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## Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports

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# Keynote Address: A Sure Bet? The Legal Status of Daily Fantasy Sports

## **Abstract**

Today, I will provide an overview of the legal status of “daily fantasy sports” and explain why the legality—or illegality—of the industry is not a sure bet. I will begin by providing a brief background of the origins of fantasy sports, and then turn to the impact of technologies such as the Internet, and the legal status of these games under both federal and state laws. I will conclude by discussing the recent efforts to regulate “daily fantasy sports” through the courts and legislation

## **Keywords**

fantasy sports, sports, betting, gambling

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## **KEYNOTE ADDRESS: A SURE BET? THE LEGAL STATUS OF DAILY FANTASY SPORTS**

*Marc Edelman*\*

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### INTRODUCTION

Good afternoon! Thank you for inviting me to speak at Pace Law School.

Before I begin my formal remarks on the legal status of “daily fantasy sports,” I would like to provide a brief background on myself and my experience in the sports law field. After graduating from the Wharton School of the University of Pennsylvania and Michigan Law School, I began my career by practicing in the antitrust group of Skadden, Arps, Slate, Meagher

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and Flom, which is one of the best-known law firms for representing professional sports leagues. Following that, I joined the litigation group at Dewey Ballantine, under Jeffrey Kessler, representing players' associations. In the spring of 2008, I left Dewey Ballantine to enter academia. At the time, I also formed a private legal practice, and one of my first clients was a full-season fantasy football competition that continues to operate today.

Based on my experiences with fantasy sports, I taught the first law school course in the country on fantasy sports and the law in the spring of 2011. While this course was intended to be a fun seminar, I ultimately converted my course notes into a law review article entitled *A Short Treatise on Fantasy Sports and the Law*, which was published by a Harvard law journal the following year.<sup>1</sup> Thereafter, I was invited to write a column on fantasy sports and the law for *Forbes SportsMoney*, as well as consult for a number of companies in the fantasy sports marketplace.

Over the past five years, I have provided legal consulting services to close to one-hundred companies that wanted to gain a better understanding of how U.S. federal and state laws apply to the fantasy sports industry. I also have advised numerous private equity companies on what types of fantasy sports businesses are comparatively safe and which companies have heightened legal risk. Not surprisingly, many of the companies where I identified elevated legal risks are now under close scrutiny in states such as New York.<sup>2</sup>

Today, I will provide an overview of the legal status of “daily fantasy sports” and explain why the legality—or illegality—of the industry is not a sure bet. I will begin by providing a brief background of the origins of fantasy sports, and then turn to the impact of technologies such as the Internet, and the legal status of these games under both federal and state laws. I will conclude by discussing the recent efforts to regulate “daily fantasy sports” through the courts and legislation.

## I. THE ORIGINS OF DAILY FANTASY SPORTS

Although some outsiders may perceive fantasy sports as being a game played by jocks, fantasy sports is actually a nerds' game with academic

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1. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1 (2012).

2. See, e.g., *Schneiderman v. FanDuel & DraftKings*, No. 453056/15 (N.Y. Sup. Ct. Dec. 11, 2015) (discussing New York attorney general Eric Schneiderman's claims that “daily fantasy sports” operators FanDuel and DraftKings operate illegal gambling businesses under New York state law).

origins.<sup>3</sup> The history of fantasy sports can be traced back to a professor at Harvard University by the name of William Gamson.<sup>4</sup> In the 1960s, William Gamson decided it would be fun to invite a group of professors together to have them select a series of baseball players that they thought would perform well during the year.<sup>5</sup> Gamson collected a small amount of money from each of his fellow professors and he gave a small prize to the professor who did the best in the contest.<sup>6</sup> Because Gamson did not want his department chair to know what he was doing, Gamson did not call his contest sports betting.<sup>7</sup> He called it “the baseball seminar.”<sup>8</sup>

As the years progressed, Gamson moved from Harvard University to the University of Michigan, and he brought “the baseball seminar” along with him.<sup>9</sup> One of the early professors at Michigan to participate in “the baseball seminar” was a journalist professor, Robert Sklar, who then introduced the game to his research assistant, Dan Okrent.<sup>10</sup> In 1979, Dan Okrent moved to New York to begin a distinguished writing career that included, most recently, a very high-level position at *The New York Times*.<sup>11</sup> In doing so, Okrent brought “the baseball seminar” to the Big Apple, where a group of his friends met annually, beginning in the spring of 1979, at a now defunct French restaurant in Manhattan known as La Rotisserie.<sup>12</sup> This led to the

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3. See *id.*; see generally Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KENT. L. REV. 443, 444 (2015) (“As some in attendance may know, fantasy sports has a very rich, innovative, and surprisingly academic tradition”).

4. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 5-6 (2012) (discussing Professor Gamson’s creation of the “Baseball Seminar”).

5. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 5-6 (2012).

6. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 5-6 (2012) (noting Gamson’s contest’s \$10 entry fee).

7. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 5-6, n. 21 (2012).

8. *Id.*

9. *Id.*

10. See C.V. of Professor William Gamson, at [http://www.mrap.info/people/gamson\\_cv.html](http://www.mrap.info/people/gamson_cv.html) (listing Professor Gamson’s move from Harvard University to the University of Michigan in 1962).

11. See generally Biography: The Public Editor, Dan Okrent, N.Y. TIMES, at <http://www.nytimes.com/ref/weekinreview/okrent-bio.html> (describing Okrent as “a founder of Rotisserie baseball, the forerunner of numerous fantasy sports games”).

12. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 6 (2012).

creation of Rotisserie baseball, which is a popularized precursor to today's fantasy sports.<sup>13</sup>

Although “the baseball seminar” began with just a small following, the game was popularized during the Major League Baseball strike in 1981 when sports journalists, searching for content during baseball's work stoppage, wrote stories about the creation of this fictional league. As statistically-minded baseball fans read about the Rotisserie League, they thought, “This looks like fun, we want to do it, too.” Soon, they began devising their own Rotisserie leagues, calculating their own statistics, and paying out their own prize pools.<sup>14</sup> As I said before, the game was a bit nerdy, but it was a lot of fun. Participation in Rotisserie leagues took place in private until 1994. Then, the Internet came along and changed the game.<sup>15</sup>

## II. THE INTERNET CHANGES EVERYTHING

For fantasy sports players, there is no doubt that the 1994 advent of the Internet changed the nature of their hobby.<sup>16</sup> With the Internet, there was no longer a need to tabulate one's own statistics.<sup>17</sup> Furthermore, there was now a way to bring fantasy sports participants together from around the world—many of whom did not know each other in real life.<sup>18</sup>

Almost immediately, sports websites began to capitalize on the opportunities generated by the Internet by offering fantasy sports contests as a way to drive traffic to their sites.<sup>19</sup> At first, the contests did not attract much legal attention. The one seminal case to look at the legal status of full-season fantasy sports indirectly was *Humphry v. Viacom*, a case that in dicta noted

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13. *Id.*

14. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 8-9 (2012) (explaining that “[a]s baseball fans came to learn about the Rotisserie League, their game began to develop a cult-following among statistically oriented sports fans”).

15. Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 11 (2012).

16. See *infra*, note \_\_ and accompanying text.

17. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 10 (2012).

18. See Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KENT. L. REV. 443, 445 (2015) (“But even with early versions of home Internet, it became possible for sports fans around the country to enter into fantasy sports leagues against one another.”)

19. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 10-11 (2012) (describing ESPN as the first major media company to offer fantasy sports contests on the web, used as a means to drive general website traffic).

that these contests were games of skill and therefore legal in most states.<sup>20</sup> Indeed, as long as fantasy sports operators avoided doing business in a limited number of states, it did not seem that any attorneys general were actively trying to shut the games down.

### III. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT

Not all forms of online contests, however, were perceived as positively by legislators as full-season fantasy sports.<sup>21</sup> For example, in addition to fantasy sports contests, the Internet brought along traditional online sports gambling and online poker—activities that Congress ultimately found to be more problematic than traditional fantasy sports.<sup>22</sup>

In 2006, Congress decided that there was a need to shut down sports betting and online poker throughout the United States. But, Congress had a lot of difficulty going after companies that entered these online marketplaces because most of these companies were located overseas and therefore Congress did not have easy jurisdiction.<sup>23</sup> As a result, in 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”).<sup>24</sup> The Act stated that any form of gambling that was illegal under the state or federal law also violated the UIGEA.<sup>25</sup> Furthermore, the Act allowed the courts to go after not only the gaming sites, but also their payment processors.<sup>26</sup> This meant that companies such as MasterCard and VISA could no longer safely accept payments from illegal gambling companies, even if they were based overseas.

By going after the payment processors—or threatening to do so—Congress cut off the head of the funding regime for illegal gambling and thus greatly reduced the number of illegal poker and sports betting sites that attempt to operate on the web in the United States. Of course, if you were to go on the web today and try to bet on any single professional or collegiate sporting event, you would likely find illegal sites based overseas that will

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20. *Humphrey v. Viacom*, No. 06-2768 (DMC), 2007 WL 1797648 (D. N.J. June 20, 2007).

21. *See infra*, note \_\_ and accompanying text.

22. *See generally* Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 121-24 (2016) (discussing the U.S. government crackdown on Internet sportsbooks and poker websites).

23. *See* Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 122-23 (2016).

24. 31 U.S.C. §§ 5361-5367 (2006).

25. *Id.*

26. *Id.*

accept your money.<sup>27</sup> But betting on one of these sites would likely entail putting your money and information in the hands of a payment processor that you have never heard of, that is located overseas, and that may be a bit sketchy—because the American payment processors will no longer get involved in such a risky enterprise.

Nevertheless, as Congress prepared to vote on the UIGEA, some of its membership expressed concern that the act—without a carve-out—would also cut off the head of funding for full-season fantasy sports contests. To avoid this unintended consequence, Congress at the last minute included a narrow carve-out in the final version of the UIGEA.<sup>28</sup> This carve-out insulates from the statute’s liability those fantasy sports contests with fixed prize pools that are based on the performance of multiple real-world players in multiple real-world events and that are based on the relative skill of the participants.<sup>29</sup> This seemed to resolve most issues pertaining to the UIGEA and fantasy sports until 2007, when Kevin Bonnet came along with his idea for “daily fantasy sports.”<sup>30</sup>

#### IV. KEVIN BONNET AND THE NEW WORLD OF FANTASY SPORTS

Kevin Bonnet was not a lawyer. Let me say this again, Kevin Bonnet was not a lawyer. Kevin Bonnet was actually a blogger who wrote about poker for a living.<sup>31</sup> And Kevin Bonnet was very upset that poker got shut down by the UIGEA.<sup>32</sup>

After reading the UIGEA carve-out for fantasy sports, Kevin Bonnet thought he conceived a brilliant idea: he created a website that looked like a sportsbook, but instead of the participants picking winners of games, they

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27. See, e.g., (but don’t do any more than see) Antigua Sports Betting Website, at [https://www.sportsbetting.ag/landingpages/sports-betting-2015/?btag=a\\_2211b\\_1036c\\_&afid=1887](https://www.sportsbetting.ag/landingpages/sports-betting-2015/?btag=a_2211b_1036c_&afid=1887) (stating USA Players Welcome).

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

29. See Unlawful Internet Gambling Enforcement Act 31 U.S.C. §§ 5362(1) (E) (ix) (2006); see also Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 143 (2016) (discussing the scope of the UIGEA carve-out for certain formats of fantasy sports, and quoting directly from the statute).

30. See, *infra*, notes \_\_ - \_\_ and accompanying text.

31. See generally Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KENT. L. REV. 443, 446 (2015) (describing Kevin Bonnet as “[a] frustrated poker blogger out of California”).

32. See generally Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. OF ILL. L. REV. 117, 124-25 (2016) (providing background on Kevin Bonnet).



picked players that they believed would play well in a single day.<sup>33</sup> Bonnet thought this new type of contest would comply with the UIGEA carve-out and thus comply with all federal and state gambling laws.<sup>34</sup> It was a rather unsophisticated legal conclusion. But, then again, Bonnet wasn't a lawyer, and he decided to move forward with his new business plan, presumably without obtaining sophisticated legal advice.

