹⁴ This is a significant development, as professional leagues have long been skeptical of variations on their games that involve gambling. However, it seems that the league's desire to drive eyes toward their games (even matchups without the luster of star players implicate fantasy matchups) has helped lead to increased interest in DFS companies. DraftKings' last investment round included investment from ESPN, Major League Soccer, the National Hockey League, the Kraft Group—owned by Robert Kraft of the New England Patriots—and Legends Hospitality, a stadium concession business owned by the New York Yankees and the Dallas Cowboys.¹⁵ In 2013, DraftKings and Major League Baseball agreed on a multiyear partnership deal, allowing DraftKings to offer co-branded MLB daily fantasy games.¹⁶ This agreement has led the companies to offer market-specific ballpark experiences, meaning that DFS is slowly becoming a formal part of the “normal fan experience.”¹⁷ Following MLB's lead, in 2014, FanDuel announced an exclusive partnership with the NBA in exchange for an equity stake.

With this growth of players and investment, DraftKings and FanDuel have become extremely valuable companies. DraftKings has an estimated valuation of \$1.2 billion, posting revenues from 2014 of \$30 million. FanDuel has a slightly higher valuation, pricing at roughly \$1.3 billion after

¹² See FanDuel, CRUNCHBASE, (January 31, 2016), <https://www.crunchbase.com/organization/fanduel>, [https://perma.cc/V3XC-B7SS].

¹³ See DraftKings, CRUNCHBASE, (January 31, 2016), <https://www.crunchbase.com/organization/draftkings#entity>, [https://perma.cc/98AB-9UXC].

¹⁴ See Richard Sandomir, Fantasy Sports Website DraftKings adds \$300 Million in New Investment, NEW YORK TIMES (July 26, 2015), <http://www.nytimes.com/2015/07/27/sports/fantasy-sports-website-draftkings-adds-dollar300-million-in-new-investment.html> [https://perma.cc/RP62-99WE].

¹⁵ See *Id.*; Travis Hoiium, DraftKings Scandal: You'll be shocked at who owns fantasy sports giants, THEMOTLEYFOOL (October 11, 2015), <http://www.fool.com/investing/general/2015/10/11/draftkings-scandal-youll-be-shocked-at-who-owns-fa.aspx> [https://perma.cc/QYT3-TCY4].

¹⁶ See Brian Flood, How Daily Fantasy Sports became a heavyweight in the advertising world, ADWEEK (July 6, 2015), <http://www.adweek.com/news/advertising-branding/how-daily-fantasy-sports-became-heavyweight-advertising-world-165704> [https://perma.cc/2D32-JC35].

¹⁷ See *id.*

collecting \$57 million in revenues in 2014.¹⁸ Adding to their allure, fantasy sports companies have proven to be highly profitable, with margins greater than 37%.¹⁹

The growth of DFS has been precipitated by a massive media blitz by both DraftKings and FanDuel. In the first week of the NFL regular season, DraftKings spent more on television advertising than any other company in the United States.²⁰ In fact, according to Nomura analyst Anthony DiClemente, DraftKings and FanDuel spent more than \$150 million on TV and internet advertising in the quarter that included the beginning of the football season.²¹

It is not just effective advertising and smart partnerships that have allowed DFS to become so successful. Indeed, those who examine DFS credit its success to a range of factors, from the convenience of the format in comparison to season-length fantasy sports to the allure of large cash prizes (some contests advertise cash prizes of up to \$1 million), as well as the ready adaptability of DFS formats to mobile devices.²² Authors have pointed out that part of the reason DFS was able to spread so quickly is that it harnessed the communal enjoyment aspect that is so crucial to the popularity of season-long fantasy leagues.²³ The structure and payouts of daily fantasy games have been designed in order to provide a feeling of “instant gratification” to

¹⁸ See Sarah Needleman, Storm of Criticism Engulfs DraftKings, FanDuel, *THE WALL STREET JOURNAL* (October 6, 2015), <http://www.wsj.com/articles/storm-of-criticism-engulfs-draftkings-fanduel-1444107475> [https://perma.cc/FP9M-JESQ].

¹⁹ See Utpal Dholakia, Why Are FanDuel Television Advertisements So Effective? *PSYCHOLOGY TODAY* (October 13, 2015), <https://www.psychologytoday.com/blog/the-science-behind-behavior/201510/why-are-fanduel-television-advertisements-so-effective> [https://perma.cc/P3QL-FDB4].

²⁰ See Hayden Bird, You're Not Crazy: DraftKing Commercials Really Are on All the Time, *BOSTINNO* (September 10, 2015), <http://bostinno.streetwise.co/2015/09/10/draftkings-advertising-stats-total-spending-in-2015-moves-to-number-one-in-time-for-nfl-kickoff/> [https://perma.cc/5VS6-BKZM].

²¹ See Myles Udland, Fantasy sports companies spend so much on commercials they're moving the needle on TV ad spending, *BUSINESS INSIDER* (October 6, 2015), <http://www.businessinsider.com/draftkings-fanduel-daily-fantasy-sports-advertising-2015-10> [https://perma.cc/2ECM-Y27U].

²² See Drew Harwell, The rise of daily fantasy sports, online betting's newest empire, *THE WASHINGTON POST* (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/> [https://perma.cc/7SPG-W7SE]; *supra* note 12.

