

2016

Switch Hitters: How League Involvement in Daily Fantasy Sports Could End the Prohibition of Sports Gambling

Jordan Meddy

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjcfcl>

 Part of the [Antitrust and Trade Regulation Commons](#), [Civil Law Commons](#), [Commercial Law Commons](#), [Constitutional Law Commons](#), [Consumer Protection Law Commons](#), [Courts Commons](#), [Criminal Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Gaming Law Commons](#), [Internet Law Commons](#), [Law and Economics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jordan Meddy, *Switch Hitters: How League Involvement in Daily Fantasy Sports Could End the Prohibition of Sports Gambling*, 10 Brook. J. Corp. Fin. & Com. L. (2016).

Available at: <https://brooklynworks.brooklaw.edu/bjcfcl/vol10/iss2/11>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of Corporate, Financial & Commercial Law by an authorized editor of BrooklynWorks.

SWITCH HITTERS: HOW LEAGUE INVOLVEMENT IN DAILY FANTASY SPORTS COULD END THE PROHIBITION OF SPORTS GAMBLING

ABSTRACT

Whether in the form of lotto tickets or casino table games, gambling is legally permitted in some way in virtually every U.S. state. Yet, in all but a handful of jurisdictions, federal law prohibits wagering on sporting events or professional athletes in any form. Several economically challenged states, particularly New Jersey, have been trying to authorize sports gambling within their borders as a way to raise tax revenues and support their local gambling industries. While these attempts have thus far been unsuccessful, Daily Fantasy Sports have simultaneously experienced a meteoric rise, becoming a multi-billion dollar industry. This Note examines the legal framework governing sports gambling and the grey area in which Daily Fantasy Sports providers have been allowed to operate. It then analyzes Daily Fantasy Sports legally and qualitatively, concluding that they constitute a form of illegal sports gambling that has largely escaped regulation. Particular emphasis is placed on the hypocritical role that the major North American professional sports leagues have played in Daily Fantasy Sports' explosive growth, while they simultaneously oppose sports gambling and fight in court to block any attempts for its legalization. Finally, this Note presents professional sports league involvement in Daily Fantasy Sports as an opportunity for states and the larger American gambling industry to gain the political capital necessary to repeal the federal sports gambling prohibition, and explores the rising tide of public and political support toward legalized sports betting on a state piecemeal basis.

INTRODUCTION

The American Gaming Association estimates that underground, illegal sports betting is a \$140 billion industry in the United States. In the state of New Jersey, most forms of traditional casino gambling are legal, but, as in nearly all states, wagering on sports in any form is federally prohibited.¹ New Jersey's gambling industry has long called for the legalization of sports betting in order to bring this massive underground market out of the shadows and into the mainstream. These calls have become much louder in the last half decade, as New Jersey's casinos and racetracks have experienced a drastic economic decline and have failed to recover from the

1. See Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–3704 (2012)).

Great Recession.² New Jersey's state government, which relies on gambling-related tax revenue and has experienced its own economic shortfalls in recent times, has responded by twice attempting to institute a license-based system of sports gambling at casinos and racetracks, in 2012 and 2014.³ Both times, a group comprised of the National Football League (NFL), the National Basketball Association (NBA), Major League Baseball (MLB), the National Hockey League (NHL), and the National Collegiate Athletic Association (NCAA) (collectively, the Leagues) brought an action seeking an injunction to stop New Jersey from implementing its plans.⁴ In both cases, the court struck down the state's proposed legislation as a violation of the federal statutory prohibition on sports gambling.⁵

Separate from these events, but perhaps not quite independent, fantasy sports and, more recently, Daily Fantasy Sports (DFS) have taken the nation by storm.⁶ While these fantasy games began as an entertaining hobby to be played with friends or coworkers, DFS has blurred the line between illegal sports gambling and legal fantasy sports gaming. In fact, DFS shares many similarities with illegal sports gambling, both in terms of legal definitions at the state law level and the way the entities that offer the games operate as they have grown. The popularity of DFS games has allowed a handful of providers—particularly FanDuel and DraftKings—to become multi-billion dollar companies, counting some of the Leagues that claim to oppose sports gambling among their primary investors.⁷ Other Leagues and league partners, while not going so far as to invest in DFS providers, have nonetheless signed huge sponsorship deals with them or formed other business relationships.⁸ The result is that these DFS operators have been allowed to entrench themselves in a market, while others such as New Jersey's gambling industry have been left out in the cold.⁹ However, the

2. See Tina Griego, *The Last Hand: The Epic Bust of Atlantic City's Gambling Economy*, WASH. POST (Sept. 23, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/09/23/the-last-hand-the-epic-bust-of-atlantic-citys-gambling-economy/>; John Wolfson, *America's Casino-Saturation Problem*, NEW YORKER (Nov. 18, 2014), <http://www.newyorker.com/business/currency/Americas-casino-saturation-problem>.

3. See Zachary Zagger, *Despite Setback, Odds Still Favor National Sports Betting*, LAW360 (Aug. 25, 2015, 9:57 PM), <http://www.law360.com/articles/695075/despite-setback-odds-still-favor-national-sports-betting>; Will Hobson, *Everything You Need to Know About New Jersey's Pending High Stakes Sports Gambling Ruling*, WASH. POST (July 1, 2015), <https://www.washingtonpost.com/news/sports/wp/2015/07/01/everything-you-need-to-know-about-new-jerseys-pending-high-stakes-sports-gambling-ruling/>.

4. See Hobson, *supra* note 3.

5. See Zagger, *supra* note 3.

6. See Darren Heitner, *The Hyper Growth of Daily Fantasy Sports is Going to Change Our Culture and Our Laws*, FORBES (Sept. 16, 2015, 4:01 PM), <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/>.

7. *Id.*

8. *Id.*

9. See Zagger, *supra* note 3.

seeming hypocrisy of the Leagues' involvement in DFS could create an opportunity for the gambling industries in New Jersey and elsewhere to succeed in their ultimate quest of repealing the federal sports gambling prohibition, allowing states to regulate, and profit from, legalized sports betting on a piecemeal basis.

Part I of this Note provides relevant background information on sports gambling, both legal and illegal, in the United States, as well as traditional fantasy sports, DFS, and the financial impact of all these activities and industries. Part II discusses the statutory framework under which sports gambling and fantasy games can or cannot operate and the attempts that states have made to permit sports gambling within their borders, despite federal prohibitions. Part III examines the nature of DFS and argues that they constitute sports gambling under virtually any definition. Finally, Part IV argues that the Leagues' involvement in DFS presents an opportunity for New Jersey and other interested states or industries to further undermine the federal sports gambling prohibition. This opportunity has become increasingly ripe, as some of the Leagues have now publicly changed their positions about sports gambling in the first place. If New Jersey is able to capitalize on this opportunity and move forward with legalizing sports gambling, there will be an influx of income to both New Jersey's struggling casinos and racetracks and the state's tax revenue.

I. BACKGROUND ON SPORTS GAMBLING AND FANTASY SPORTS

Generally speaking, gambling is very popular in the United States, and the business of gambling is booming. Nationally, casinos in thirty-nine states “generate enough consumer demand to produce total [annual] revenues of more than \$81 billion.”¹⁰ Research conducted by Oxford Economics estimates that the legal gambling industry in the United States “[g]enerates nearly \$240 billion annually in total economic impact.”¹¹ The industry also produces roughly \$38 billion in gaming and gaming-related tax revenue for local, state, and federal governments.¹² Sports gambling, in particular, is also extremely popular in the United States, but since the activity is federally prohibited in all but a few states, the large majority of sports betting transactions occur illegally, in what some call “the world’s largest black market for sports betting.”¹³ An “estimated \$80 billion to \$380

10. This includes both commercial and tribal casinos. AM. GAMING ASS'N, WHEN GAMING GROWS, AMERICA GAINS: HOW GAMING BENEFITS AMERICA 3 (2014), https://www.americangaming.org/sites/default/files/research_files/AGA_EI_Report_FINAL.pdf.