Kevin Bonnet's website never gained much traction.<sup>35</sup> Since it was developed during the early days of "daily fantasy sports," his site was marred by the perception that it constituted illegal gambling.<sup>36</sup> However, within a few years of Bonnet launching his website, a group of more sophisticated businessmen from Scotland formed FanDuel, and FanDuel emulated Bonnet's model more successfully.<sup>37</sup> Based on their past business experience with McKinsey Consulting, FanDuel ultimately was able to convince payment processors that their business was safe under the UIGEA. By 2013, they had raised upwards of \$6 million from Comcast Ventures to build out their "daily fantasy sports" offerings.<sup>38</sup>

As FanDuel executives began to build their brand in a way that Kevin Bonnet could not, several other companies entered the "daily fantasy sports" marketplace, copying the FanDuel business model.<sup>39</sup> Throughout this time, there remained a perception among some that these "daily fantasy sports" contests were illegal. For example, as recently as March 2013, Bob Bowman, CEO of Major League Baseball Advanced Media, referred to "daily fantasy

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33. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 124 (2016).

34. *Id.*

35. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 125-26 (2016) (mentioning how many other "daily fantasy sports" businesses ultimately surpassed Bonnet's website).

36. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 125 (2016) (mentioning how many other "daily fantasy sports" businesses ultimately surpassed Bonnet's website).

37. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 126 (2016).

38. See Jonathan Blum, *Comcast Takes \$11 Million Swing at Fantasy Sports*, CRAIN'S NEW YORK BUSINESS (Feb. 6, 2013), at <http://www.crainsnewyork.com/article/20130206/TECHNOLOGY/130209958/comcast-takes-11m-swing-at-fantasy-sports/>.

39. See, e.g., *The Evolution of the Daily Fantasy Sports Industry*, RotoGrinders, at <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (referencing the January 2012 launch of DraftKings, which rapidly emerged as FanDuel's

sports” as “akin to a flip of a coin”—in essence, sports gambling.<sup>40</sup> However, as these contests began to show the potential to generate revenues, the legal risk was obscured in the overall investment analysis of big-time private equity companies.

Indeed, even though Bob Bowman had proclaimed “daily fantasy sports contests” illegal and “akin to a flip of a coin” in March of 2013, just a few months later Major League Baseball partnered with the startup company DraftKings.<sup>41</sup> The company’s founders actually seem to have convinced Bob Bowman and his associate, Kenny Gersh, that they could make a lot of money from “daily fantasy sports” without much legal risk.<sup>42</sup> And despite Bowman’s public statements to *The New York Times* just a few months earlier, the perception of DraftKings as “akin to a flip of a coin” no longer received much attention.<sup>43</sup>

Since Major League Baseball’s buy-in, the flow of private equity funding into the “daily fantasy sports” marketplace has skyrocketed.<sup>44</sup> At present, both DraftKings and FanDuel have raised more than \$1 billion dollars in funding, with some investments coming from the sports leagues themselves and other investments coming from large private equity companies.<sup>45</sup> Both companies’ commercials appear all over the web; their names are ubiquitous with fantasy sports.<sup>46</sup>

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40. See Joshua Brustein, *Fantasy Sports and Gambling: The Line is Blurred*, N.Y. TIMES, (Mar. 11, 2013), (quoting Robert Bowman, CEO of Major League Baseball Advanced Media, as describing “daily fantasy sports” as “akin to a flip of the coin, which is the definition of gambling”).

41. See Adam Kilgore, *Daily Fantasy Sports Websites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-4-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-4-d172-11e4-a62f-ee745911a4ff_story.html) (referencing the partnership between Major League Baseball and DraftKings).

42. See Adam Kilgore, *Daily Fantasy Sports Websites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html) (describing an April 2013 meeting between DraftKings founder Jason Robins and MLBAM’s Bob Bowman and Kenny Gersh).

43. Joshua Brustein, *Fantasy Sports and Gambling: The Line is Blurred*, N.Y. TIMES (Mar. 11, 2013), (quoting Robert Bowman, CEO of Major League Baseball Advanced Media).

44. See Tom Huddleston Jr., *Fantasy Sports Site FanDuel is Now Worth Over \$1 Billion*, FORTUNE (Jul. 14, 2015), at <http://fortune.com/2015/07/14/fanduel-funding-billion>.

45. See Tom Huddleston Jr., *Fantasy Sports Site FanDuel is Now Worth Over \$1 Billion*, FORTUNE (Jul. 14, 2015), at <http://fortune.com/2015/07/14/fanduel-funding-billion>.

46. See Dustin Gowker, *King of Commercials: DraftKings Rises to No. 1 in TV Spending with \$24 Million this Week*, LEGAL SPORTS REPORT (Sept. 7, 2015), at <http://www.legalsportsreport.com/3611/draftkings-no-1-in-tv-commercials>.

Leading up to the massive growth and popularity of DraftKings and FanDuel, few people stopped to consider their legal risks. Of course, the argument in favor of legality all went back to the views of Kevin Bonnet.<sup>47</sup> But guess what? Kevin Bonnet was not a lawyer and the legal status of “daily fantasy sports” was never quite as simple as Kevin Bonnet and his successors tried to make us believe. A more careful analysis of this budding industry was, no doubt, imperative.

#### V. ARE “DAILY FANTASY SPORTS” ILLEGAL?

Let’s now discuss the realities of the law. As a matter of U.S. gambling law, contests have to comply with both state law and federal law to be legal. As a matter of state law, a contest is illegal if it includes three elements: consideration (which generally means an entry fee), chance, and reward.<sup>48</sup> Almost all “daily fantasy sports” games include an entry fee.<sup>49</sup> Additionally, almost all of these games include a prize.<sup>50</sup> This means that in order to be legal under state law, “daily fantasy sports” games cannot constitute games of chance.<sup>51</sup> This part of the equation is simple, but it now becomes more complex.

The definition of “chance,” to the surprise of many, varies state by state.<sup>52</sup> In some states, such as Arizona and Tennessee, if a contest involves any chance whatsoever, it is illegal.<sup>53</sup> There is no way “daily fantasy sports” can operate in a state with that definition of chance.<sup>54</sup> On the other end of the

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47. See, *supra*, notes \_\_\_ - \_\_\_ and accompanying text.

48. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 129-30 (2016).

49. Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 130 (2016).

50. *Id.*

51. *Id.*

52. See generally Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 130-35 (2016) (discussing the various legal tests for analyzing “daily fantasy sports.”).

53. See ARIZ. REV. STAT. §13-3301(4) (2014) (defining gambling as “risking or giving something of value for the opportunity to obtain a benefit from a game or contest or chance or skill or a future contingent event but does not include bona fide business transactions which are valid under the law of contacts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity, or guarantee and life, health, or accident insurance”); TENN. CODE ANN. §39-17-501 (2014) (defining gambling, subject to a number of impertinent exemptions in the “daily fantasy sports” context, as “risking anything of value for a profit whose return is to any degree contingent on chance”).

54. See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. L. 1, 33 (2012)

spectrum, in other states, known as “predominant purpose test” states, if you can mathematically show that a game involves more skill than chance, the game is legal.<sup>55</sup> Some of the “predominant purpose test” states include California, Massachusetts, and Kansas.<sup>56</sup> It should not be surprising that FanDuel and DraftKings operate in each of these states, and these states have not issued negative attorneys general opinions.

Many states, however, fall within a middle ground that applies neither the “any chance test” nor the “predominant purpose test.”<sup>57</sup> New York, for example, is in the middle ground.<sup>58</sup> New York law states that a game is illegal if it involves a material element of chance or if it is based on a future contingent event. The “material element of chance test” states that a contest is allowed to have some chance, but not too much.<sup>59</sup> The mathematical percentages do not exclusively matter, and many different factors—many of which are factual in nature—need to be considered.<sup>60</sup> We have to look at mathematical ratios of skills versus chance. But, we also have to look at the common participants.<sup>61</sup> Are the common participants in the game winning based on skill or winning based on chance?<sup>62</sup> Is the game being marketed as a game of skill or a game of chance? Does the contest fuel a gambling instinct amongst its participants?<sup>63</sup> These questions present nuanced issues of fact.

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(explaining that “even the most intricate fantasy sports game involves at least some level of chance with respect to weather conditions and player injuries”).

55. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 130-31 (2016) (describing “predominant purpose test” states).

56. See, e.g., *In re Allen*, 377 P. 2d. 280, 281 (Cal. Sup Ct. 1962); *Three Kings Holdings, L.L.C. v. Six*, 255 P.3d 1218, 1223 (Kan. App. 2011); *Commonwealth v. Lake*, 57 N.E.2d 923, 925 (Sup. Jud. Ct. of Mass. 1944).

57. See, *infra*, notes \_\_ - \_\_ and accompanying.

58. See, *infra*, notes \_\_ - \_\_ and accompanying.

59. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 134 (2016) (“Under the material element test, it is possible for a court to find a contest is not determined by skill even if one can prove mathematically that the contest is 51% or more skill. Indeed, a court applying the material element test may consider, among other factors, whether the contest is entered into among novices or experts, as well as whether the amount of information provided to the contestants negates the skill-based advantages that true experts may have obtained”) (internal citations and quotations omitted).

60. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 134 (2016).

61. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 134 (2016).

62. *Id.*

63. *Id.*

When “daily fantasy sports” businesses first launched several years ago, the position I took—and the position I continue to take as expressed in my recent *Illinois Law Review* article entitled *Navigating the Legal Risks of Daily Fantasy Sports*<sup>64</sup>—is that the legal status of “daily fantasy sports” absolutely cannot be reviewed in the gestalt; it varies by states of operation and by particular contest format.<sup>65</sup> Furthermore, not all “daily fantasy sports” contests present an equal risk portfolio.<sup>66</sup> There are certain formats of “daily fantasy sports” like DraftKings’s one-race fantasy NASCAR that are far riskier than other formats because they are not based on multiple events.<sup>67</sup> In addition, thus far the operators of these single-event contests have not even provided mathematical ratios showing very high ratios of skill to chance.

Furthermore, those contests that are found to be in violation of state law are likely, by consequence, also in violation of various federal laws, including the Wire Act, the Illegal Gambling Business Act, and the Unlawful Internet Gambling Enforcement Act.<sup>68</sup> Due to time restraints, I will not delve into the minutiae of each of these three acts. But to grossly oversimplify, these acts state that when a gaming business violates state law for operating an illegal game of chance, they have committed a predicate offense for violating federal law, as well.<sup>69</sup> Consequently, if two “daily fantasy sports” operators offer identical contests with 97% skill ratios and one company operates in

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64. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117 (2016).

65. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 149 (2016) (“[T]he legality of ‘daily fantasy sports’ is very much unsettled, and the ultimate issue of legality seems to depend on each individual contest’s game rules and states of operation”).

66. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 129-44 (2016) (recognizing different risk portfolios for the various different legal formats of “daily fantasy sports.”)

67. See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 147 (2016) (suggesting that “daily fantasy sports” operators can reduce their legal risk by ensuring their contests are indeed based on multiple real-world events); see also Marc Edelman, *Can DraftKings ‘Fantasy Golf’ Get Major League Baseball into Legal Trouble*, FORBES (Oct. 28, 2015), at <http://www.forbes.com/sites/marcedelman/2015/10/28/could-draftkings-fantasy-golf-get-major-league-baseball-executives-into-legal-trouble/#22312307a329>.

68. For a far more detailed discussion of this issue, see, e.g., Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117, 135-44 (2016) (discussing the legal risks of “daily fantasy sports” under federal law).

69. See Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KENT. L. REV. 443, 449-50 (2015) (discussing how liability under federal gambling laws often conflates with liability under state law).

Tennessee and the other does not, the company that operates in Tennessee—an “any chance test” state—has not only violated Tennessee state law, but also has likely violated federal law, even though the other company may well have not violated any federal law whatsoever.

As I mentioned earlier, it was poor legal logic that was briefly accepted by fantasy sports operators and the media that led many to believe the UIGEA provided a blanket exemption to all companies that called their businesses fantasy sports. However, one of the prongs of the UIGEA worth noting is that the underlying contests have to be based on the “relative skill” of the participants.<sup>70</sup> The federal law does not define skill, so we need to look at skill in the states in which they operate to determine whether the underlying skill ratios are met. In other words, the UIGEA does not seek to override state law. Rather, it coincides with it.