²³ See Mike Butcher, *FanDuel turns fantasy sports betting into a social game*, *TECHCRUNCH* (July 21, 2009), <http://techcrunch.com/2009/07/21/fanduel-turns-fantasy-sports-betting-into-a-social-game/> [https://perma.cc/XB7V-SQGY].

players similar to that of traditional sports gambling and online poker.²⁴ Indeed, many players gain a great deal of personal satisfaction from engaging in DFS, as evidenced by the groundswell of support that DFS has received after efforts to regulate or prohibit it.²⁵

III. LEGAL ISSUES

While DFS initially flew under the radar, as the industry has grown, the sites offering daily fantasy games have continued to operate in a space of questionable legality.²⁶ At first glance, it appeared that DFS activities were exempted from traditional regulation of internet gambling, as they seemed to fit into an exception carved out by the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA). This act was added as Title VIII to the SAFE Port Act, which otherwise regulated America's harbor and port security.²⁷ UIGEA "prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law."²⁸ The act specifically excluded fantasy sports that met particular requirements as well as skill-based games and legal intrastate and inter-tribal gaming.

The act was largely considered to be a response to a 2002 United States Court of Appeals for the Fifth Circuit ruling that the Federal Wire Act did not prohibit internet gambling on a game of chance.²⁹ Federal regulation was helpful due to the online nature of many gambling businesses making it difficult for states to muster effective responses. The act contains specific language exempting traditional fantasy sports from regulation. The statute,

²⁴ See *id.*

²⁵ See Daily Fantasy Sports Supporters Rally In Front of NY Attorney General's Office, CBS NEW YORK (November 13, 2015), <http://newyork.cbslocal.com/2015/11/13/daily-fantasy-sports-rally-fanduel-draftkings/> [<https://perma.cc/E3AX-98TJ>].

²⁶ See Sacha Feinman & Josh Israel, The Hot New Form Of Fantasy Sports Is Probably Addictive, Potentially Illegal And Completely Unregulated, THINK-PROGRESS (May 7, 2015), <http://thinkprogress.org/sports/2015/05/07/3648832/daily-fantasy-sports-gambling/> [<https://perma.cc/U3SS-ESQM>].

²⁷ Security and Accountability For Every Port Act, 31 U.S.C. §§ 5361–5367 (2006).

²⁸ Unlawful Internet Gambling Enforcement Act of 2006 Overview, available at <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf> [<https://perma.cc/JWX4-N3FG>].

²⁹ *In re MasterCard Intern. Inc., Internet Gambling Litig.*, 132 F. Supp. 2d 468, 480 (E.D. La. 2001) *aff'd sub nom. In re MasterCard Intern. Inc.*, 313 F.3d 257 (5th Cir. 2002).

31 U.S.C.A. § 5362, exempted participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions: (i) all prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of fees paid by those participants. (ii) all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events, and (iii) no winning outcome is based solely on any single performance of an individual athlete in any single real-world sporting or other event.³⁰

While DFS sites have pointed to this regulation to argue that they are legal, when the act passed, DFS was not being widely played or marketed to players. Indeed, it is unclear whether DFS even existed at this time. There is no evidence that legislators or drafters considered DFS, and it is only clear that the Act intended to exempt traditional, season-long, fantasy sports. Indeed, legal scholars writing about fantasy sports and UIGEA did not even mention daily fantasy sports.³¹

Despite this, DFS sites have pointed to the fantasy exception carved out by UIGEA as proof positive that their offerings are legal and aboveboard. Under these auspices, DFS has steadily grown, with few genuine challenges. Given the online nature of the games, it has been difficult to enforce state regulation of DFS. However, as DFS became increasingly popular, scrutiny ratcheted up, and state regulators began to take notice. Because “[f]ederal gambling laws . . . only facilitate the enforcement of state gambling laws,”³² the ultimate determinations of legality for DFS will rest with individual states.

³⁰ 31 U.S.C.A. § 5362.

³¹ Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire And The Reality Of U.S. Gaming Law*, 31 T. Jefferson L. Rev. 317, 319 (2009); Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. Rev. 1195, 1199 (2007).

³² *Id.*

A. Skill or Chance?

The distinction between games of skill and chance is often highlighted as a key feature determining whether or not a particular activity should be considered gambling or legal activity and is advanced by DFS companies as a key reason why their games are legal. State laws traditionally apply varying standards when determining whether a game is one of skill or of chance. Most base their determinations on whether the chance-based elements are predominant over the skill-based ones and on whether chance has more than an incidental impact on the outcome of the game.³³ This determination is crucial, as many states allow people to pay money to participate in games of skill but forbid them from paying to enter games of chance.³⁴

Of course, most games have elements of both skill and chance, meaning that whether a given game is considered a game of chance or a game of skill will often depend on a subjective determination of which element is the dominant factor in the outcome. This highlights a major weakness of the skill vs. chance determination, as different individuals may arrive at vastly different conclusions.³⁵ Traditional hallmarks of games of skill include learned or developed ability, identifiable strategy or tactics that result in positive outcomes, and technical expertise. These factors combine to make it legal to bet on several games of skill. Some of the most common examples include certain card games such as gin rummy, pool, darts, and season-long fantasy sports leagues.

Opponents have argued that because athlete performance varies on a week-to-week basis, DFS contests involve little more than wagering on the performance of individual athletes during a given game. This is crucially different from traditional fantasy sports, which involves managing a team on a week-to-week basis across a season.³⁶ This distinction is mobilized to argue that DFS ultimately relies on chance.