11. *Id.*

12. *Id.*

13. Will Hobson, *Sports Gambling in U.S.: Too Prevalent to Remain Illegal?*, WASH. POST (Feb. 27, 2015), <https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c>

billion” is wagered illegally on sports in the United States each year.¹⁴ The phenomenon is not distinctly American by any means, and some other jurisdictions embrace regulated sports gambling as part of their overall legalized gambling scheme. In the United Kingdom, for example, where sports betting is legal and widespread (with the top professional soccer league even running a sports book), the government generated £1.7 billion (more than \$2.5 billion USD) in overall gambling tax revenue from 2012 to 2013.¹⁵ In addition, the U.K.’s gambling industry employs over 100,000 people and generates more than \$9.6 billion USD in total revenue, close to 0.5 percent of the nation’s gross domestic product.¹⁶

In the United States, under federal legislation prohibiting sports gambling, only four states—Nevada, Oregon, Delaware, and Montana—are allowed to authorize any form of sports gambling within their borders.¹⁷ Nevada is “the only state that offers the full-range of legal sports wagering for all of the major professional and collegiate sports.”¹⁸ Nearly \$4 billion is bet on sports legally annually in Las Vegas alone.¹⁹ In 1976, Delaware implemented a limited sports betting scheme known as “Scoreboard,” which included three games, all confined to betting on NFL games and “parlay” or multi-game wagering.²⁰ The state abandoned the scheme after the 1976 season, but revived sports betting in 2009 in a similar limited form.²¹ Under the current Delaware system, gamblers can only bet on NFL games and only in parlay wagers—a form of betting where one bets on the outcomes of at least three games per betting card and must correctly pick them all to win.²² Betting under this Delaware scheme increased every year from 2009 to 2013, when wagering reached an annual total of \$31.5 million.²³ In Oregon, from 1989 until 2007 (when it was repealed), the state “operated a sports betting lottery called ‘Sports Action,’ which allowed [individuals] to make parlay bets on NFL games.”²⁴ In its first two years of

-b7d3-11e4-9423-f3d0a1ec335c_story.html.

14. *Id.* Estimates vary wildly. See Jordan Weissmann, *Big Bucks or Bogus Betting Baloney?*, SLATE (Nov. 21, 2014, 2:19 PM), http://www.slate.com/articles/business/moneybox/2014/11/a_dam_silver_says_there_s_400_billion_per_year_of_illegal_sports_betting.html.

15. See Heitner, *supra* note 6.

16. *Id.*

17. Eric Meer, Note, *The Professional and Amateur Sports Protection Act (PASPA): A Bad Bet for the States*, 2 UNLV GAMING L.J. 281, 288–89 (2011).

18. *Id.* at 288.

19. Hobson, *supra* note 13.

20. See Office of the Comm’r of Baseball v. Markell, 579 F.3d 293, 296 (3d Cir. 2009).

21. Meer, *supra* note 17, at 289.

22. Jeff Barker, *Delaware’s NFL Betting Business is Booming – and Marylanders are Noticing*, BALTIMORE SUN (Nov. 14, 2014, 11:56 PM), <http://www.baltimoresun.com/business/bs-bs-sports-betting-nfl-20141114-story.html>.

23. *Id.* A “significant number” of bettors come from out-of-state, including many from neighboring Pennsylvania and Maryland, further driving development in the gambling and tourism industries. See *id.*

24. See Meer, *supra* note 17, at 288.

operation, the Oregon Sports Action game “generated over \$14.5 million in gross revenue,” resulting in “more than \$4.5 million in net profit for the State.”²⁵ Finally, Montana allows state-licensed sports pools and a few other games, but sports gambling in the state is limited to those schemes only.²⁶

Fantasy sports were traditionally not viewed as a form of sports gambling. Fantasy sports have existed in the United States in some form since the 1950s. However, in recent decades, the rise of the Internet and Americans’ ever-increasing obsession with professional sports has launched fantasy games into a mainstream hobby and true national pastime.²⁷ Traditional fantasy sports leagues are comprised of regular fans, each of which own and manage their own “team” in a particular sport.²⁸ These leagues most commonly consist of somewhere between eight and fourteen teams, and the participants “draft” their individual teams, usually by selecting a roster of players, either one at a time or in an auction format.²⁹ Participants then compete and score points based on the actual performances of their individual players in real-world sporting events.³⁰ Fantasy sports games do not inherently require players to pay an entry fee or to compete for prize money, and indeed the major traditional fantasy sports companies (e.g., ESPN, Yahoo, Inc., and CBS) do not charge to play their games, nor do they offer financial prizes to the winners.³¹ However, because the leagues are comprised of private individuals, and often friends, coworkers, or others who know each other, it is a simple and common practice for players to organize their own entry fee requirements and prize pools.³²

The number of people engaged in fantasy sports has exploded dramatically in recent years; the Fantasy Sports Trade Association estimates that 56.8 million people in the United States and Canada aged twelve and over played fantasy sports in 2015.³³ Americans spend an estimated \$800 million annually on all fantasy sports media products.³⁴ In all, research shows that fantasy sports comprise a \$1.5 billion industry, with annual growth of more than 10 percent.³⁵ The traditional fantasy sports providers

25. S. REP. NO. 102-248, at 11–12 (1991).

26. Meer, *supra* note 17, at 289.

27. See Michael Trippiedi, Note, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 204–06 (2014).

28. *Id.* at 207.

29. *Id.*

30. See *id.* at 207–08.

31. Leigh Steinberg, *The Fantasy Football Explosion*, FORBES (Aug. 29, 2014, 8:07 PM), <http://www.forbes.com/sites/leighsteinberg/2014/08/29/the-fantasy-football-explosion/>.

32. See David A. Palanzo, *Non-Exempt But Unenforced: The Status of Fantasy Sports Under the UIGEA*, 1 SPORTS & ENT. L.J. 135, 135–36 (2011).

33. Heitner, *supra* note 6.

34. Steinberg, *supra* note 31.

35. *Fantasy Sports Services in the U.S.: Market Research Report*, IBISWORLD (May 2015), <http://www.ibisworld.com/industry/fantasy-sports-services.html>.

largely generate their huge profits from the sale of information (i.e., advice and statistical analysis) and advertising from the enormous amount of web traffic that fantasy sports generate.³⁶ Research also shows that fantasy sports create a \$3 billion to \$4 billion annual impact across the entire sports industry.³⁷

DFS leagues, a new form of fantasy sport games, have surged in popularity in recent years due to “[their] rapid-fire play, near instant gratification, simple rules, and, of course, the ability to win real money.”³⁸ Instead of selecting players for an entire season like in traditional fantasy sports, DFS games require individuals to choose a lineup for a single night or week, while arranging the values of their players so as to stay under a “salary cap.”³⁹ Players can compete in one-on-one matches with their friends, either for free or for a set entry fee, or can pay to join a one-day league, with the winners taking home actual cash prizes offered by the games’ operators.⁴⁰ One leading DFS provider, FanDuel, says that it paid out \$500 million in cash prizes in 2014 alone, while its largest competitor, DraftKings, paid out \$200 million.⁴¹ Those two DFS providers are believed to have paid out over a billion dollars to players in 2015.⁴²

While only a small subset of traditional fantasy game players currently play DFS, researchers estimate that DFS generated \$3.4 billion in entry fees in 2015, and this figure is expected to grow 41% annually, reaching \$14.4 billion in 2020.⁴³ As the market for DFS has exploded, the fantasy sports providers have picked up millions of dollars in investments.⁴⁴ In 2013, two-year-old DraftKings closed a \$24 million Series B round of funding only six months after it closed a \$7 million Series A round.⁴⁵ In the same year, FanDuel secured \$11 million in investment.⁴⁶ A third provider, DraftStreet,

36. Steinberg, *supra* note 31.

37. Stephen Dorman, *The Fantasy Football Phenomenon*, THE ACORN (Aug. 3, 2006), <http://www.theacorn.com/news/2006-08-03/Sports/076.html>.

38. Noah Davis, *The Daily Fantasy Sports Takeover*, VICE: SPORTS (Oct. 29, 2014), http://sports.vice.com/en_us/article/the-daily-fantasy-sports-takeover.

39. *Id.*

40. *Id.*

41. *Id.*

42. Heitner, *supra* note 6.

43. *Id.*; David Purdum, *Congressional Subcommittee Examining Daily Fantasy*, ESPN (May 10, 2016), http://espn.go.com/chalk/story/_id/15498648/congressional-subcommittee-examining-daily-fantasy-sports.

44. *See* Davis, *supra* note 38.

45. Darren Heitner, *\$24 Million Investment in DraftKings Should Shake Up the Daily Fantasy Sports Space*, FORBES (Nov. 26, 2013, 11:59 AM), <http://www.forbes.com/sites/darrenheitner/2013/11/26/daily-fantasy-sports-provider-draftkings-secures-substantial-amount-of-series-b-funding/>; Darren Heitner, *Atlas Ventures Delivers \$7 Million to Daily Fantasy Sports Provider DraftKings, Inc.*, FORBES (May 6, 2013, 10:00 AM), <http://www.forbes.com/sites/darrenheitner/2013/05/06/atlas-venture-delivers-7-million-to-daily-fantasy-sports-provider-draftkings-inc/>.