But, even if the UIGEA did otherwise—to be blunt—Bonnet’s reading of the UIGEA as ubiquitously legalizing “daily fantasy sports” was an absurdity based on basic doctrines of federalism.<sup>71</sup> To make that point clear, consider minimum wage law.<sup>72</sup> There is a federal minimum wage,<sup>73</sup> but California law requires employers to pay a higher minimum wage than that.<sup>74</sup>

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

71. See David Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171, 181-82 (2015) (“Vertically, the Constitution divides federal and state governments. The Founders hoped this arrangement would advance the political marketplace as each level of government competed for the people’s loyalty. States could garner public support by passing favorable laws and by bringing politics closer to the people. Importantly, states would not only compete with each other but also with the central federal government. Again, though not necessarily efficient, the decentralization of power and the competition for political favor hoped to provide a critical check against an overweening federal government”).

72. See, *infra*, notes \_\_ - \_\_ and accompanying text.

73. See note, John Foley, *Questioning the Merits of Federal Minimum Wage Legislation*, 5 GEO J. L. & PUB. POL’Y 679, 680 (2007) (The federal government’s authority to maintain a national minimum wage is rooted in the Fair Labor Standards Act of 1938 (FLSA). The FLSA was upheld by the Supreme Court in 1941 as a valid exercise of Congress’ power to regulate interstate commerce, succeeding where similar legislation had failed. In the decades following the Court’s 1941 decision, amendments to the FLSA have extended wage regulation to almost all public and private employment, and the general constitutionality of a federal minimum wage has not been seriously challenged. Since the FLSA’s passage, Congress has raised the wage floor applicable to most of the nation’s employees eighteen times”).

74. See John Myers & Liam Dillon, *Deal Reached to Raise California’s Minimum Wage to \$15, Avoiding Ballot Box Battle*, LOS ANGELES TIMES (Mar. 26, 2016), <http://www.latimes.com/politics/la-pol-sac-minimum-wage-deal-20160326-story.html>

If you operate in California—even if you operate a national business like Wal-Mart in California—you have to comply with the higher of the two.<sup>75</sup> The same is logically true with gaming law.

But, on the other hand, Bonnet’s legal error—and again, Bonnet was not a lawyer—does not make all “daily fantasy sports contests” illegal.<sup>76</sup> A “daily fantasy sports contest” involving a sport such as football that operates only in the states of Massachusetts, Kansas and California is probably legal.<sup>77</sup> Although many pundits from the Fantasy Sports Trade Association claim that all games that call themselves “daily fantasy sports” are legal, we now understand why that is not true.<sup>78</sup> If you operate play-for-play fantasy sports contests such as one-race fantasy NASCAR or any type of pay-for-play contests with prizes in states such as Arizona or Tennessee—and probably Arkansas, Louisiana and others—your contest almost certainly violates state law and you have likely violated federal criminal laws, as well. Indeed, a legal analysis of “daily fantasy sports” points to conclusions that the legal status of these contests is all over the map.<sup>79</sup>

## VI. MEANINGFUL CHALLENGES TO “DAILY FANTASY SPORTS”

Now, let’s discuss what is happening today with “daily fantasy sports.” How did we go from a world in which these games were proliferating on the web without much scrutiny to one where many states have now brought legal actions and issued negative attorneys general opinions?

The conventional story making its way through the media is probably not entirely accurate. The conventional story comes from Joe Drape of *The New York Times*. The story claims that problems with “daily fantasy sports” begin and end with an employee of DraftKings who made a lot of money playing on the FanDuel site based on his access to confidential and

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(referencing California’s new state minimum wage of \$15/hour – a rate higher than the federal minimum wage).

75. See generally State Minimum Wages, on National Conference of State Legislators Website, available at <http://www.ncsl.org/research/labor-and-employment/state-minimum-wage-chart.aspx> (noting that 29 states currently have state minimum wage laws that exceed the federal minimum wage rate).

76. See, *infra*, notes \_\_ - \_\_ and accompanying text.

77. See, *supra*, notes \_\_ - \_\_ and accompanying text.

78. See, *supra*, notes \_\_ - \_\_ and accompanying text.

79. For an example of such a thorough legal analysis, see, e.g., Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* 2016 U. OF ILL. L. REV. 117 (2016) (discussing the legal risks of “daily fantasy sports” under federal law).

proprietary information.<sup>80</sup> However, that story, even if it is true, is just one of the many factors that led to increased scrutiny of the industry. It is probably not even the strongest factor, given that the Nevada Gaming Commission issued a negative ruling about “daily fantasy sports” right around the same time that Joe Drape’s story broke to the public – leading to the reasonable conclusion that Nevada had been investigating the issue since well before then.<sup>81</sup>

Indeed, there are perhaps several more compelling storylines that led to the change in legal climate for “daily fantasy sports” that do not involve Joe Drape or his stories that appeared in *The New York Times*. First, during the opening week of the 2016 NFL season, DraftKings and FanDuel decided to substantially ramp up their advertising efforts.<sup>82</sup> In fact, DraftKings spent more money on advertising during the first week of the NFL season than any other company in the country—ahead of Coca Cola and AT&T.<sup>83</sup> People who had not been paying attention to “daily fantasy sports” because they thought the industry was too small to worry about saw the commercials and began thinking cautiously about it. In hindsight, the “daily fantasy sports” industry’s media blitz invited scrutiny that perhaps otherwise could have been avoided. Some might say DraftKings and FanDuel brought this scrutiny upon themselves.

The second more compelling storyline involves a letter penned to Congress by New Jersey congressman Frank Pallone.<sup>84</sup> This summer, the

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80. Cf. Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2016), at 2015 (discussing the DraftKings insider information scandal that some had purported led to the greater scrutiny of “daily fantasy sports” that began in the fall of 2015).

81. See Memorandum of Law, from J. Brin Gibson & Ketan D. Bhirud to A.G. Burnett, Terry Johnson and Shawn Reed, Nevada Control Board (Oct. 16, 2015), at <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf>.