³³ See Davey Alba, Does Winning at Fantasy Sports Require Skill or Dumb Luck?, WIRED (October 17, 2015), <http://www.wired.com/2015/10/does-winning-at-fantasy-sports-require-skill-or-dumb-luck/> [https://perma.cc/U3VZ-6JKY].

³⁴ See Ken LaMance, Games of Chance vs. Games Of Skill Lawyers, LEGALMATCH (February 6, 2016), <http://www.legalmatch.com/law-library/article/games-of-chance-vs-games-of-skill.html> [https://perma.cc/JQB4-PJ9A].

³⁵ Hancock, 31 T. Jefferson L. Rev. at 337.

³⁶ See Geoff Baker, Is it gambling? Why fantasy sports sites like DraftKings and FanDuel are illegal in Washington state, SEATTLE TIMES (November 11, 2015), <http://www.seattletimes.com/sports/seahawks/is-it-gambling-why-fantasy-sports-sites-like-draftkings-and-fanduel-are-illegal-in-washington-state/> [https://perma.cc/DY5L-ZXP6].

In response, advocates have argued that preparing a daily fantasy team requires skill, as creating a successful team requires extensive knowledge. Players must not only be familiar with the sport, the individual players, and their respective performances, but they must possess the ability to utilize this knowledge to construct a team of top-performing players within the limitation of a salary cap. The data does seem to bolster the argument that DFS is a game of skill. One study by McKinsey & Company examined the first half of the 2015 MLB season.³⁷ The study estimated that 91% of winnings were won by only 1.3% of players.³⁸ This is far from the normal distribution that would be expected from a game whose outcome relies purely on chance. It is also clear that inexperienced players can be at a disadvantage due to the skill of their opponents.³⁹

Exact determinations of whether DFS is a game of skill or chance will ultimately rest on state law interpretations of these terms. This adds another wrinkle to determinations of the legality of DFS, as different states will interpret provisions differently, leading to variable outcomes. Indeed, the difficulty of determining whether a game is one of skill or chance is evident from the cases of poker,⁴⁰ horse racing,⁴¹ sweepstakes,⁴² and even carnival games.⁴³

To illustrate this problem, one can examine the question of whether DFS is a game of skill or chance under New York law. New York defines “contest of chance” to mean “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor

³⁷ See Ed Miller & Daniel Singer, For daily fantasy sports operators, the curse of too much skill, *SPORTSBUSINESSJOURNAL* (July 27, 2015), <http://www.sportsbusinessdaily.com/Journal/Issues/2015/07/27/Opinion/From-the-Field-of-Fantasy-Sports.aspx> [<https://perma.cc/A8WY-PYWT>].

³⁸ See Steven Stradbroke, Just 1.3% of daily fantasy sports players earn 91% of player profits, Calvin Ayre (September 4, 2015), <http://calvinayre.com/2015/09/04/business/tiny-silver-daily-fantasy-sports-players-earn-bulk-profits> [<https://perma.cc/7JUK-RDJC>].

³⁹ See Barrabi, *supra* note 12.

⁴⁰ See Steven D. Levitt, Thomas J. Miles & Andrew M. Rosenfield, Is Texas Hold ‘Em A Game of Chance? A Legal and Economic Analysis, 101 *Geo. L.J.* 581 (2013).

⁴¹ See Laura A. D’Angelo & Daniel I. Waxman, No Contest? An Analysis of the Legality of Thoroughbred Handicapping Contests Under Conflicting State Law Regimes, 1 *Ky. J. Equine, Agric. & Nat. Res. L.* 1 (2009).

⁴² See Tywanda H. Lord & Laura C. Miller, Playing the Game by the Rules: A Practical Guide to Sweepstakes and Contest Promotions, 29 *Franchise L.J.* 3 (2009).

⁴³ See J. Royce Fichtner, Carnival Games: Walking the Line Between Illegal Gambling and Amusement, 60 *Drake L. Rev.* 41, 53-54 (2011).

therein” (emphasis added).⁴⁴ New York Penal Law 225.00 defines gambling as when a person “stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence” (emphasis added).⁴⁵

Thus, one can see that, under New York law, DFS could be a game of skill yet still be classified as gambling if Courts decide that the outcome of DFS games is determined by a “material degree of chance.” New York courts have no recent rulings defining exactly what level of chance would be considered material, but experts suggest that the court may choose to follow one of two opposing precedents.⁴⁶ Some highlight a decision from Missouri, where a court ruled that chance can be material without being the dominant element even when a game is more than 50% skill-based.⁴⁷ Alternatively, a New York case from the early 20th century required a *material degree of chance* to be the dominant element, meaning chance must be the controlling factor in a game.⁴⁸

While the determination made by the New York state court will be discussed below, it is clear that there is no “slam-dunk” legal answer to whether DFS is a game of skill or chance, even when we examine the law of just one state. This illustrates the difficulty of regulating DFS state by state; such a process will result in a long period of uncertainty as many legal issues work their way through the courts and appellate procedures. Given that there is no clear answer for whether DFS should be considered a game of skill, chance, or a game of skill that nonetheless relies on a “material degree of chance,” it is clear that the ultimate determination of legality under New York law is a difficult and subjective one.⁴⁹ Indeed, it is predictable that different courts might find different answers when examining this issue. Given that this determination is highly subjective and fact-specific, DFS continues to operate in a “grey area” of legality, lacking any clear legislative guidance on this issue.

