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FROM ‘TOO SMALL TO NOTICE’ TO ‘TOO BIG TO FAIL’ – THE RAPID GROWTH OF DAILY FANTASY SPORTS, AND DFS EFFORTS TO CHANGE ILLINOIS GAMBLING LAWS

Marc Edelman*

I. INTRODUCTORY REMARKS

On March 4, 2016, *DePaul Law Review* hosted its 26th annual symposium on the topic of “Daily Fantasy Sports and Sports Gambling.”¹ The DePaul Law Review symposium featured not only legal experts, such as myself, but also an advocate for the Fantasy Sports Trade Association (FSTA) and an Illinois state representative who sought to affirmatively legalize “daily fantasy sports.”² The symposium marked only the second time that a law review has devoted an entire day to discussing the legal status of daily fantasy sports.³ The goal of the symposium was to analyze the legal future of daily fantasy sports with a special emphasis on the proposed legislation to affirmatively legalize daily fantasy sports in the state of Illinois.⁴

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1. *See 26th Annual DePaul Law Review Symposium: Daily Fantasy Sports and Sports Gambling*, DEPAUL U.C.L., <http://via.library.depaul.edu/law-review/symposia.html> (last visited Sep. 18, 2016); *see Law Review Symposium Brings Daily Fantasy Sports to Light*, DEPAUL U.C.L. (Mar. 14, 2016), <http://law.depaul.edu/about/news/Pages/Sportsgamblingsymposium.aspx>.

2. H.B. 4323, 99th Gen. Assemb., Reg. Sess. (Ill. 2015). The advocate from the Fantasy Sports Trade Association who presented was Peter Schoenke, the Chairman of the FSTA Board of Directors. Meanwhile, the state representative in attendance was Rep. Michael J. Zalewski, who introduced the Fantasy Contests Act to the Illinois General Assembly. *See supra* note 1.

3. The first law review to devote an entire day to discussion of daily fantasy sports was the *Northern Kentucky Law Review*, which hosted a symposium titled “The New Era in Gaming Law” on March 20, 2015. *The New Era in Gaming Law*, N. KY. U. CHASE COLL. L., <http://chaselaw.nku.edu/academics/lawreview/symposia/gaming-law.html>. I participated in that symposium and also published an article about the legal status of daily fantasy sports. *See* Marc Edelman, *Speech: The Legal Status of Daily Fantasy Sports in a Changing Business Environment*, 42 N. KY. L. REV. 443 (2015). More than one dozen other law schools conducted symposiums during the 2015–2016 academic year with panels related to daily fantasy sports; however, these other symposiums were generally not full-day events, nor were they affiliated with the law school’s primary law journal.

4. *See supra* note 1.

These introductory remarks serve as a summary of my conversation at the DePaul Law Review Symposium on daily fantasy sports.⁵ The topics discussed in this article include the following: (1) a brief overview of the daily fantasy sports marketplace;⁶ (2) an overview of the legal status of daily fantasy sports under Illinois law;⁷ (3) an analysis of the Illinois Attorney General letter determining that daily fantasy sports violate Illinois state law;⁸ and (4) an explanation and critical evaluation of the Illinois bill that sought to legalize daily fantasy sports.⁹ This article ends with some general remarks about the overall state of the daily fantasy sports industry.¹⁰

II. DAILY FANTASY SPORTS INDUSTRY OVERVIEW

The term “fantasy sports” describes “a wide range of contests, in which participants construct virtual teams to compete against other participants’ teams, using statistics generated by real-life athletes in individual and team-based sporting events.”¹¹ Participants manage their virtual rosters of real-world players throughout a professional sports season, set team lineups, and trade players with fellow fantasy owners.¹² It is a highly social activity, as well as one that keeps friends

5. This Article is not intended to replicate or replace my three full-length law review articles on fantasy sports and the law, which discuss these issues in far greater detail. For a more thorough analysis of legal issues pertaining to daily fantasy sports, see Marc Edelman, *A Short Treatise on Fantasy Sports & the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1 (2012); Marc Edelman, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 ILL. L. REV. 117 (2016); Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L. J. (forthcoming Jan. 2017).

6. See *infra* notes 11–25 (describing the difference between “fantasy sports” and “daily fantasy sports,” and the legal issues that impact them).

7. See *infra* notes 25–36 (describing the legal status of daily fantasy sports under Illinois law and the related analysis of the amount of skill and chance involved in participating in them).

8. See *infra* notes 37–41 (noting Attorney General Lisa Madigan’s interpretation of the illegality of daily fantasy sports).

9. See *infra* notes 42–55 (explaining why Representative Michael Zalewski’s bill failed to distinguish daily fantasy sports from online gambling).