82. See Geoff Baker, *DraftKings and FanDuel Spend Millions on Fantasy Sports Advertising, and it Works*, THE SEATTLE TIMES (Nov. 11, 2015), at <http://www.seattletimes.com/sports/seahawks/draftkings-and-fanduel-spend-millions-on-fantasy-sports-advertising-and-it-works> (stating that “[i]n the seven days after the opening of the NFL schedule, DraftKings was No. 2 in the iSpot.TV rankings of television’s top-10 ad spenders — coming in at \$16.6 million. FanDuel was No. 5 on the list at \$13.7 million”).

83. See Dustin Gowker, *King of Commercials: DraftKings Rises to No. 1 in TV Spending with \$24 Million this Week*, LEGAL SPORTS REPORT (Sept. 7, 2015), <http://www.legalsportsreport.com/3611/draftkings-no-1-in-tv-commercials>.

84. See Jessica Chasmar, *Frank Pallone, Democratic Congressman, Wants Hearing on Fantasy Football*, WASH. TIMES (Sept. 15, 2015), <http://www.washingtontimes.com/news/2015/sep/15/frank-pallone-wants-congressional-hearing-on-fanta/> (“Mr. Pallone, a top New Jersey Democrat on the Energy and Commerce Committee, sent a letter to his Republican counterparts on Monday, asking the committee to “hold a hearing examining the relationship



U.S. Court of Appeals for the Third Circuit heard a case about whether the State of New Jersey could legalize sports gambling despite the Professional and Amateur Sports Protection Act (“PASPA”), a federal law that sought to prevent any new states from legalizing traditional sports gambling within its borders.<sup>85</sup> New Jersey wanted to legalize traditional sports betting to enhance its economy.<sup>86</sup> However, the NCAA and the four professional sports leagues all opposed it, which was ironic to an extent because Major League Baseball directly profits from DraftKings’s “daily fantasy sports” and mass-markets DraftKings’s contests throughout the country.<sup>87</sup> The NBA profits from “daily fantasy sports,” as well, through its ownership stake in FanDuel,<sup>88</sup> but NBA Commissioner Adam Silver penned a wonderful article in *The New York Times* taking a more liberal view toward sports gambling and explaining his more transparent legal approach compared to the approach adopted by Major League Baseball.<sup>89</sup>

In any event, Pallone, who is the congressman from New Jersey, was furious that the sports leagues, which were profiting from “daily fantasy sports,” were trying to keep sports gambling out of New Jersey. Pallone wanted to convince Congress that “daily fantasy sports” and sports gambling were similar and should be treated identically under PASPA; he specifically wanted to reveal the hypocrisy of the sports leagues. So, Pallone wrote a letter that was quite tongue and cheek, and he raised concerns about “daily fantasy

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between professional sports and fantasy sports to review the legal status of fantasy sports and sports betting.”).

85. See National Collegiate Athletic Ass’n v. Governor of New Jersey, 799 F.3d 259 (3d. Cir. 2015).

86. See Brent Johnson, *N.J. Spars with Sports Leagues Once Again over Sports Betting in Federal Appeals Court*, NJ.COM (Mar. 18, 2015), [http://www.nj.com/politics/index.ssf/2015/03/nj\\_battles\\_sports\\_leagues\\_again\\_over\\_sports\\_betting\\_in\\_federal\\_appeals\\_court.html](http://www.nj.com/politics/index.ssf/2015/03/nj_battles_sports_leagues_again_over_sports_betting_in_federal_appeals_court.html) (referencing “New Jersey’s long battle to bring sports betting to casinos”).

87. See Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/9298844-4-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/9298844-4-d172-11e4-a62f-ee745911a4ff_story.html); Marc Edelman, *Could An FBI Investigation of DraftKings Implicate Major League Baseball*, FORBES (Oct. 19, 2015), at <http://www.forbes.com/sites/marcedelman/2015/10/19/could-an-fbi-investigation-of-draftkings-implicate-major-league-baseball/#549682526348> (both discussing financial relationship between Major League Baseball and DraftKings).

88. See John Lombardo, *NBA Signs Four Year Deal with FanDuel that Includes Equity Stake in the Company*, SPORTS BUSINESS JOURNAL (Nov. 12, 2014), at <http://www.sportsbusinessdaily.com/Daily/Issues/2014/11/12/Marketing-and-Sponsorship/NBA-FanDuel.aspx>.

89. See Adam Silver, Editorial, *Legalize and Regulate Sports Gambling*, N.Y. TIMES (Nov. 13, 2014), at [http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?\\_r=0](http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0).

sports” that mimicked the concerns about sports betting that were raised in the Third Circuit Court of Appeals’s opinion.<sup>90</sup> Pallone hoped Congress would see the hypocrisy and support legalized sports gambling in New Jersey. Instead many members of Congress, who had seen the commercials for FanDuel and DraftKings during the first week of the NFL season, read the letter and decided it was time to begin investigating.

Finally, the third compelling storyline leading up to more recent investigations was that DraftKings indicated an interest to go public beginning late last year.<sup>91</sup> Now, throughout this time, the legal status of “daily fantasy sports” remained ambiguous.<sup>92</sup> However, statements were issued by Rob Manfred, who is the Commissioner of Major League Baseball, and Jason Robins, the CEO of DraftKings, expressing the belief that all DraftKings contests were legal.<sup>93</sup> Language on DraftKings’ own website

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90. See Jessica Chasmar, *Frank Pallone, Democratic Congressman, Wants Hearing on Fantasy Football*, WASH. TIMES (Sept. 15, 2015), <http://www.washingtontimes.com/news/2015/sep/15/frank-pallone-wants-congressional-hearing-on-fanta/> (citing to Pallone letter).

91. See Max Miceli, *DraftKings, FanDuel and Gambling on the World of Fantasy Sports*, U.S. NEWS AND WORLD REPORT (Oct. 30, 2015), at 2015 WLNR 32539323; Jonathan Marino, *DraftKings’ \$1 Billion Fantasy Momentum Could Mean Big IPO in 2016*, THE STREET (Dec. 19, 2014), at <http://www.thestreet.com/story/12990595/1/draftkings-1-billionfantasy-momentum-could-mean-a-big-ipo-in-2016.html> (explaining the DraftKings CEO Jason Robins believes “thinks it will take ‘one more mega-round’ of venture financing to bolster his Boston-based brainchild’s operations, and that an IPO could come in as little as two years, in 2016).