⁴⁴ N.Y. Penal Law § 225.00 (McKinney); 35C N.Y. Jur. 2d Criminal Law: Principles and Offenses § 1744.

⁴⁵ *Id.*

⁴⁶ See Peter Hammon, Analyzing FanDuel’s Statistical Arguments On Skill Vs. Chance At The New York Hearing, LEGAL SPORTS REPORT (December 1, 2015), <http://www.legalsportsreport.com/6605/fanduels-skill-vs-chance-arguments> [https://perma.cc/L856-TX64].

⁴⁷ See *Thole v. Westfall*, 682 S.W.2d 33, 37, n. 8 (Mo. Ct. App. 1984) (holding that to satisfy Missouri’s material element test, “chance must be a material element in determining the outcome,” but “need not be the dominant element”).

⁴⁸ *People ex rel. Ellison v. Lavin*, 71 N.E. 753, 754 (N.Y. 1904) (holding that a lottery need not be determined exclusively by chance to be considered gambling).

⁴⁹ For another look at this difficulty, see Hammon, *supra* note 49.

IV. REASONS TO REGULATE

Beyond legal arguments, opponents point to several normative justifications for why DFS should face some level of regulation.

A. *Addictive Potential*

Recently, researchers have begun to examine DFS through a public health lens due to fears that games like DFS can exacerbate gambling addiction.⁵⁰ Indeed, in the cease and desist letter that Attorney General (AG) Eric Schneiderman of New York sent to DraftKings and FanDuel, he specifically highlighted that “[d]aily Fantasy Sports are creating the same public health and economic concerns as other forms of gambling.”⁵¹

Of particular concern is the fact that fantasy games primarily appeal to the demographic that researchers identify as most likely to develop gambling problems— young men. Research affirms that this same demographic is most likely to engage in high-risk behaviors⁵² and is most vulnerable to developing problems with gambling.⁵³ Indeed, neuroscientific evidence supports that young men are at highest risk for developing improper neural reward pathways⁵⁴ which tend to result in addiction.⁵⁵ Furthermore, recent research suggests that gambling addiction has a high prevalence of harmful comorbidities, such as substance abuse disorders and other mental health problems, indicating that ready access to gambling can have untold negative effects on those most susceptible.⁵⁶ FanDuel readily admits that it targets millennials, and psychologists who analyze DFS advertisements highlight that the psychological mechanisms employed are particularly effective at

⁵⁰ See Feinman, *supra* note 28.

⁵¹ See Jackie Wattles, Daily Fantasy sports are banned in New York, CNN MONEY (November 10, 2015), <http://money.cnn.com/2015/11/10/news/companies/fantasy-sports-ban-new-york> [<https://perma.cc/WF25-WQXX>].

⁵² See Valerie Reyna & Susan E. Rivers, Current theories of risk and rational decision making, 28 Dev. Rev. 1, 1 (2008).

⁵³ See William Feigelman et. al., Problem gamblers, problem substance users, and dual-problem individuals: an epidemiological study, 88 Am. J. Pub. Health 467, 467 (1998).

⁵⁴ See Peter Putman et al., Exogenous cortisol acutely influences motivated decision making in healthy young men, 208 Psychopharmacology 257, 260 (2010).

⁵⁵ See Andre Chambers & Marc N. Potenza, Neurodevelopment, impulsivity, and adolescent gambling, 19 J. of Gambling Stud. 53, 54 (2003).

⁵⁶ Felicity K. Lorains et. al., Prevalence of comorbid disorders in problem and pathological gambling: systematic review and meta-analysis of population surveys, 106 Addiction 490, 490 (2011).

persuading young men.⁵⁷ Indeed, the barrage of advertising has proven to be extremely effective.

There are already numerous stories of DFS exacerbating problems, or acting as a damaging enabling outlet, for those with serious gambling problems.⁵⁸ Stories of players racking up extremely high levels of debt are commonplace.⁵⁹ Furthermore, DFS companies have not been proactive in addressing the concerns related to gambling addiction. Indeed, neither FanDuel nor DraftKings mentions 1-800-GAMBLER, one of the most well regarded support hotlines for those suffering with gambling problems, on its website. While the sites include links to the National Center for Responsible Gaming, this group has come under fire recently for being funded, in part, by the casino industry.

B. Company Abuse and Practices

Beyond the nature of DFS games themselves, company practices at DraftKings and FanDuel have led to increased scrutiny and criticism of the industry.⁶⁰ A major scandal for DFS erupted when an employee at DraftKings admitted to inadvertently releasing data before the start of the third week of N.F.L. games.⁶¹ It was discovered that this employee, a midlevel content manager, won \$350,000 at FanDuel that same week. This raised legitimate fears of a form of “insider trading,” where employees at DFS companies could muster the knowledge they gained from employment to gain a competitive advantage in contests on competing sites. In many ways, DFS is akin to a form of day trading on athletes, so concerns related to insider trading are particularly salient.

While employees have always been banned from playing on their own website, this episode raised serious questions about which employees at daily

⁵⁷ See *supra* note 21.

⁵⁸ See Walt Bogdanich & Jacqueline Williams, For Addicts, Fantasy Sites Can Lead to Ruinous Path, *THE NEW YORK TIMES* (November 22, 2015), <http://www.nytimes.com/2015/11/23/sports/fantasy-sports-addiction-gambling-draftkings-fanduel.html> [<https://perma.cc/SWB8-ECND>].