10. See *infra* notes 57–62 (noting that while state representatives and lobbyists continue to fight about whether to legalize daily fantasy sports, both FanDuel and DraftKings continue to operate in Illinois and other questionable states).

11. Edelman, *Regulating Fantasy Sports*, *supra* note 5 (manuscript at 5); see also *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 179648, at *1 (D.N.J. June 20, 2007) (“Fantasy sports leagues allow participants to ‘manage’ virtual teams of professional players in a given sport throughout a sport’s season and to compete against other fantasy sports participants based upon the actual performance of those players in key statistical categories.”).

12. See *Humphrey*, 2007 WL 179648, at *1–2 (explaining that “the success of a fantasy sports team depends on the participants’ skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench”).

in communication throughout their favorite professional sports season.¹³

By contrast, daily fantasy sports are conducted over shorter periods of time, such as a single week or day of competition.¹⁴ “Most ‘daily fantasy sports’ contests entail participants competing against a huge pool of entrants, rather than a small group of friends. In addition, most ‘daily fantasy sports’ contests ‘do not allow for the forms of roster management that simulate what a real-life team manager does.’”¹⁵ For this reason, some legal analysts liken daily fantasy sports, in certain respects, to traditional sports gambling.¹⁶ Meanwhile, others, perhaps more brazenly, purport there is absolutely no difference whatsoever between daily fantasy sports and illegal gambling.¹⁷

It is amazing how, in just a few years, the daily fantasy sports industry has gone from too small to notice to, perhaps, “too big to fail.”¹⁸ In 2011, when I first wrote my article for the *Harvard Journal of Sports and Entertainment*, the daily fantasy sports industry was so small that it warranted less than two pages of discussion within my more than fifty-page article.¹⁹ Meanwhile, today, the two largest daily fantasy sports companies, FanDuel and DraftKings, each value themselves at upwards of \$1 billion.²⁰ The major investors in daily fantasy

13. See Michael Hiestand, *Online Leagues of Their Own Internet Provides Fantasy Groups Ways to Have Fun by Association*, USA TODAY (Oct. 6, 1999), <http://pqasb.pqarchiver.com/USA Today/doc/408828856.html?FMT=ABS&FMTS=ABS:FT&date=Oct+6%2C+1999&author=Hiestand%2C+Michael&pub=USA+TODAY&edition=&startpage=01.C&desc=Online+leagues+of+their+own+Internet+provides+fantasy+groups+ways+to+have+fun+by+association> (quoting Debby Goldberg, marketing director for Smallworld.com, who explains how playing fantasy sports helps people to keep up with friends).

14. Edelman, *Regulating Fantasy Sports*, *supra* note 5 (manuscript at 9).

15. *Id.* (quoting Letter from Kathryn M. Rowe, Md. Assistant Att’y Gen., to Hon. Thomas V. Mike Miller, Jr., Md. S. President 16–17 (Jan. 15, 2016), <http://www.legalsportsreport.com/wp-content/uploads/2016/01/Miller-01-15-16.pdf>).

16. See Edelman, *Regulating Fantasy Sports*, *supra* note 5 (manuscript at 10) (“The underlying concept behind ‘daily fantasy sports’ is a hybrid between mainstream fantasy sports and sports betting.”).

17. See, e.g., Daniel Wallach, *No Question, PASPA Applies to Daily Fantasy Sports*, SPORTS L. BLOG (Jan. 11, 2016, 1:18 PM), <http://sports-law.blogspot.com/2016/01/no-question-paspa-applies-to-daily.html> (arguing that the Professional and Amateur Sports Protection Act, which is designed to disallow traditional sports gambling, “contains language that is arguably (and perhaps inarguably) directed at fantasy sports”).

18. Raju Mudhar, *Daily Fantasy Sports Industry Mired in Controversy*, TORONTO STAR (Dec. 14, 2015), <https://www.thestar.com/sports/2015/12/14/daily-fantasy-sports-industry-mired-in-controversy-mudhar.html> (concluding that “[a]s for what’s next, there should absolutely be regulation of [daily fantasy sports] ventures although, at this point, these [daily fantasy sports] companies almost feel like they are too big to fail”).

19. See generally Edelman, *A Short Treatise*, *supra* note 5.

20. See Tom Huddleston, Jr., *Fantasy Sports Site FanDuel Is Now Worth Over \$1 Billion*, FORTUNE (July 14, 2015, 11:38 AM), <http://fortune.com/2015/07/14/fanduel-funding-billion/>.

sports include not only the large private equity companies, but also many of the professional sports leagues in the United States, including Major League Baseball and the National Basketball Association.²¹

Recognizing the unsettled legal status of daily fantasy sports, FanDuel and DraftKings recently hired attorney and lobbyist Jeremy Kudon to try to change state laws to ensure legality of their contests.²² These efforts have led to state legislators proposing new bills to insulate daily fantasy sports from traditional state gambling laws.²³ Nevertheless, these new bills, even where implemented, do not obviate the questions as to whether FanDuel and DraftKings jumped the gun by launching their daily fantasy sports contests before securing legal change.