46. Darren Heitner, *Fantasy Sports Service, FanDuel, Secures \$11 Million Investment; Includes Money from Comcast Ventures*, FORBES (Jan. 30, 2013, 6:00 AM),

received roughly \$3 million in venture capital from 2010 through 2012.⁴⁷ The investment growth has frenetically traced the staggering rise in participation and revenues, with DraftKings and FanDuel together having raised more than \$735 million total to date in venture capital.⁴⁸

II. THE STATUTORY CONSTRAINTS ON EXPANDING SPORTS GAMBLING

In October 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA, the Act), a federal prohibition on sports gambling with the purpose of curbing the activity throughout the United States.⁴⁹ Congress largely justified PASPA on policy grounds; the prohibition was necessary to “stem the growth of teenage gambling and protect the integrity of sports.”⁵⁰ The Leagues played an instrumental role in the initiation, drafting, and eventual passage of PASPA, lobbying Congress to protect the competitive integrity of their product.⁵¹ At the time PASPA was being debated, however, in addition to the four states with some form of pre-existing legalized sports betting, thirteen others were considering legislation to authorize some form of state-sponsored sports gambling scheme, largely as a revenue-generating device to combat mounting budget deficits.⁵² PASPA was, at least in part, a reaction and attempt to impede the spread of sports betting to those thirteen states on the aforementioned policy grounds.⁵³ Recognizing the enormous potential financial impact of state-sponsored sports wagering, Congress nevertheless felt that the revenue benefit to the states was “not enough to justify the waste and destruction attendant to the practice.”⁵⁴

Specifically, PASPA makes it unlawful for any governmental entity⁵⁵ to:

<http://www.forbes.com/sites/darrenheitner/2013/01/30/fantasy-sports-service-fanduel-secures-11-million-investment-includes-money-from-comcast-ventures/>.

47. Peter Lauria, *Become a Millionaire Playing Fantasy Football*, BUZZFEED (Aug. 27, 2013, 9:30 AM), <http://www.buzzfeed.com/peterlauria/become-a-millionaire-playing-fantasy-football>.

48. Heitner, *supra* note 6.

49. Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992) (codified as amended at 28 U.S.C. §§ 3701–3704 (2012)).

50. Sen. Bill Bradley, *The Professional and Amateur Sports Protection Act – Policy Concerns Behind Senate Bill 474*, 2 SETON HALL J. SPORT L. 5, 5 (1992).

51. The Leagues have long claimed to oppose sports gambling because of concern it would expose the Leagues to corruption and potential game fixing, or even just the perception among the public that such activities could occur. *See* Hobson, *supra* note 13; *see also* Michael McCann & Will Green, *New Jersey Sports Wagering Hopes Facing Uphill Climb After Hearing*, SPORTS ILLUSTRATED (Feb. 18, 2016), <http://www.si.com/nfl/2016/02/17/new-jersey-sports-betting-hearing-chris-christie>.

52. Bradley, *supra* note 50, at 8.

53. *See* S. REP. NO. 102-248, at 5 (1991).

54. Bradley, *supra* note 50, at 6.

55. Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 (2012).

“sponsor, operate, advertise, promote, license or authorize . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on one or more competitive games in which amateur or professional athletes participate . . . or on one or more performances of such athletes in such games.”⁵⁶

PASPA specifically provides for injunctive relief to enjoin a state’s violation (or proposed violation) of the statute, but only the Attorney General of the United States or “a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation” are authorized to bring such a claim.⁵⁷

PASPA also contains a grandfather clause, whereby states are allowed to continue authorizing sports betting schemes that would otherwise constitute a violation of the Act, so long as those games were authorized by the state and actually existed prior to the Act’s enactment.⁵⁸ The states to benefit from this exception are Delaware, Oregon, Montana, and Nevada, with Nevada having the most expansive sports gambling scheme in operation prior to PASPA’s passage.⁵⁹ The legislative history shows the decision to include this exemption was largely economic: these states, particularly Nevada, derived significant revenue from state-sponsored sports gambling in the form of taxation and local business development, and thus forcing these states to eliminate the schemes would “work a harsh result.”⁶⁰

Following the passage of PASPA, Congress passed the Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006—a last-minute attachment to the Security and Accountability For Every Port Act (SAFE Port Act), an unrelated bill to improve the security of U.S. ports.⁶¹ Like with PASPA, the Leagues lobbied aggressively for the UIGEA and were instrumental in its passage.⁶² Noting that the development of technology, specifically the Internet, had altered the gambling landscape in this country, Congress sought to clear up the many uncertainties and grey areas that existed in the online gaming regulatory system.⁶³ The UIGEA attempts to do this in two ways. First, the UIGEA prohibits any person “engaged in the business of betting or wagering [from] knowingly accept[ing][a financial

56. *Id.* § 3702.

57. *Id.* § 3703.

58. *See id.* § 3704.

59. James C. W. Goodall, Note, *Bringing Down the House: An Examination of the Law and Policy Underpinning the Professional and Amateur Sports Protection Act of 1992*, 67 RUTGERS L. REV. 1097, 1108 (2015); Meer, *supra* note 17, at 287–89.

60. Bradley, *supra* note 50, at 9–10.

61. Unlawful Internet Gambling Enforcement Act, Pub. L. No. 109-347, 120 Stat. 1884 (2006) (codified as amended at 31 U.S.C. §§ 5361–5367 (2012)); Meer, *supra* note 17, at 292.

62. Joe Falchetti, *UIGEA, 6 Years Later*, CALVINAYRE (Oct. 15, 2012), <http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/>.

63. Meer, *supra* note 17, at 292.

transaction], in connection with the participation of another person in unlawful Internet gambling.”⁶⁴ Second, the UIGEA requires U.S. financial institutions, such as banks and credit card companies, to prohibit funding to unlawful Internet gambling. This may be accomplished “through the establishment of policies and procedures reasonably designed to identify and block or otherwise prevent or prohibit the acceptance of restricted transactions.”⁶⁵ Thus, the UIGEA essentially makes it illegal for individuals, businesses, and financial institutions to receive funds or credit transfers related to unlawful Internet gambling.⁶⁶ In the area of sports betting, unlawful Internet gambling constitutes, at the very least, a transaction originating in one of the forty-six states not granted an exemption from PASPA.⁶⁷

Crucially, the UIGEA makes an explicit, carved-out exception for fantasy sports games, at least ones that meet certain requirements.⁶⁸ According to the UIGEA, the definition of “bet or wager” does *not* include “participation in any fantasy or simulation sports game or educational game or contest in which . . . 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.”⁶⁹ The UIGEA further requires: (1) that the prizes offered are established and made known in advance of the game, and that their value not be based on the number of participants;⁷⁰ (2) that the outcomes are based on the relative knowledge and skill of the participants, and are determined predominantly by accumulated statistical results of the performance of individuals in real-world sporting events;⁷¹ and (3) that the outcomes are not based on the score, point-spread, or the performance of any single real-world team or solely on the single performance of an individual athlete in a real-world sporting event.⁷² Thus, the UIGEA attempts to distinguish between games of skill and games of chance in carving out the exception for fantasy sports games.⁷³ While there is some debate whether even the large majority of traditional fantasy sports games

64. 31 U.S.C. § 5363 (2012).

65. *Id.* § 5364.

66. The UIGEA does *not* make it illegal for private citizens to attempt to send funds or make any such transfers related to unlawful Internet gambling. Falchetti, *supra* note 62.

67. *See* Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of the U.S., 580 F.3d 113, 177 (3d Cir. 2009) (“Whether the transaction . . . constitutes unlawful Internet gambling turns on how the law of the state from which the bettor initiates the bet would treat that bet, i.e., if it is illegal under that state’s law, it constitutes ‘unlawful Internet gambling’ under the Act”).

68. *See* 31 U.S.C. § 5362(1)(E)(ix) (2012).

69. *Id.*

70. *Id.* § 5362(1)(E)(ix)(I).

71. *Id.* § 5362(1)(E)(ix)(II).

72. *Id.* § 5362(1)(E)(ix)(III).