⁵⁹ See Steve Petrella, DFS player: How daily fantasy ruined my life, *SPORTING NEWS* (October 8, 2015), <http://www.sportingnews.com/fantasy-news/4657565-daily-fantasy-sports-dfs-gambling-addiction-regulation-lawsuit-industry-nfl> [<https://perma.cc/AL6L-7QQ4>].

⁶⁰ See Joe Drape and Jacqueline Williams, Scandal Erupts in Unregulated World of Fantasy Sports, *THE NEW YORK TIMES* (October 5, 2015), <http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html?ref=sports> [<https://perma.cc/4ZLT-C7NB>].

⁶¹ See *id.*

fantasy companies have access to valuable proprietary data and how these employees are using this information. This data, including which players a majority of the money is being bet on, can offer significant advantages if utilized properly, because top prizes are often won by individuals with players who appear on fewer rosters in a given tournament. It should be noted that the fact that insiders are able to muster information to gain an advantage speaks against the notion that DFS is purely a game of chance.

After the discovery of the conduct of their employees, both DraftKings and FanDuel have been named in class-action lawsuits. The companies are accused of fraud, negligence, and false advertising.⁶² The case was brought by Adam Johnson of Kentucky,⁶³ who claims that daily fantasy games offered by the two companies are misrepresented as fair, in large-part because employees from rival sites were able to participate and gain a competitive advantage. This lawsuit is just one of several working its way through the courts.⁶⁴ Increased scrutiny has focused on DFS advertisements as being misleading, as some claim the ads make the chance of winning seem far greater than it really is—tantamount to false advertising to mislead potential players.⁶⁵

In response, a FanDuel spokesperson told ESPN.com that DraftKings employees have won only 0.3 percent of the money FanDuel has awarded in its entire history.⁶⁶ Both companies advanced new procedures to prohibit their employees from playing DFS on rival sites.⁶⁷ However, controversy remains, especially after recent allegations that DFS companies were aware

⁶² See Ilan Mochari, Why DraftKings and FanDuel Spent \$206 Million on Ads This Year, Inc. (October 9, 2015), <http://www.inc.com/ilan-mochari/fantasy-sports-betting-startups-206-million-tv-ads.html> [<https://perma.cc/9PTX-WDU9>].

⁶³ Johnson began by depositing \$100 into a DraftKings account.

⁶⁴ See Mike Chiari, Daily Fantasy Sports Customers File Class-Action Lawsuit in Florida, BLEACHER REPORT (November 21, 2015), <http://bleacherreport.com/articles/2584449-daily-fantasy-sports-customers-file-class-action-lawsuit-in-florida> [<https://perma.cc/WQ9G-86QT>].

⁶⁵ See Dan Adams, Daily fantasy sports companies offer differing messages to fans, courts, THE BOSTON GLOBE (November 30, 2015), <https://www.bostonglobe.com/business/2015/11/29/daily-fantasy-sports-companies-offer-conflicting-messages-fans-courts/vybJqhZXxIMGXdAPZJvStL/story.html> [<https://perma.cc/5CV9-9XTX>].

⁶⁶ See Darren Rovell, Class action lawsuit filed against DraftKings and FanDuel, ESPN (October 9, 2015), http://espn.go.com/chalk/story/_/id/13840184/class-action-lawsuit-accuses-draftkings-fanduel-negligence-fraud-false-advertising [<https://perma.cc/WDH8-K9J4>].

⁶⁷ See *DraftKings, FanDuel amend employee policies after controversy*, SB NATION, (October 6, 2015), <http://www.sbnation.com/nfl/2015/10/6/9466057/draftkings-fanduel-amend-employee-policies-controversy>, [<https://perma.cc/PFU8-VNJW>]

their employees were playing on rival sites and did not take action to prevent it.⁶⁸ Controversy has continued as media outlets focusing on DFS “success stories” (players who win large sums of money) have found that major winners are few and far between.⁶⁹ Additionally, as FanDuel and DraftKings have been forced to argue that DFS is a game of skill, their advertising, which depicts even inexperienced players as having a good chance of winning, has come under increased scrutiny.⁷⁰

V. STATE RESPONSES

While DFS sites have pointed to the UIGEA as providing legal protection for DFS games, states have begun to increasingly seek actions to prohibit or regulate DFS. UIGEA does not prohibit states from deciding to regulate fantasy games, and recently Congressman Jim Leach, one of the authors of the UIGEA, explained that the fantasy sports carve-out was not intended to cover the present-day daily fantasy industry. The Congressman claimed, “it is sheer chutzpah for a fantasy sports company to cite the law as a legal basis for existing.”⁷¹ DFS has long operated on a state-by-state model due to the uncertain legality of DFS under state gambling laws. For instance, daily fantasy services have made residents of Arizona, Iowa, Louisiana, Montana, and Washington ineligible for participation.⁷²

A more interesting area for examination is to look at states that are currently deciding whether and how to regulate DFS. By examining two

⁶⁸ See Kevin Draper, *FanDuel Told Employees Not To Win Too Much Money On DraftKings Or People Would Get Suspicious*, DEADSPIN (November 20, 2015), <http://deadspin.com/fanduel-told-employees-not-to-win-too-much-money-on-draftkings-1743814536> [<https://perma.cc/AJU7-VFBV>].