92. For a realistic depiction of the legal status of “daily fantasy sports,” see, e.g., See Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law 2016* U. OF ILL. L. REV. 117 (2016) (which was already wide available and distributed in draft form on the Social Science Research Network by mid-2015).

93. See Drew Harwell, *More Over Budweiser: Football Has a New Advertising King*, WASH. POST (Sept. 15, 2015), [https://www.washingtonpost.com/business/economy/move-over-budweiser-football-has-a-new-advertising-king/2015/09/16/00c8d562-5c84-11e5-b38e-06883aacba64\\_story.html](https://www.washingtonpost.com/business/economy/move-over-budweiser-football-has-a-new-advertising-king/2015/09/16/00c8d562-5c84-11e5-b38e-06883aacba64_story.html) (quoting DraftKings CEO Jason Robbins, presumably inaccurately, proclaiming that “anyone who has taken the time to understand the law as it relates to DraftKings’ offerings, and anyone who has seen the data . . . on the skillfulness of the game [knows] it’s really, honestly not a debate. It’s clearly legal. And we have a team of great lawyers who watch everything we do.”); Mark Feinsad, *MLB Commissioner Rob Manfred Defends DraftKings Partnership, Says Fantasy Sports ‘Not Gambling,’* DAILY NEWS (Oct. 26, 2015), at <http://www.nydailynews.com/sports/baseball/fantasy-sports-not-gambling-mlb-commissioner-manfred-article-1.2412347> (quoting MLB Commissioner Rob Manfred as stating that Major League Baseball “thoroughly investigate[d] the games that were available on [DraftKings],” as the league was “completely comfortable with the idea that those games were consistent with the existing federal law”).

even said that their games were “100% legal” – whatever such a bizarre term may mean.<sup>94</sup>

Why did they make such assertions? According to various reports, DraftKings wanted to spin its business off into the public hands.<sup>95</sup> If the company intended to go public, arguing that it was a legal business would likely have driven up the IPO price. Indeed, if DraftKings had gone public, one of two results then would have likely occurred, and both would have been against the interests of the society. First, the government could have determined the business was illegal after it went public, shut down the company, and caused common investors to lose a significant amount of money. Alternately—and I believe this what DraftKings and the private equity funds had wanted—during the spin-off to the public, the government could have made “daily fantasy sports” legal because it reasoned that it had already allowed the company to operate for years without stopping and it did not want the public to lose money on a bum stock.

## VII. THE INDUSTRY TODAY: LEGISLATION TO LEGALIZE

The importance of what is going on now is not based on certainty in the marketplace, but rather on uncertainty. It is imperative that we have an assessment of whether various formats of “daily fantasy sports” are legal or illegal at this very moment before one of the “daily fantasy sports” companies goes public. It is also imperative that we reach some certainty because there are many other established businesses with respectable credentials that want to enter the marketplace, but will not do it with the perception of legal risk. In other words, it is important to have an ascertaining of legality or illegality so that potential new competitors of FanDuel and DraftKings will know whether they can enter the marketplace and compete effectively in a legal enterprise.

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94. See DraftKings Webpage, at <https://www.draftkings.com/help/why-is-it-legal> (stating that “Playing on DraftKings is 100% legal in the USA”) (last visit Apr. 13, 2016).

95. See Max Miceli, *DraftKings, FanDuel and Gambling on the World of Fantasy Sports*, U.S. NEWS AND WORLD REP. (Oct. 30, 2015), at 2015 WLNR 32539323 (noting that both DraftKings and FanDuel seem poised for initial public offerings as soon as 2016); Jonathan Marino, *DraftKings’ \$1 Billion Fantasy Momentum Could Mean Big IPO in 2016*, THE STREET (Dec. 19, 2014), at <http://www.thestreet.com/story/12990595/1/draftkings-1-billion-fantasy-momentum-could-mean-a-big-ipo-in-2016.html> (predicting a DraftKings IPO by 2016); Eric Jackson, *As AG’s Probe Extends to Yahoo!, DraftKings and FanDuel Play High Stakes IPO Game*, THE STREET (Nov. 19, 2015), <http://realmoney.thestreet.com/articles/11/19/2015/ags-probe-extends-yahoo-draftkings-and-fanduel-play-high-stakes-ipo-game> (discussing potential for DraftKings IPO).

Today, we see the challenges facing the “daily fantasy sports” industry taking shape in two ways: legislation across the different states and litigation within some states. In New York, there is ongoing legal action with the attorney general, Eric Schneiderman, challenging the legality of FanDuel and DraftKings.<sup>96</sup> I tend to be bullish on at least certain aspects of “daily fantasy sports,” but I also think the litigation is a good thing. At the end of this litigation, once and for all (at least in New York), we will have a greater sense of certainty. If it is illegal, FanDuel and DraftKings will be banished from the state and perhaps have their past revenues stripped. If it is legal, players will have assurance and new companies will be able to enter the marketplace with reduced legal risk. The industry could see mass expansion.

At the same time as this litigation, legislators across states are seeking to legalize “daily fantasy sports” affirmatively.<sup>97</sup> I am bullish on legislation to the extent that it opens up a marketplace in such a way that it is regulated, that there is age verification for the first time, that there is assurance that the companies will not go bankrupt, and that the legislation does not foreclose or inhibit new market competitors. I think that slowly but inevitably, the U.S. will legalize regulated sports gambling, much like England, and this will include, in part, at least most forms of “daily fantasy sports.”<sup>98</sup>

However, conversely, I am not bullish about the actual language of the recently proposed legislation.<sup>99</sup> FanDuel and DraftKings are enormous businesses, and with help from the Fantasy Sports Trade Association, they have been pushing for nearly-identical bills in every state.<sup>100</sup> Although the bills push to legalize the industry, they have a few problems.<sup>101</sup> First, they do

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96. See, e.g., *Schneiderman v. FanDuel & DraftKings*, No. 453056/15 (N.Y. Sup. Ct. Dec. 11, 2015) (discussing New York attorney general Eric Schneiderman’s claims that “daily fantasy sports” operators FanDuel and DraftKings operate illegal gambling businesses under New York state law).