73. Pete Brush, *Too Easy to Play? Your Fantasy Game Might Be Illegal*, LAW360 (July 24, 2015, 2:07 PM), <http://www.law360.com/articles/675467/too-easy-to-play-your-fantasy-game-might-be-illegal>.

meet the UIGEA's requirements,⁷⁴ both traditional fantasy and DFS providers operate within this UIGEA carve-out.⁷⁵

Despite the federal statutory scheme, some states have tried to implement legalized sports gambling regimes, leading to several lengthy and high profile legal battles. In May 2009, Governor Jack Markell of Delaware signed into law legislation that legalized wagering on all sporting events, "making it the only state other than Nevada where such betting [was] allowed."⁷⁶ Markell believed that sports betting could generate up to \$30 million in gambling tax revenue⁷⁷ and at least \$52 million in total state revenue in the first year—an influx of funds the state desperately needed, as it was facing an estimated \$800 million budget deficit at the height of the Great Recession.⁷⁸ Calling the scheme "a competitive advantage that's available to Delaware and not to other states," Markell signed the bill at Delaware Park, one of the state's three racetrack-casinos that collectively stood to benefit from the legalization of sports betting.⁷⁹ Before the legislation was set to take effect, however, the Leagues filed suit in the United States District Court for the District of Delaware, seeking *inter alia*, a preliminary injunction enjoining Delaware state officials from implementing its proposed gaming scheme.⁸⁰ The Leagues based their claim for relief on the ground that the officials' actions amounted to "authorizing" sports wagering in contravention of PASPA's prohibitions.⁸¹ Although the district court denied the Leagues' motion for a preliminary injunction, the United States Court of Appeals for the Third Circuit granted the plaintiffs an expedited appeal and reversed the district court's decision.⁸² The Third Circuit held as a matter of law that the state's intended legislation violated PASPA and was therefore invalid.⁸³ The court determined that, consistent with PASPA's grandfather clause, Delaware could go forward with a limited sports betting scheme that mirrored the one it briefly put into place in 1976, but the state was prohibited from offering any single-game wagering or betting on any sporting events other than NFL games.⁸⁴ In May

74. See Palanzo, *supra* note 32, at 135.

75. Brush, *supra* note 73.

76. Theo Emery, *Delaware Legalizes Wagering on Sporting Events*, N.Y. TIMES (May 15, 2009), http://www.nytimes.com/2009/05/16/us/16delaware.html?_r=0.

77. Memorandum from Jennifer W. Davis et al., to Hon. Ruth A. Minner, Governor, State of Delaware, Sports Betting Report as per HJR 10 of the 144th Gen. Assem. 2 (Jan. 10, 2008), <http://finance.delaware.gov/publications/sportsbetting.pdf>.

78. Emery, *supra* note 76.

79. *See id.*

80. *See* Office of the Comm'r of Baseball v. Markell, 579 F.3d 293, 296–97 (3d Cir. 2009).

81. *See id.*

82. *Id.* at 304.

83. *Id.*

84. *Id.*

2010, the United States Supreme Court denied Delaware's petition for writ of certiorari, leaving the court of appeals' ruling in place.⁸⁵

New Jersey was the next state to attempt to legalize sports gambling despite the federal prohibition contained in PASPA and, like Delaware, was economically motivated. For much of the 1980s and 90s, New Jersey's Atlantic City casinos were actually earning more than the casinos on the Las Vegas strip, but ever since the 2008 financial crisis, New Jersey's once thriving legal gambling industry has experienced a steep economic decline.⁸⁶ In addition to the general nationwide downturn, the gambling industry's decline can also be attributed to increased competition from neighboring states, as several northeastern states, such as Pennsylvania, loosened their own (non-sports related) gambling prohibitions, ending New Jersey's decades-old regional "monopoly."⁸⁷ While gross gaming revenue in the northeastern U.S. market increased from \$9.5 billion in 2006 to \$11.7 billion in 2013, Atlantic City's share of that revenue fell from a total of \$5.2 billion to \$2.8 billion over the same period.⁸⁸ Pennsylvania, meanwhile, saw its gross gaming revenue rise sharply to \$3.1 billion in 2013, more than Atlantic City and second nationally behind Nevada.⁸⁹ Almost two-thirds of Pennsylvania's gambling revenue comes from the eastern part of the state, revenue that otherwise likely would have gone to Atlantic City if Pennsylvania had not loosened its restrictions on gambling.⁹⁰

It is not an exaggeration to say that the results for Atlantic City's economy have been drastic. Four casinos on the famed Atlantic City boardwalk closed in 2014, including the Trump Plaza Hotel and Casino and Revel, a \$2.3 billion project that opened just two years prior.⁹¹ This led to thousands of layoffs and unemployment claims, many of the former employees being local residents or nearby commuters.⁹² The state and local governments have been equally affected. Atlantic City's total assessed property value fell more than \$9 billion from \$20.5 billion in 2010 to \$11.3 billion in 2014, largely due to successful casino appeals for reassessments, in a municipality that derives up to ninety percent of its budget from real estate taxes.⁹³

Following the Delaware case, a group of New Jersey interest groups attempted to challenge the constitutionality of PASPA in *Interactive Media*

85. *Delaware Loses Appeal On Betting*, N.Y. TIMES (May 4, 2010), <http://www.nytimes.com/2010/05/04/sports/04sportsbriefs-delaware.html>.

86. Wolfson, *supra* note 2.

87. *Id.*

88. *New Jersey Gaming Summary*, UNLV CENTER FOR GAMING RESEARCH, http://gaming.unlv.edu/abstract/nj_main.html (last visited Feb. 15, 2016); *see also* Griego, *supra* note 2.

89. Griego, *supra* note 2.

90. *Id.*

91. Wolfson, *supra* note 2.

92. Griego, *supra* note 2.

93. *Id.*

Entertainment & Gaming Association v. Holder.⁹⁴ The plaintiff group was comprised of the Interactive Media Entertainment & Gaming Association, a New Jersey nonprofit corporation, three New Jersey “Horseman’s Associations,” which represented various members of the state’s horseracing industry, and New Jersey State Senators Raymond J. Lesniak and Stephen M. Sweeney.⁹⁵ By letter, New Jersey Governor Chris Christie declined to intervene in the action filed in the United States District Court for the District of New Jersey.⁹⁶ The plaintiffs made three major substantive arguments challenging PASPA’s constitutionality: (1) that Congress’s enactment of PASPA exceeded its Commerce Clause power because Congress did not legislate uniformly among the several states as required; (2) that PASPA violates the Equal Protection Clause of the Fourteenth Amendment because the Act allows citizens in four states to “enjoy the privilege of engaging in multiple forms and platforms for Sports Betting and Sports Betting in general,” while citizens from the remaining forty-six states are prohibited from enjoying the same privilege; and (3) that PASPA violated the Tenth Amendment by handing the federal government “express and implied reserved powers to the individual states to regulate matters affecting its citizens including the raising of revenue by means of a form of authorized Sports Betting.”⁹⁷ However, the district court granted the government’s motion to dismiss for lack of standing, finding that none of the plaintiffs satisfied the injury and redressability requirements for standing.⁹⁸ The court added that the state of New Jersey would be the appropriate party to challenge PASPA’s constitutionality on Tenth Amendment grounds.⁹⁹

In December 2010, the New Jersey Legislature got involved, seeking to provide “a potential economic lifeline to our casino and racetrack industries.”¹⁰⁰ While the *Interactive Media* litigation was pending, the Legislature proposed a voter referendum on a state constitutional amendment that would authorize it to legalize sports betting at the state’s casinos and horse racetracks.¹⁰¹ After the amendment passed with 64

94. See *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301(GEB), 2011 U.S. Dist. LEXIS 23383 (D. N.J. Mar. 7, 2011).

95. *Id.* at *2–3.

96. *Id.* at *3.

97. Complaint & Demand for Declaratory Relief at 18–23, 26–27, *Interactive Media Entm’t & Gaming Ass’n v. Holder*, No. 09-1301(GEB), 2011 U.S. Dist. LEXIS 23383 (D. N.J. Mar. 7, 2011).

98. See *Interactive Media*, 2011 U.S. Dist. LEXIS 23383.

99. See *id.*

100. Jeannie O’Sullivan, *Rematch Possible In Fight Over NJ Sports Betting Law*, LAW360 (Aug. 25, 2015, 10:15 PM), <http://www.law360.com/articles/695240/rematch-possible-in-fight-over-nj-sports-betting-law>.

101. Christopher L. Soriano, *The Efforts to Legalize Sports Betting in New Jersey – A History*, N.J. LAWYER 22, 24 (2013), http://www.duanemorris.com/articles/static/soriano_njlawyer_0413.pdf.

percent of the vote in the November 2011 general election, the Legislature proceeded to amend the Casino Control Act to authorize a license-based sports betting system at casinos and racetracks (the Sports Wagering Law).¹⁰² The state's Division of Gaming Enforcement and Racing Commission was given power to approve license applications for sports betting, with the exception that wagers continued to be prohibited on any college sporting events taking place in New Jersey, or any games involving a college team from the state.¹⁰³

As New Jersey prepared to implement its new sports gambling legislation, the Leagues, as they had in Delaware, attempted to block the state's efforts by filing suit in the district court in August 2012.¹⁰⁴ In *National Collegiate Athletic Association v. Governor of New Jersey (Christie I)*, the Leagues (and the United States as an intervening plaintiff) sought to enjoin the New Jersey state government from implementing the Sports Wagering Law on the grounds that the legislation violated PASPA.¹⁰⁵ The state moved to dismiss, claiming the Leagues lacked standing to bring the action and their claim failed on the merits, arguing that PASPA is unconstitutional under the Commerce Clause, the Due Process Clause, the Equal Protection Clause, and the Tenth Amendment.¹⁰⁶ The district court concluded that the Leagues had standing, and later upheld PASPA's constitutionality, granting summary judgment to the Leagues and enjoining New Jersey from implementing the Sports Wagering Law.¹⁰⁷

On appeal, the United States Court of Appeals for the Third Circuit affirmed the district court's rulings on the Leagues' standing, PASPA's constitutionality, and the injunction against the state in a 2-1 decision handed down in September 2013.¹⁰⁸ In arguing PASPA's unconstitutionality, the state focused on the Act's alleged violation of the "anti-commandeering" principle of the Tenth Amendment, which "bars Congress from conscripting the states into doing the work of federal officials."¹⁰⁹ New Jersey claimed PASPA's mandate that states maintain a ban on sports betting required the state to actively effectuate the federal legislation, a clear example of legislative commandeering, according to the state.¹¹⁰ The Third Circuit found no such violation, however, determining "there is nothing . . . to suggest that the [anti-commandeering] principle is meant to apply when a law merely operates via the Supremacy Clause to

102. *Id.*; N.J. STAT. ANN. §§ 5:12A-1 to -4 (West 2012) (repealed 2014).