⁶⁹ See Gregg Easterbrook, *DraftKings and FanDuel are not your friends*, THE NEW YORK TIMES (October 6, 2015), http://www.nytimes.com/2015/10/07/upshot/the-big-winners-in-fantasy-football-and-the-rest-of-us.html?_r=0 [<https://perma.cc/UND7-TRT6>].

⁷⁰ See Ed Miller and Daniel Singer, *For daily fantasy-sports operators, the curse of too much skill*, MCKINSEY & COMPANY (September, 2015), http://www.mckinsey.com/insights/media_entertainment/for_daily_fantasy_sports_operators_the_curse_of_too_much_skill [<https://perma.cc/NV3R-MRLQ>].

⁷¹ See Tim Dahlberg, *Author of anti-gambling law says “sheer chutzpah” for daily fantasy sites to claim legitimacy*, USNEWS (October 12, 2015), <http://www.usnews.com/news/sports/articles/2015/10/12/former-congressman-says-dfs-is-cauldron-of-daily-betting> [<https://perma.cc/D592-8F82>].

⁷² See Bob Hohler, *An uncertain line between fantasy sports, gambling*, THE BOSTON GLOBE (August 2, 2015), <https://www.bostonglobe.com/sports/2015/08/02/fantasy-games-draw-scrutiny-ban-sports-gambling-blurs/XxWUs2cwrveLvJe8bFt3wI/story.html> [<https://perma.cc/ADJ9-KBWD>].

different models for regulation proposed by New York and Massachusetts, one can begin to understand the complexities and challenges of any scheme to reign in DFS. These two states were chosen due to the large size of their DFS markets, the fact that the companies are themselves based in New York (FanDuel) and Massachusetts (DraftKings), and the fact that the state responses have been very different.

A. *New York*

New York has taken an extremely aggressive approach to DFS, with Schneiderman issuing a cease-and-desist order to DraftKings and FanDuel on November 10th, 2015. The AG argued that DFS was illegal under state law, as players were risking “something of value” on a contest where they did not have “control or influence” over the outcome.⁷³ Invoking New York penal law, Schneiderman contended that winning or losing in DFS depends on numerous elements of chance to a “material degree” and characterized the DFS industry as being a “massive, multi-billion-dollar scheme intended to evade the law and fleece sports fans across the country.”⁷⁴

Schneiderman’s letter set off a firestorm of controversy. In response, DraftKings and FanDuel filed lawsuits against the state of New York, alleging that DFS was a game of skill and that the AG had denied the companies due processes by overstepping his power.⁷⁵ Both companies further alleged that Schneiderman had engaged in tortious interference by sending cease and desist notices to payment processors.⁷⁶ In response, a few days later, the AG filed a request for a temporary injunction to force DraftKings and FanDuel to halt service for players in New York. Schneiderman reiterated his argument that DFS was simply a “re-branding” of sports gambling,

⁷³ See Darren Rovell and David Purdum, New York Supreme Court judge rules against DraftKings, FanDuel, ESPN (December 11, 2015), http://espn.go.com/chalk/story/_/id/14342458/new-york-supreme-court-judge-bars-draftkings-fanduel-operating-state [https://perma.cc/WJD7-2M5V].

⁷⁴ See Darren Rovell and David Purdum, N.Y. AG declares DraftKings, FanDuel are illegal gambling, not fantasy, ESPN (November 11, 2015), http://espn.go.com/chalk/story/_/id/14100780/newyork-attorney-general-declares-daily-fantasy-sports-gambling [https://perma.cc/DD39-5KRJ].

⁷⁵ See Brent Schrottenboer, DraftKings, FanDuel file lawsuits in New York after cease-and-desist order, USA TODAY (November 13, 2015), www.usatoday.com/story/sports/fantasy/2015/11/13/draftkings-lawsuit-new-york-cess-desist-order/75705742/ [https://perma.cc/VK3B-M9JB].

⁷⁶ *Id.*

while also bringing up the insider trading scandal in accusing the two companies of “basic compliance issues.”⁷⁷

During hearings held on November 25, 2015, Judge Manuel J. Mendez of the New York Supreme Court was skeptical of assertions by DFS companies that a player’s choice of athletes represents “control or influence” over the outcome. The Judge stated that players are ultimately “relying on someone else’s skill” to determine the outcome.⁷⁸ On December 11, 2015, Mandez sided with Schneiderman and granted a temporary injunction forbidding DraftKings and FanDuel from “accepting entry fees, wagers or bets” from residents of the state of New York.⁷⁹ While holding that UIGEA has “no corresponding authority under New York State law,” Mandez highlighted that payment of an ‘entry fee’ as high as \$10,600 could “certainly be deemed risking ‘something of value.’”⁸⁰ This ruling seemed to set aside the question of skill or chance, as Mandez pointed out that even if DFS was a game of skill, it could still meet the requirements for prohibition under NY law.