III. SHORT OVERVIEW OF LEGAL STATUS OF DAILY FANTASY SPORTS UNDER ILLINOIS COMMON LAW

Greatly oversimplified, the legal status of daily fantasy sports varies based on the “nature of any specific contest’s game rules and where that particular contest operates.”²⁴ As a matter of state law, almost every state recognizes that online contests constitute illegal gambling if three elements are met: (1) consideration (generally an entry fee paid by individual participants); (2) reward (generally a prize); and (3) chance (rather than skill).²⁵ The specific manner in which each state defines “chance” varies.²⁶

21. See Curt Woodward, *DraftKings, FanDuels Raking in Millions as Yahoo Jumps in Game*, BOS. GLOBE: BETA BOSTON (July 14, 2015), <http://betaboston.com/news/2015/07/14/draftkings-fanduel-raking-in-millions-as-yahoo-jumps-in-the-game/> (noting that FanDuel’s new investment round was led by the private equity firms KKR & Co., Google Capital, and Time Warner Investments, meanwhile its “previous investors included NBC Sports Ventures and Comcast Ventures”); see also Christopher Reynolds, *Fantasy Sports’ Trials and Tribulations*, TORONTO STAR (Dec. 11, 2015), <http://torontostar.newspaperdirect.com/epaper/services/OnlinePrintHandler.ashx?issue=1038201512110000000001001&page=56&paper=A3> (listing investors in DraftKings including: “Fox Sports, Major League Baseball, the National Hockey League, Major League Soccer, Madison Square Garden Company, Legends and the Kraft Group”).

22. See generally Curt Woodward, *Daily Fantasy Faces Huge Legal Test in N.Y. Statehouse*, BOS. GLOBE (June 4, 2016), <https://www.bostonglobe.com/business/2016/06/03/daily-fantasy-faces-huge-legal-test-statehouse/bzSic35Zd6VSP2jKprUDyL/sotry.html>.

23. See Philip Marcelo, *State Legislatures See a Flurry of Daily Fantasy Sports Bills*, ASSOCIATED PRESS (Feb. 28, 2016, 3:15 PM), (describing the “flurry of recent legislative activity” in the area of state bills pertaining to daily fantasy sports).

24. Marc Edelman, *Navigating the Legal Risks*, *supra* note 5, at 119 (“[I]n all likelihood, the legal status of ‘daily fantasy sports’ varies based on the nature of any specific contest’s game rules and where that particular contest operates.”).

25. See Edelman, *A Short Treatise*, *supra* note 5, at 26–29.

26. See *infra* notes 28–30 and accompanying text (describing how various states define “chance” in the context of daily fantasy sports and their gambling laws).

On one end of the spectrum, some states, known as “predominant purpose test states,” allow individuals to legally operate contests in which the underlying activity, from a mathematical perspective, entails more skill than chance.²⁷ On the opposite end of the spectrum, other states, known as “any chance states,” prohibit contests that involve even a “modicum” of chance.²⁸ Meanwhile, between these two types of states, some states apply a variety of middle ground tests.²⁹

Illinois is one of the states that has long applied a middle ground test for “illegal gambling.”³⁰ Applying Illinois’s gambling statute, a person “commits gambling when he [or she] plays a game of chance or skill for money or other thing of value.”³¹ Nevertheless, it is a defense to the crime of illegal gambling in Illinois when the parties engaged in the wager are “[p]articipants in . . . any bona fide contest for the determination of skill, speed, strength or endurance.”³²

There are few cases in Illinois that attempt to explain how the state’s general gambling law interacts with the “bona fide contest for the determination of skill” exception.³³ Most notably, in the early 1980s the Illinois Appellate Court upheld the conviction of two individuals who participated in a Hold’em poker game, concluding that “[a]lthough there was some testimony tending to indicate that the poker games involved some degree of skill, [the court did] not find the jury’s implicit conclusion that they were not ‘bona fide contests for the determination of skill’ so improbable as to warrant a reversal.”³⁴ In other words, the threshold of “skill” required to evade liability for illegal gambling in Illinois is quite high.³⁵

27. See *O’Brien v. Scott*, 89 A.2d 280, 283 (N.J. Super. Ct. Ch. Div. 1952) (explaining that under New Jersey’s application of the predominant purpose test, “[t]he test 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, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment”).

28. See Edelman, *A Short Treatise*, *supra* note 5, at 31–32 (discussing the “any chance” states).

29. Edelman, *Navigating the Legal Risks*, *supra* note 5, at 134; see also N.Y. PENAL LAW § 225.00(1) (McKinney 2015) (defining a “contest of chance” to include “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein”) (emphasis added); *United States v. DiCristina*, 726 F.3d 92, 98 (2d Cir. 2013).