103. Soriano, *supra* note 101, at 24.

104. *See* NCAA v. Governor of N.J. (*Christie I*), 730 F.3d 208 (3d Cir. 2013).

105. Soriano, *supra* note 101, at 24.

106. *Id.*

107. *Christie I*, 730 F.3d at 217.

108. *Id.* at 240–41.

109. *Id.* at 227.

110. Goodall, *supra* note 59, at 1118–19.

invalidate contrary state action.”¹¹¹ Lacking any affirmative command that the states enact or carry out a federal scheme, PASPA, according to the court, only stops the states from doing something, and therefore does not violate the anti-commandeering principle.¹¹²

Additionally, New Jersey argued that PASPA violates the equal sovereignty of the states by “singling out Nevada for preferential treatment and allowing only that state to maintain broad state-sponsored gambling.”¹¹³ Rejecting a “one-size-fits-all test for equal sovereignty analysis,” the court held that laws which treat states differently in order to combat “local evils” such as gambling are “but one of the types of cases in which a departure from the equal sovereignty principle is permitted.”¹¹⁴ Following the Third Circuit’s decision, New Jersey petitioned the United States Supreme Court for a writ of certiorari, but the Court declined to take the state’s appeal in June 2014.¹¹⁵

Bearing in mind the lessons of *Christie I*, the New Jersey Legislature made a second attempt to implement sports gambling in 2014, this time partially repealing the state’s existing sports gambling prohibitions (the 2014 Law).¹¹⁶ By almost “completely deregulat[ing] private sports wagering” in the state, the legislature believed it could allow sports gambling without violating PASPA, as the Third Circuit interpreted the Act in *Christie I*.¹¹⁷ Not surprisingly, the Leagues once again brought suit against New Jersey in district court, seeking to enjoin it from giving effect to the 2014 Law.¹¹⁸ The district court granted summary judgment in favor of the Leagues and issued a permanent injunction against the state, holding that a partial repeal of gambling legislation amounts to an authorization of sports wagering in violation of PASPA (*Christie II*).¹¹⁹

On appeal, New Jersey continued to argue that the 2014 Law complied with PASPA and, as a repeal of gambling legislation and not an affirmative act, was consistent with *Christie I*.¹²⁰ The Third Circuit rejected the argument, because the partial repeal only allowed sports betting to take place at casinos and racetracks, while leaving in place sports gambling

111. *Christie I*, 730 F.3d at 237.

112. *Id.*

113. *Id.*

114. *Id.* at 238–39.

115. Goodall, *supra* note 59, at 1127–29.

116. See N.J. STAT. ANN. §§ 5:12A-7 to -9 (West 2012), *invalidated by* Nat’l Collegiate Athletic Ass’n v. Governor of N.J., 799 F.3d 259 (3d Cir. 2015); NCAA v. Governor of N.J. (*Christie II*), 799 F.3d 259, 263 (3d Cir. 2015).

117. Goodall, *supra* note 59, at 1131–32; Martin Bricketto, *NJ Sports Betting Law Struck Down By 3rd Circ.*, LAW360 (Aug. 25, 2015, 10:36 AM), <http://www.law360.com/articles/684051/nj-sports-betting-law-struck-down-by-3rd-circ>.

118. *Christie II*, 799 F.3d at 263.

119. *Id.* at 263–64.

120. *Id.* at 264.

prohibitions everywhere else.¹²¹ The court noted this was “not a situation where there are no laws governing sports gambling in New Jersey,” and therefore the 2014 Law violated PASPA by providing authorization “for conduct that is otherwise clearly and completely legally prohibited.”¹²² Thus, despite the suggestion in *Christie I* that New Jersey could repeal its sports betting laws without violating PASPA, the court in *Christie II* switched positions, finding that the partial repeal amounted to an authorization of sports betting in violation of the federal legislation. However, the court conceded that, had the 2014 Law repealed all prohibitions on sports gambling, given *Christie I*, it would be difficult to find that the state “authorized” sports betting in violation of PASPA.¹²³

The state also made an interesting additional argument, though one that the court of appeals ultimately rejected as well. The state claimed that the district court erred in granting injunctive relief to the Leagues because the Leagues had unclean hands, a result of their hypocritically supporting sports gambling in other contexts, such as holding events in places where sports gambling is legal and “sanction[ing] and encourage[ing] fantasy sports betting.”¹²⁴ The court held, however, that such action is not “unconscionable” and therefore “fail[s] to rise to the level required for application of the unclean hands doctrine.”¹²⁵

Similarly to *Christie I*, *Christie II* was a split panel, 2-1 decision in the court of appeals.¹²⁶ Interestingly, though, and surprising to some, the dissenter in *Christie II*, Circuit Judge Julio M. Fuentes, was the author of the majority opinion in the former case.¹²⁷ Judge Fuentes disagreed with the majority as to whether a partial appeal amounted to an “authorization,” claiming the majority’s decision rested on a “false equivalence” between the two.¹²⁸ According to the dissent, a repeal, even a partial one, treats the repealed statute “as if it never existed.”¹²⁹ Judge Fuentes echoed his own language from the majority decision in *Christie I* to argue that “the lack of an affirmative prohibition of an activity does not mean it is *affirmatively* authorized by law.”¹³⁰

In September 2015, New Jersey requested an en banc rehearing of the case by the Third Circuit, adopting the view of Judge Fuentes’s dissent and arguing the majority’s opinion in *Christie II* was inconsistent with the

121. *Id.* at 265–66.

122. *Id.* at 266; *see also* Zagger, *supra* note 3.

123. *Christie II*, 799 F.3d at 266.

124. *Id.* at 268.

125. *Id.*

126. O’Sullivan, *supra* note 100.

127. *See id.*

128. *Christie II*, 799 F.3d at 269 (Fuentes, J., dissenting).

129. *Id.*

130. *Id.* at 269–70 (Fuentes, J., dissenting) (quoting *NCAA v. Governor of N.J. (Christie I)*, 730 F.3d 208, 232 (3d Cir. 2013)).

concept of “authorizing by law” defined in *Christie I*.¹³¹ Although en banc rehearings are “extraordinarily rare,” the Third Circuit granted the state’s request over the Leagues’ objections, vacating its previous decision and agreeing to take another look at the issue.¹³² Oral arguments took place on February 17, 2016 and the Third Circuit’s en banc decision is forthcoming as of this writing.¹³³ However, observers and commentators have noted that the judges appeared skeptical toward New Jersey’s arguments, and the state has a “steep hill to climb” to convince the Third Circuit to hold in its favor.¹³⁴ Whichever side loses could then attempt to appeal to the United States Supreme Court for further review, prolonging the now years-old litigation even further. The Supreme Court only accepts about 1 percent of cases for review, however, and the lack of any circuit split makes it less likely the Court will take the case.¹³⁵

III. DFS GAMES ARE GAMBLING

As previously discussed, the UIGEA contains an explicit carve out for fantasy sports games, which recognizes them as a game of skill, provided that “winning outcomes reflect the relative knowledge and skill of the participants.”¹³⁶ DFS providers have operated within this federal exception since their inception, believing that as a game of skill they do not constitute gambling and are therefore legal. DFS providers maintain this argument despite the fact that the legislation “was enacted at a time when season-long fantasy sports matchups, not daily ones, were becoming popular.”¹³⁷ Analysis of whether DFS falls within this exception must, however, be conducted in the context of state law, which governs most gambling-related regulations and determines whether a game is one of “skill” or “chance.”¹³⁸

131. See Matthew Perlman, *NJ Pols Say 3rd Circ. Contradicted Itself On Sports Betting*, LAW360 (Sept. 8, 2015, 8:11 PM), <http://www.law360.com/articles/700400/nj-pols-say-3rd-circ-contradicted-itself-on-sports-betting>.