Despite the ruling, Mandez granted a temporary stay, confirmed by the appellate court, pending adjudication on appeal.⁸¹ Prior to the appellate hearing, on January 4, 2016, Schneiderman amended the lawsuit to demand that the two companies pay restitution of over \$4 billion, which includes returning of all money collected from customers in New York State. Schneiderman alleged that this restitution was justified in part by the two companies’ deceptive advertising practices.⁸² Pending an appeals court ruling, DFS continues to operate in New York. Given the legal uncertainty,

⁷⁷ New York seeks injunction to shut down DraftKings and FanDuel immediately, *THE GUARDIAN* (November 17, 2015), <http://www.theguardian.com/us-news/2015/nov/18/new-york-seeks-injunction-to-shut-down-draftkings-and-fan-duel-immediately> [<https://perma.cc/49T2-5H7D>].

⁷⁸ See Daniel Roberts, Daily Fantasy Sports Hearing Ends Without Decision, *FORTUNE* (November 25, 2015), <http://fortune.com/2015/11/25/fantasy-sports-hearing-no-decision> [<https://perma.cc/J5KY-VTEJ>].

⁷⁹ *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at *10 (N.Y. Sup. December 11, 2015).

⁸⁰ See *id.* at *6.

⁸¹ Suzanne Barlyn & John McCrank, Fantasy sports sites allowed to operate in New York during appeal, *REUTERS* (January 11, 2016), <http://www.reuters.com/article/us-fantasysports-new-york-idUSKCN0UP27320160111> [<https://perma.cc/E3AA-49XP>].

⁸² See Darren Rovell, New York attorney general amends lawsuit against daily fantasy sites, *ESPN* (January 2, 2016), http://espn.go.com/chalk/story/_/id/14458955/new-york-attorney-general-wants-draftkings-fanduel-return-profits [<https://perma.cc/QU7Q-YN7D>].

there has been a renewed push for a legislative response to DFS,⁸³ and State Senator Michael Ranzenhofer has introduced a bill that would end the legal drama by explicitly classifying daily fantasy sports as a game of skill.⁸⁴

B. Massachusetts

Another state that has begun to scrutinize DFS is Massachusetts, where Massachusetts AG Maura Healey proposed a new set of regulations for daily fantasy operators.⁸⁵ Rather than make DFS illegal, as Schneiderman wants to do, Healey proposes regulating the industry closely using a consumer protection framework. Healey has said that daily fantasy sports businesses are legal in the state but still constitute gambling.⁸⁶

Healey's proposal is outlined in 940 C.M.R. 34.00: Daily Fantasy Sports Contest Operators in Massachusetts. The purpose of the regulation is to "protect Massachusetts consumers who play Daily Fantasy Sports contests for prizes from unfair and deceptive acts and practices that may arise in the gaming process." The regulation is also intended to "protect the families of persons who play Daily Fantasy Sports to the extent that they may be affected by unfair and deceptive practices that lead to unaffordable losses." Healey's full list contains 14 bullet-point rules in four sections that range from "protecting minors" and "leveling the playing field" to "advertising and marketing" and "financial protections."⁸⁷

⁸³ See James Surowiecki, *The Hypocritical Legal Campaign Against Daily Fantasy Sports*, THE NEW YORKER (December 11, 2015), <http://www.newyorker.com/business/currency/hypocritical-legal-campaign-daily-fantasy-sports> [https://perma.cc/KW3Z-Z9TR].

⁸⁴ See Glenn Blain, *N.Y. lawmaker introduces bill to protect FanDuel, DraftKings from shutdown in the state*, NEW YORK DAILY NEWS (November 16, 2015), <http://www.nydailynews.com/sports/football/n-y-lawmaker-aid-fanduel-draftkings-article-1.2436626> [https://perma.cc/JU5D-RGZQ].

⁸⁵ See Cyndi R. Gonzalez & Jillian Fennimore, *AG Healey Proposes Strong Consumer Protection Regulations for Daily Fantasy Sports Operations in Massachusetts*, COMMONWEALTH OF MASSACHUSETTS (November 19, 2015), <http://www.mass.gov/ago/news-and-updates/press-releases/2015/2015-11-19-daily-fantasy-sports.html> [https://perma.cc/4F6Y-RX97].

⁸⁶ See Rachel Axon, *How Massachusetts wants to change daily fantasy sports*, USA TODAY (November 19, 2015), <http://www.usatoday.com/story/sports/2015/11/19/massachusetts-daily-fantasy-sports-consumer-protection/76046936> [https://perma.cc/S6L9-P5G6].

⁸⁷ See Daniel Roberts, *Massachusetts Will Restrict Daily Fantasy Sports to Ages 21 And Up*, FORTUNE (November 20, 2015), <http://fortune.com/2015/11/20/healey-fantasy-sports-regulation>.

The proposed regulations include measures that would not allow a DFS player to establish more than one username or more than one account. A rule like this, properly enforced, could help prevent some of the gambling binges that present the greatest danger to addicts.⁸⁸ The regulations also include a section specifically on truthful advertising and a requirement that ads include information regarding assistance available to problem gamblers.⁸⁹ Another element of the proposal is that playing be restricted to ages 21 and older and that users be limited to depositing \$1,000 a month.