97. For a very detailed analysis of the attempts at legislation, see Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L. J. \_\_ (2016) (publication forthcoming), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759995](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759995).

98. See generally Ken Belson & Joe Drape, *N.F.L.’s Forays into London Muddle its Stance on Sports Betting*, N.Y. TIMES (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/sports/football/nfls-forays-into-london-muddle-its-stance-on-sports-betting.html> (discussing the legal but heavily regulated world of sports betting in England).

99. See, e.g., Fantasy Contests Act (Va. 2016), at <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB646ER>.

100. See *DraftKings, FanDuel Partner to Lobby in Florida: Here’s Why It’s Important for DFS*, LEGAL SPORTS REPORT (Aug. 8, 2015), <http://www.legalsportsreport.com/2916/draftkings-fanduel-florida-lobbying> (discussing combined lobbying efforts of DraftKings, FanDuel and the Fantasy Sports Trade Association).

101. See, *infra*, notes \_\_ - \_\_ and accompanying text.

not indicate that fantasy sports are a legal game of skill.<sup>102</sup> Even though the bills purport to legalize the activity, the wording is poor and they do not actually legalize anything. Second, some of the protections that the recent bills attempt to put in place are not sufficiently strong.<sup>103</sup> For example, the bills require that the companies be audited, but the bills allow these companies to use any accountant to perform the audit and they are permitted to use the same auditor every year. Third, and most problematic, those states wanting to make money off “daily fantasy sports” have included steep licensing fees in their bills. The licensing fees that are being proposed are not variable based on revenues, but are substantial flat fees: \$50,000 to enter in one state, for instance.<sup>104</sup> These fees essentially work right into the hands of the big players: FanDuel and DraftKings. Ultimately, the fees are problematic because only the big companies pay the fees, thus giving them a shared monopoly over the marketplace.<sup>105</sup> FanDuel, DraftKings, and perhaps Yahoo could afford to pay these fees, but the smaller operators cannot afford the fees and will be forced to go out of business.

Finally, we have to discuss the sports leagues and their role in this whole legal mess. The NBA’s Adam Silver has been forthright with his intentions with FanDuel and his openness to sports betting from the day he took the commissionership.<sup>106</sup> On the other hand, I have very real concerns about Major League Baseball and specifically, Rob Manfred, the Commissioner of Major League Baseball. Last year, Manfred purportedly had several people working with him to do a very extensive research project on whether “Shoeless” Joe Jackson, ninety five years after the Black Sox

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102. See Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L. J. \_\_\_ (2016) (publication forthcoming), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759995](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759995) (discussing concerns with current state bills seeking to regulate the fantasy sports marketplace).

103. *Id.*

104. See, e.g., Fantasy Contests Act (Va. 2016), at <https://lis.virginia.gov/cgi-bin/legp604.exe?161+ful+SB646ER>.

105. See Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L. J. \_\_\_ (2016) (publication forthcoming), draft available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2759995](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2759995) (discussing concerns with current state bills seeking to regulate the fantasy sports marketplace).

106. See Adam Silver, Editorial, *Legalize and Regulate Sports Gambling*, N.Y. TIMES (Nov. 13, 2014), at [http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?\\_r=0](http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0).

scandal, should be eligible for the Hall of Fame.<sup>107</sup> Meanwhile, during roughly the same period, Major League Baseball, likely knowing full well that certain DraftKings contests likely violated gambling laws in certain states of operation, kept information that it is a shareholder in DraftKings confidential from the public and did not disclose its investment share to the mainstream media.<sup>108</sup> This fact did not even come out until Adam Kilgore of *The Washington Post* reported on it early March of last year—creating a bizarre result of Major League Baseball giving an impression of opposing “daily fantasy sports” when it was really directly profiting from it.<sup>109</sup> To me, that was highly disingenuous.

#### CONCLUDING THOUGHTS

Moving into the future, as a matter of general legal policy, we need transparency and earnestness. If we are going to legalize a marketplace, every company should have a reasonable opportunity to enter. Big businesses should not get to be bullies with their legal tactics and statements or deter new entrants while secretly profiting from that very marketplace.

Let’s allow our Congress and our state governments consider how we feel about this and make reasonable determinations to allow for reasonable online gaming and modifications in the law. These changes should be coming from society, not simply from two companies wishing to do so. Over the next year or two, for better or worse, we will see state governments using both legislative efforts and in some cases, such as in New York, legal action to attempt to regulate the industry and determine the future of this growing “daily fantasy sports” marketplace. Indeed, “daily fantasy sports” is different from traditional fantasy sports in the way it evolved, and it needs very real

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107. See Mandrallius Robinson, *MLB Reconsidering Shoeless Joe Jackson*, GREENVILLE ONLINE (Aug. 31, 2015), (discussing Major League Baseball’s purportedly systematic review of Shoeless Joe Jackson’s ineligibility for the MLB Hall of Fame).

108. See generally Adam Kilgore, *MLB’s Deal with DraftKings Should Signal Baseball’s Changing Stance on Gambling*, THE WASH. POST (Apr. 7, 2015), at <https://www.washingtonpost.com/news/sports/wp/2015/04/07/mlbs-deal-with-draftkings-should-signal-baseballs-changing-stance-on-gambling> (“Last week, Major League Baseball announced an extension and enhancement of its previously under-the-radar partnership with DraftKings, a leading daily fantasy sports Web site. The deal gave baseball a small ownership stake in the company, with which baseball had been in business since MLB’s Advanced Media struck a deal in 2013.”).

109. See Adam Kilgore, *Daily Fantasy Sports Website Finds Riches in Internet Gaming Law Loophole*, WASH. POST (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/9298844-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/9298844-d172-11e4-a62f-ee745911a4ff_story.html).

oversight. Let's hope American government can begin to regulate these businesses the right way and make decisions that are good for consumers and competition—not just risk-takers and private equity.