132. Joe Drape, *Appeals Court to Rehear New Jersey Sports Betting Case*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/sports/appeals-court-to-rehear-new-jersey-sports-betting-case.html>; see also Matthew Perlman, *Leagues Urge 3rd Circ. Not to Rehear NJ Sports Betting Case*, LAW360 (Sept. 30, 2015, 5:06 PM), <http://www.law360.com/articles/708974/leagues-urge-3rd-circ-not-to-rehear-nj-sports-betting-case>.

133. McCann & Green, *supra* note 51.

134. *Id.*; see also David Purdum, *Judges Skeptical of New Jersey Sports Betting Bid*, ESPN (Feb. 18, 2016), http://espn.go.com/chalk/story/_/id/14800849/chalk-leagues-appear-upper-hand-new-jersey-sports-betting-case.

135. McCann & Green, *supra* note 51.

136. Zachary Zaggar, *Outlook for Fantasy Sports Murky Amid Increased Scrutiny*, LAW360 (Sept. 18, 2015, 7:57 PM), <http://www.law360.com/articles/704086/outlook-for-fantasy-sports-murky-amid-increased-scrutiny>.

137. Kimberly Pierceall, *Q&A: A Look at How Daily Fantasy Sports Websites Operate*, ASSOCIATED PRESS (Oct. 16, 2015, 11:37 PM), <http://bigstory.ap.org/article/b0c7a72a3d464057912b118bbf61ee01/qa-look-how-daily-fantasy-sports-websites-operate>.

138. David O. Klein, *Fantasy Sports: The Rapidly Developing Legal Framework*, LAW360 (Sept. 20, 2015, 10:27 PM), <http://www.law360.com/articles/704275/fantasy-sports-the-rapidly-developing-legal-framework>; see also Dustin Gouker, *Daily Fantasy Sports Sites Say Their Users*

States vary in their treatment of the chance or skill division, resulting in a patchwork legal framework.¹³⁹

In the majority of states, the standard for whether a game is one of skill or chance is the “Dominant Element Test.”¹⁴⁰ Under this predominant test, the issue of “the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game.”¹⁴¹ Whether an activity constitutes gambling depends on the answers to two questions: (1) “[i]s the result of an activity separable from the element of chance, so that skills can be determinative, at least in some cases?”; and (2) “is the result always sufficiently affected by the operation of chance that chance could always account for the result?”¹⁴² Although the Dominant Element Test has been adopted in a majority of states, the analysis is further complicated by the fact that courts and legislatures among the states disagree on how to apply it, meaning there is “no clear consistency in how states treat activities . . . even when it comes to the same game.”¹⁴³ A minority of states use the conservative “Any Chance Test,” under which wagering on a game that contains any element of chance, however small, is always prohibited as gambling.¹⁴⁴ This minority includes states such as Arizona, Iowa, Louisiana, North Dakota, Vermont, and Washington.¹⁴⁵

A few states have dealt with the legality of fantasy sports explicitly. Montana has taken a unique approach and under its state law, “it is lawful to conduct or participate in a fantasy sports league as long as no wagers take place by either the telephone or Internet.”¹⁴⁶ Montana therefore potentially allows traditional, season-long fantasy sports leagues among friends, while clearly prohibiting Internet-based DFS providers.¹⁴⁷ In three other states—Arizona, Florida, and Louisiana—the respective attorneys general have examined fantasy sports and issued advisory opinions, each concluding that

Aren't Gambling. They're Wrong., WASH. POST (Oct. 13, 2015), <http://www.washingtonpost.com/posteverything/wp/2015/10/13/daily-fantasy-sports-sites-say-their-users-arent-gambling-theyre-wrong/> (“The aforementioned carve-out from the 2006 federal law paves the way for states to determine the legality of daily fantasy sports.”).

139. Klein, *supra* note 138.

140. Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports*, 22 SPORTS L.J. 79, 96 (2015).

141. *Id.*

142. *Id.*

143. Dana L. Hooper, *Outside the Lines: An Examination of the Legal Veracity of Fantasy Sports As an Exception to Traditional Gambling Regulation*, 1 SPORTS & ENT. L.J. 115, 125 (2011); *see also* Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering In the United States*, 40 J. MARSHALL L. REV. 1195, 1204 (2007).

144. Cabot & Csoka, *supra* note 143, at 1205.

145. Klein, *supra* note 138.

146. Ehrman, *supra* note 140, at 100–01 (citing MONT. CODE ANN. § 23-5-802 (2011)).

147. *Id.* at 101.

fantasy sports played for money are illegal games of chance.¹⁴⁸ However, these are merely persuasive authority and thereby nonbinding to courts.

Very recently, numerous other major states have noticed the explosion in popularity of DFS and have begun to address the legal questions underlying the billion-dollar industry. In October 2015, the Nevada Gaming Control Board, in conjunction with the state Attorney General, issued a notice declaring that DFS is a form of gambling under Nevada law, and, as a result, DFS providers are required to be licensed with the Nevada Gaming Commission and comply with the appropriate regulations.¹⁴⁹ The regulators ruled that DFS providers, such as DraftKings and FanDuel, must suspend operations and cease from offering their games to Nevada residents until the companies obtained the requisite licenses.¹⁵⁰

Less than a month later, New York State Attorney General Eric T. Schneiderman sent cease and desist letters to the major DFS providers, telling them their games constituted illegal gambling under state law and ordering them to stop accepting bets from New York residents.¹⁵¹ The Attorney General followed up the letters by seeking an injunction in New York state court to prohibit the DFS providers from operating in the state, claiming the DFS games were “plainly illegal” and “nothing more than a rebranding of sports betting.”¹⁵² The New York Attorney General’s action in the area is particularly important to the nationwide treatment and perception of DFS games for two reasons: First, New York is the DFS industry’s largest market, containing 12.8 percent of all DFS users.¹⁵³ Second, New York is where the headquarters of FanDuel, all the major sports leagues, and many of the media companies and other investors that have partnered with the DFS providers and powered their explosive growth, are located.¹⁵⁴ At least a dozen additional states have taken or are currently considering legislative or executive action aimed at regulating DFS games as gambling, including California, Illinois, Texas, Massachusetts, Michigan, and Florida, with the list growing rapidly.¹⁵⁵

148. Cabot & Csoka, *supra* note 143, at 1206.

149. Joe Drape, *Nevada Says It Will Treat Daily Fantasy Sports Sites as Gambling*, N.Y. TIMES (Oct. 15, 2015), <http://www.nytimes.com/2015/10/16/sports/gambling-regulators-block-daily-fantasy-sites-in-nevada.html>.

150. *Id.*

151. Walt Bogdanich, Joe Drape & Jacqueline Williams, *Attorney General Tells DraftKings and FanDuel to Stop Taking Entries in New York*, N.Y. TIMES (Nov. 10, 2015), <http://www.nytimes.com/2015/11/11/sports/football/draftkings-fanduel-new-york-attorney-general-tells-fantasy-sites-to-stop-taking-bets-in-new-york.html>; Joe Drape, *End Sought to Fantasy Sites in New York; Yahoo Is Said to Be Added to Inquiry*, N.Y. TIMES (Nov. 17, 2015), <http://www.nytimes.com/2015/11/18/sports/football/draftkings-fanduel-new-york-attorney-general-injunction.html> [hereinafter Drape, *End Sought to Fantasy Sites*].

152. Drape, *End Sought to Fantasy Sites*, *supra* note 151.

153. *Id.*

154. *Id.*

155. See Alexandra Berzon & Sharon Terlep, *Fantasy Sports Trade Association Gets Subpoena From U.S. Prosecutor*, WALL ST. J. (Oct. 16, 2015, 7:42 PM), <http://www.wsj.com/articles/fantas>

As a result of the preceding state actions, the major DFS providers currently prohibit the residents of seven states from participating in their games: Arizona, Iowa, Hawaii, Louisiana, Montana, Nevada, and Washington.¹⁵⁶ The recent trend of states, especially states employing the Dominant Element Test, to regulate DFS supports the argument that DFS games constitute gambling everywhere in the United States, regardless of which test for gambling a particular state has adopted. This is because DFS games cannot be rationally understood as anything other than games predominated by chance. Expert players can put together what appears to be an optimal lineup, but with a couple of unlucky bounces or untimely injuries, even the best roster of fantasy players can lose. As one legal commentator has noted, “an amateur chess player will likely never beat a grandmaster; a hastily constructed fantasy lineup will beat a pro’s lineup some percentage of the time.”¹⁵⁷

DFS games resemble traditional gambling in numerous ways that suggest they are, and should be treated, the same. Even though DFS games do not involve wagering directly on the outcomes of any games, the choices that its participants make look similar to the “prop” bets that sports books usually offer on many facets of individual games, including the statistical performances of individual players.¹⁵⁸ Also, similar to traditional casino gambling, “[a] vast majority of [DFS] players are net losers, losing far more money playing on the sites than they win.”¹⁵⁹ DraftKings’ data shows that “89.3 percent of [its] players had an overall negative return on investment across 2013 and 2014.”¹⁶⁰ According to other data, in the first half of the 2015 MLB season, 91 percent of DFS player profits were won by just 1.3 percent of players.¹⁶¹ This disparity leads to the conclusion that DFS games may have taken on a different set of characteristics common to unregulated or illicit sports gambling enterprises (and even some legal ones), namely corruption.

y-sports-trade-association-gets-subpoena-from-u-s-prosecutor-1445030125; Joe Drape, *Illinois Says Daily Fantasy Sports Are Illegal*, N.Y. TIMES (Dec. 23, 2015), <http://www.nytimes.com/2015/12/24/sports/illinois-says-daily-fantasy-sports-are-illegal.html>; Joe Drape, *Texas Attorney General Deems Daily Fantasy Sports Illegal*, N.Y. TIMES (Jan. 19, 2016), <http://www.nytimes.com/2016/01/20/sports/texas-attorney-general-deems-daily-fantasy-sports-illegal.html>; Klein, *supra* note 138; Zagger, *supra* note 136.