Indeed, the protection of minors is a theme that runs throughout Healey's proposal, which also wants to ban the companies from marketing on college campuses, a position that has already gained momentum in other corners. The SEC Network, one of ESPN's channels, decided to stop running DraftKings and FanDuel ads.⁹⁰ Recently, ESPN and College Football Playoff officials agreed that there will be no advertising for daily fantasy games during the telecasts of the national semifinals or the national championship game.⁹¹

While these proposed rules would arguably hamper revenues for daily fantasy companies in Massachusetts, both DraftKings and FanDuel quickly voiced support for Healey's plan. Their receptiveness has most likely been tied to the fact that Healey's proposal of regulation is clearly much friendlier than Schneiderman's proposal in New York. Indeed, DraftKings called the proposal "a thoughtful and comprehensive approach," while FanDuel argued that it made "a tremendous amount of sense." Healey's office cannot implement the new regulations immediately, but must accept public comments through January before making a final proposal.⁹² Thanks to the pub-

⁸⁸ See *The Personal and Professional Risks of a Gambling Binge*, DES MOINE ADDICTION TREATMENT, <http://www.desmoinesaddictiontreatment.com/rehab-guide/the-personal-and-professional-risks-of-a-gambling-binge> [https://perma.cc/45M5-QN3W]; Alex Blaszczynski & Lia Nower, A pathway model of problem and pathological gambling, 97 ADDICTION at 487-499 (2002).

⁸⁹ Draft 940 C.M.R. § 34.07 (2016), available at <http://www.mass.gov/ago/docs/regulations/proposed/940-cmr-34-draft.pdf> [https://perma.cc/DF8G-DAG2].

⁹⁰ See Bryan Armen Graham, SEC Network bans ads for DraftKings and FanDuel citing gambling concerns, THE GUARDIAN (September 25, 2015), <http://www.theguardian.com/sport/2015/sep/25/sec-network-bans-ads-for-draftkings-and-fan-duel-citing-gambling-concerns> [https://perma.cc/Q33N-D4BL].

⁹¹ See Marc Tracy, ESPN and College Football Playoff agree Not to Air Daily Fantasy Ads, THE NEW YORK TIMES (December 9, 2015), <http://www.nytimes.com/2015/12/10/sports/naafootball/espn-college-football-playoff-draftkings-fan-duel-ads-daily-fantasy.html> [https://perma.cc/3546-EJQC].

⁹² See AG Healey set to have hearing on daily fantasy sports in Mass., WCVB NEWS (January 10, 2016), <http://www.wcvb.com/news/ag-healey-set-to-have-hearing-on-daily-fantasy-sports-in-mass/37363008> [https://perma.cc/A4XQ-AAFY].

lic comment period, the process will play out under a microscope, and hearings on DFS have already begun.

The examples of New York and Massachusetts provide an interesting window into how states can begin to deal with the reality of DFS. Of course these are not the only two models, as actions concerning DFS have accelerated in a number of states. For instance, in Nevada, where licensed gambling is legal, regulators ruled that DFS constitutes a form of gambling and is not a game of skill. State officials ordered DraftKings and FanDuel to stop operating immediately in the state until the companies and their employees receive state gambling licenses. Others highlight Illinois as the next battleground state after a court recently advised that DFS is illegal.⁹³

VI. CONCLUSION

The examples of Massachusetts and New York highlight that challenges to the standard operating practices of DFS will continue until the legal gray areas of DFS are clarified. If the industry of DFS is to survive, companies should strive to work with regulators rather than oppose them. Working with regulators to address legitimate concerns about public health and company practices will allow these companies to better avoid the wholesale prohibition advocated by some of the staunchest opponents. This begs the important question of whether DFS companies will be proactive and begin making changes to appease regulatory bodies, or whether they will put their efforts towards resisting legal intervention.

At the same time, regulators should view DFS as a potential opportunity. DFS has clearly struck a cord with consumers and fans, and there is no reason that it cannot continue, as long as responsible and common sense changes are made to ameliorate the legitimate concerns. For example, Massachusetts and Texas recently explored bills examining the possibility of allowing the lottery to run online, skill-based games, such as daily fantasy sports.⁹⁴

Most importantly, this is an issue that requires legislative guidance. DFS is not similar enough to traditional fantasy or gambling games to be considered by a group of inexperienced judges under the existing rubric of gam-

⁹³ See Sports and Gaming: Daily Fantasy Sports Contests as Gambling, Ill. Att’y Gen. Op. No. 15-006 (December 23, 2015), at *1 (holding that “it is my opinion that the contests in question constitute illegal gambling”).

⁹⁴ See Curt Woodward, Mass. AG ‘reviewing’ daily fantasy sports as lawmakers look into lottery expansion, THE BOSTON GLOBE (September 17, 2015), <http://www.betaboston.com/news/2015/09/17/mass-ag-reviewing-daily-fantasy-sports-as-lawmakers-look-into-lottery-expansion> [https://perma.cc/BW8U-Q9GS].

bling laws written well before the invention of DFS. Rather, this issue demands careful study and fact finding so that the scope of the problem and the true dimensions of DFS can be properly debated and discussed. These are clearly tasks that are best suited to the legislative branch, and there are already numerous examples of legislators introducing bills to prohibit, or allow, DFS.

There are signs that a sea change is coming for daily fantasy sports. In late March, FanDuel and DraftKings agreed to halt their business in New York, putting their hopes on a legislative avenue to make DFS legal. In contrast, in Massachusetts, the push for regulation continues, and the AG is expected to issue formal rules governing DFS in early April. These contrasting state models do not just serve as a lesson to DFS companies but should highlight the need for proper legislative guidance on this sensitive issue. Legislative guidance will allow the will of the people of each state to decide whether DFS is right for their particular circumstances while considering the perspective of diverse stakeholders. It will also enable common sense regulation in order to ameliorate the legitimate problems and concerns related to widespread access to DFS.