156. See *Terms of Use*, FANDUEL, <https://www.fanduel.com/terms> (last visited Feb. 15, 2016); see also *Terms of Use*, DRAFTKINGS, <https://www.draftkings.com/help/terms> (last visited Feb. 15, 2016).

157. Gouker, *supra* note 138.

158. See Zagger, *supra* note 136.

159. Drape, *End Sought to Fantasy Sites*, *supra* note 151.

160. *Id.*

161. Drake Baer, *Fantasy Football Has Been Infiltrated By a ‘Shark and Fish’ System That Crushes Most People’s Chances*, TECH INSIDER (Sept. 16, 2015, 12:09 PM), <http://www.techinsider.io/fantasy-football-favors-the-sharks-heavily-over-the-fish-2015-9>.

Allegations have swirled regarding predatory tactics and questionable use of insider information by DFS providers and their employees, leading the Federal Bureau of Investigation (FBI) to open an inquiry into the companies' practices.¹⁶² The FBI became involved shortly after a scandal in which a DraftKings employee admitted on a fantasy sports message board that he had prematurely released sensitive data about the site's biggest contest and, the same week, won \$350,000 by playing on rival FanDuel's site.¹⁶³ Although both companies claimed the employee received no additional advantage over other players as a result of the data, they both quickly banned their employees from playing DFS games on any site.¹⁶⁴ The scandal has led to the filing of numerous class action lawsuits by players against the major DFS providers and heightened calls from federal lawmakers to regulate DFS providers as illegal (or at least unlicensed) sports gambling entities.¹⁶⁵ The allegations make sense within the model of the "shark and fish" theory discussed above, where DFS providers "need a lot of people to play – even for a little bit of money – in order to pay out big prizes which, in theory, entice people to keep playing," but which in reality are won by a small minority of players.¹⁶⁶

DFS providers have referred to the gambling nature of their own games in numerous contexts. In filing for an injunction against the major DFS providers, the New York Attorney General's office alleged that FanDuel told an early investor that its target market is the male sports fan who cannot "gamble online legally," while DraftKings' CEO had called DFS a "mash-up between poker and fantasy sports" with a revenue model "identical to a casino."¹⁶⁷ Moreover, these companies have embedded gambling keywords into the programming code for their websites to drive traffic from people looking to gamble on search engines.¹⁶⁸ DFS providers

162. See Berzon & Terlep, *supra* note 155; Drape, *supra* note 149.

163. Berzon & Terlep, *supra* note 155.

164. Matthew Perlman, *FanDuel Bans Employees From Fantasy Play, Opens Review*, LAW360 (Oct. 7, 2015, 3:15 PM), <http://www.law360.com/articles/711960/fanduel-bans-employees-from-fantasy-play-opens-review>; Benjamin Horney, *Latest Suit Says FanDuel, DraftKings Allowed 'Shark Bettors'*, LAW360 (Oct. 16, 2015, 4:16 PM), <http://www.law360.com/articles/715172/latest-suit-says-fanduel-draftkings-allowed-shark-bettors>.

165. See Benjamin Horney, *More Controversy for FanDuel, DraftKings in NY Class Action*, LAW360 (Oct. 15, 2015, 3:21 PM), <http://www.law360.com/articles/714637/more-controversy-for-fanduel-draftkings-in-ny-class-action>; Horney, *supra* note 164; Benjamin Horney, *NJ Lawmakers Seek Federal Regulation for Fantasy Sports*, LAW360 (Oct. 7, 2015, 5:24 PM), <http://www.law360.com/articles/712080/nj-lawmakers-seek-federal-regulation-for-fantasy-sports>.

166. See Myles Udland, *Fantasy Sports Companies Spend So Much on Commercials They're Moving the Needle on TV Ad Spending*, BUS. INSIDER (Oct. 6, 2015, 2:56 PM), <http://www.businessinsider.com/draftkings-fanduel-daily-fantasy-sports-advertising-2015-10>; see also Baer, *supra* note 161. For an in-depth look at how these predatory tactics play out in DFS, see Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES MAGAZINE (Jan. 6, 2016), http://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0.

167. Drape, *End Sought to Fantasy Sites*, *supra* note 151.

168. *Id.*

have also acknowledged their own gambling nature when seeking to expand their operations into jurisdictions outside the United States and Canada.¹⁶⁹ For example, DraftKings has applied for, and received a gaming license to, operate in Britain, where sports gambling is legal, heavily regulated, and extremely popular.¹⁷⁰

The fact that DFS providers have formed explicit ties with other gambling entities further undermines the claim that DFS is not itself a form of sports gambling. Some online gambling companies have invested in the major DFS providers, engaging in cross-promotion arrangements as well.¹⁷¹ Both FanDuel and DraftKings have recruited and hired senior executives who came from online gambling companies or were professional poker players.¹⁷² DFS providers have also borrowed a classic sponsorship strategy from their online poker cousins, hiring rosters of “celebrity endorsers” who are professional or semi-professional fantasy players, along with showcasing DFS success stories.¹⁷³ DFS providers then put their enormous advertising budgets to use, “bombarding television and the internet with [inspirational] ‘this man turned \$50 into \$31,000 in three weeks’ tales.”¹⁷⁴ Many of these sponsored players use complicated computer programs and algorithms that give them a significant advantage over other players; these “professionals” are some of the very same “shark bettors” that casual players complain about in lawsuits against DFS providers.¹⁷⁵ Overall, despite the frantic claims of DFS providers who suddenly find themselves under fire, these games blur the line between fantasy sports and gambling and thereby make the distinction unworkable. What once was considered a grey area of legal uncertainty has quickly, and increasingly, been exposed for what it is—a form of sports gambling that should be regulated if it is to remain legal.

IV. UNCLEAN HANDS AND THE FUTURE OF PASPA

Experts have noted that the real winners from the courts’ rulings in *Christie I* and *Christie II* are the DFS providers, which “can continue to entrench [themselves] without competition from legalized sports betting.”¹⁷⁶ When the Third Circuit renders its en banc decision in *Christie II*, before

169. Gouker, *supra* note 138.

170. *Id.*

171. Bogdanich, Drape & Williams, *supra* note 151.

172. *Id.*

173. Davis, *supra* note 38.

174. *Id.* According to one analyst, DraftKings and FanDuel likely spent a combined \$150 million on TV and Internet advertising in the third quarter of 2015 alone, which included the beginning of the football season. The outlay from the DFS giants was enough to add 0.5 percent to the overall TV advertising growth numbers for the fiscal quarter. Udland, *supra* note 166.

175. See Zachary Zagger, *DraftKings, FanDuel Hit with Insider Scandal Class Action*, LAW360 (Oct. 8, 2015, 9:26 PM), <http://www.law360.com/articles/712738/draftkings-fanduel-hit-with-insider-scandal-class-action>; see also Horney, *supra* note 164.

176. See Zagger, *supra* note 3.

even reaching the merits of whether a partial repeal of sports betting legally counts as an authorization of sports wagering in violation of PASPA, the state of New Jersey, and the economic interests it represents, will have a much stronger hypocrisy argument than it did in its previous actions. New Jersey can and should now argue that the Leagues are acting with unclean hands in seeking equitable relief. Far from merely hosting sporting events in jurisdictions that allow sports betting, the Leagues have all, to varying degrees, intertwined themselves with and supported DFS providers. DFS providers are increasingly and forcefully being recognized at the state and federal levels for what they are: a form of sports gambling that has managed to escape regulation. MLB, the NBA, the NHL, and Major League Soccer (MLS) are all investors in DFS providers, as are many of the Leagues' largest media partners, such as Comcast, NBC, and Fox Sports.¹⁷⁷ While the NFL is not a direct investor, nearly every one of its teams has a sponsorship deal with DraftKings or FanDuel, and "two powerful [team] owners – Jerry Jones of the Dallas Cowboys and Robert K. Kraft of the New England Patriots – have equity stakes in the companies."¹⁷⁸ One legal commentator specializing in gambling and sports law has noted, "[t]he irony is that the N.F.L. and other leagues are filing against New Jersey while at the same time . . . supporting daily fantasy If they maintain the suit in New Jersey, it sure looks like they are trying to have it both ways."¹⁷⁹ This clear hypocrisy, bordering on anti-competitive behavior, may be enough to defeat the Leagues' action and allow New Jersey to move forward with its own sports gambling scheme.

Even if this argument is ultimately unsuccessful and the court once again strikes down New Jersey's proposal, it is still in the state's and the gambling industry's best interest to publicize the idea that the Leagues are acting with unclean hands as much as possible. DFS providers are under intense scrutiny at the moment, and more and more states are currently mandating DFS providers cease operations within their borders.¹⁸⁰ One potential step could be for New Jersey to join these other states in banning DFS, or at least investigating publicly the connection between DFS and sports gambling, although, realistically, it makes sense for New Jersey to wait until the full conclusion of its *Christie II* litigation before undertaking such action.¹⁸¹ Nonetheless, the Leagues may have reached a level of

177. Bogdanich, Drape & Williams, *supra* note 151; Heitner, *supra* note 6.

178. Bogdanich, Drape & Williams, *supra* note 151.

179. Drape, *supra* note 149. In 2013, the chief executive of Major League Baseball Advanced Media, Robert Bowman, said DFS is "akin to the flip of the coin, which is the definition of gambling." Just over a year later, MLB signed a partnership with DraftKings. See Davis, *supra* note 38.

180. See Drape, *supra* note 155.

181. New Jersey state lawmakers, in fact, announced in 2015 that they would not move on "any sort of DFS regulation until the state's sports betting case was resolved," because such an attempt "could be seen as being at odds with the sports betting law" for which the state fought. Dustin

involvement that is too deep to simply abandon and sever their relationships with DFS. Ultimately, this could push the Leagues to instead make a complete change in position on sports gambling and side with New Jersey, supporting the repeal of PASPA and the institutionalization of large scale licensed and regulated sports wagering. Given how instrumental the Leagues were in Congress's original drafting and adoption of PASPA, League support and lobbying efforts would likely go a long way in ending the federal prohibition. By capitalizing on this opportunity, the gambling industry, and states that seek to increase tax revenue through sports gambling, could turn their most vociferous opponents into their most powerful allies.

The likelihood of these events coming to pass is bolstered by another recent development: some of the Leagues are *already* publicly indicating a change of stance on the issue of sports gambling. In November 2014, NBA Commissioner Adam Silver made waves when he wrote a *New York Times* op-ed piece in which he argued that Congress should legalize regulated sports betting in the United States, the first public stance of its kind to come from a major North American professional sports league.¹⁸² Silver argued that “[g]ambling has increasingly become a popular and accepted form of entertainment in the United States,” and pointed to the “thriving underground business that operates free from regulation or oversight” as further support for his position that there is “an obvious appetite among sports fans for a safe and legal way to wager on professional sporting events.”¹⁸³ Silver called on Congress to adopt a federal framework that would allow states to authorize sports betting on a piecemeal, as-desired basis, subject to strict regulatory requirements and technological safeguards that, according to the Commissioner, should include: “mandatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures, geo-blocking technology to ensure betting is available only where it is legal; mechanisms to identify and exclude people with gambling problems; and education about responsible gaming.”¹⁸⁴ MLB Commissioner Rob Manfred has also recently made statements in support of sports betting that, “while more tempered than [Commissioner] Silver’s, are still a stark departure from baseball’s long-held anti-betting stance.”¹⁸⁵

Gouker, *If New Jersey Wins Sports Betting Appeal, What Might Happen Next In U.S.?*, LEGAL SPORTS REP. (Feb. 16, 2016, 11:04 PM), <http://www.legalsportsreport.com/7524/new-jersey-sports-betting-case-impacts/>.

182. See Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), <http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.

183. *Id.*

184. *Id.*

185. Zagger, *supra* note 3.

The Leagues are beginning to realize that they can leverage the public's interest in sports betting into higher ratings, more attention, and higher revenues from the sale of complimentary and informational products, just like they have by promoting and investing in fantasy sports.¹⁸⁶ They are also finding that successful regulatory schemes exist and can be implemented to both ensure their cut of the profits and protect against game-fixing and other threats to the competitive integrity of sporting events. In Nevada, where the sports betting scheme is extensive, the Gaming Control Board—the regulatory agency for gaming throughout the state—has long noted a lack of any issues with local universities and professional teams, finding the scandals usually happen in other states where gambling is illegal.¹⁸⁷ Nevada has also provided examples of how regulation can effectively weed out corruption and other potential game fixing in sports. One such example occurred in March 1994, when “Las Vegas casinos noticed more than \$1 million pouring in on an Arizona State basketball game that normally generated about \$50,000 in gambling activity.”¹⁸⁸ The casinos alerted the FBI, which uncovered “a point-shaving scandal involving Arizona State players, a campus bookie and gamblers from Chicago.”¹⁸⁹ Leagues like the NBA are also looking to Europe, where legalized sports betting is a thriving, but closely watched, industry that is regulated like a stock market, with irregular betting patterns being identified in order to maintain the integrity of sporting events.¹⁹⁰ The Leagues and/or regulators in states other than Nevada can use these models to develop similar systems to protect against corruption, while still expanding legalized sports gambling.

CONCLUSION

While traditional sports gambling remains an extremely popular, yet illegal activity in the United States, DFS providers have carved out and built a massive new type of sports gambling industry, entirely within the grey confines of a legal loophole. The Leagues, hypocritically, have and continue to intertwine themselves in this process. As the popularity of DFS continues to rise, significant challenges to sports gambling legalization remain contentious and extensive. Perhaps the biggest among them is the “continued vehement opposition by the NFL, by far the league with the most clout in Washington,” and to a lesser extent, the NCAA as well.¹⁹¹ The

186. See Heitner, *supra* note 6.

187. Joe Drape, *Cash-Hungry States Eye Sports Betting, to Leagues' Dismay*, N.Y. TIMES (Mar. 27, 2013), <http://www.nytimes.com/2013/03/28/sports/more-states-look-to-get-in-the-sports-bettin-g-game.html>.

188. Hobson, *supra* note 13.

189. *Id.*

190. See Zagger, *supra* note 3.

191. In 2014, the NFL spent \$1.2 million on lobbying, according to the Center for Responsive Politics, while the NCAA spent \$580,000. The NBA, NHL, and MLB spent \$700,000 combined. See Hobson, *supra* note 13. The DFS providers are also getting involved, as DraftKings reportedly

political tide is shifting, however, as state governments, the public, and even the Leagues begin to understand just how much money can be made from sports gambling that, despite being allegedly illegal, is already reaching new and unprecedented levels of popularity. This shifting tide is making it more likely than ever that PASPA, at least as it currently stands, could soon be a prohibition of the past.¹⁹² DFS has presented a unique opportunity to states like New Jersey who seek the political capital to repeal PASPA, as “[i]t is not hard to discern why politicians can get behind changing the law with these kind of tax revenues at stake for their constituents . . . not to mention the campaign donations from all the people and companies that could benefit from a change in the law.”¹⁹³ The Leagues are finally being forced to realize that this group includes them as well.

*Jordan Meddy**

spent about \$80,000 on political lobbying in the fourth quarter of 2015. Ryan Rodenberg, *Four Big Issues Facing the DFS Industry in 2016*, ESPN (Feb. 11, 2016), http://espn.go.com/chalk/story/_/id/14759843/daily-fantasy-payment-processors-leaving-big-issues-surrounding-industry.

192. In May 2016, the House Subcommittee on Commerce, Manufacturing and Trade held an informational hearing focused on the legal and consumer-protection issues surrounding DFS, and whether federal oversight may be needed. Reports indicated “a broader look at the prohibition of traditional sports betting and online gambling laws also [would] be part of the discussion.” Purdum, *supra* note 43.

193. Heitner, *supra* note 6.

* B.A., Vassar College, 2006; M.S., Syracuse University, 2008; J.D. Candidate, Brooklyn Law School, 2017. This work is dedicated to my late grandmother, Sheila Berkowitz, who inspires me to work hard and live life joyfully. Special thanks go to Jennifer Drayer and my parents, Jodee Meddy and Stewart Berkowitz, for all of their love and support. Finally, I would like to give my endless gratitude to the entire staff of the *Brooklyn Journal of Corporate, Financial & Commercial Law*, in particular, Ned L. Schultheis and Dylan L. Ruffi, for their hard work in preparing this Note for publication.