30. See *infra* notes 32–33 and accompanying text (explaining that Illinois defines “gambling” as a game involving either chance or skill).

31. 720 ILL. COMP. STAT. 5/28-1(a)(1) (2014); see also *Phillips v. Double Down Interactive LLC*, No. 15 C 04301, 2016 WL 1169522, at *6–7 (N.D. Ill. Mar. 25, 2016) (clarifying that the same standard applies to online contests, accessible in Illinois).

32. 720 ILL. COMP. STAT. 5/28-1(b)(2) (2014).

33. See *infra* note 35 and accompanying text (referencing a case in which the defendants were unable to prove that a poker game involved some degree of skill).

34. *People v. Mitchell*, 444 N.E.2d 1153, 1155 (Ill. App. Ct. 1983).

35. *Id.* at 1157.

IV. ILLINOIS ATTORNEY GENERAL LETTER

Given the unsettled legal status of daily fantasy sports under Illinois gambling law, the House of Representatives' Judiciary Committee late last year requested a written legal opinion from Attorney General Lisa Madigan.³⁶ Upon her review, the attorney general concluded that daily fantasy sports were illegal in Illinois because these contests constituted "a game of chance or skill for money or other things of value."³⁷

The Illinois attorney general further opined that daily fantasy sports were not excluded from Illinois gambling law based on the statutory exception for "[p]articipants in . . . any bona fide contest for the determination of skill, speed, strength or endurance."³⁸ According to Madigan, the "bona fide contest" exception only applied with respect to "actual contestants in the actual sporting event."³⁹ In daily fantasy sports, the actual participants, according to Madigan, are the actual athletes and not the individuals trying to predict how the athletes will perform.⁴⁰

V. PROPOSED ILLINOIS FANTASY SPORTS BILL

In light of the negative attorney general ruling in Illinois, Representative Michael J. Zalewski, in conjunction with the lobbying efforts of Jeremy Kudon, proposed a bill to affirmatively legalize daily fantasy sports within the state.⁴¹ The proposed bill, known as the Fantasy Contests Act, sought to exempt "fantasy contests" from all existing state gambling laws.⁴² The bill provides a comprehensive definition of a "fantasy contest" as follows:

36. Letter from Lisa Madigan, Ill. Att'y Gen., to Hon. Elgie R. Sims Jr., Chairperson, Ill. H.R. Judiciary – Criminal Comm. & Rep. Scott R. Drury, Vice-Chairperson, Ill. H.R. Judiciary – Criminal Comm. 1 (Dec. 23, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/12/Illinois-DFS.pdf>.

37. *Id.* at 6–7, 13 (citing 720 ILL. COMP. STAT. 5/28-1(a)(1) (2014)); *c.f. id.* at 12–13 (acknowledging that "daily fantasy sports contests may involve some degree of skill, such as selecting an athlete for a participant's team based on the knowledge of the athlete's historical performance, match-up against a particular opponent, performance in a particular venue, and/or performance in particular weather conditions").

38. 720 ILL. COMP. STAT. 5/28-1(b)(2) (2016).

39. Letter from Lisa Madigan, Ill. Att'y Gen., to Hon. Elgie R. Sims Jr. & Hon. Scott R. Drury, Ill. State Judiciary Comm'n, at 10 (Dec. 23, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/12/Illinois-DFS.pdf> (quoting 720 ILL. COMP. STAT. 5/28-1(b)(2) (2016)).

40. *Id.* (explaining further that "[i]n this regard, persons whose wagers depend upon how particular, selected athletes perform in actual sporting events stand in no different stead than persons who wager on the outcome of any sporting event in which they are not participants").

41. *See infra* notes 43–47 and accompanying text (discussing the proposed bill legalizing daily fantasy sports in Illinois).

42. *See* H.B. 4323, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).

[A]ny fantasy or simulated game or contest in which: (1) winning participants are eligible to receive cash or anything else of value; (2) the value of all prizes and awards offered to winning participants are established and made known to the participants in advance of the contest; (3) all winning outcomes reflect the relative knowledge and skill of the participants and shall be determined predominantly by accumulated statistical results of performance of individuals, including athletes in the case of sports events; and (4) no winning outcome is based on the score, point spread, or any performance or performances of any single actual team or combination of such teams or solely on any single performance of an individual athlete or player in any single actual event.⁴³

In exchange for special treatment under Illinois gambling law, the bill proposes a series of special regulations to help ensure that operators of “fantasy contests” do not cause harm to the public.⁴⁴ Among these special regulations include requirements prohibiting fantasy sports employees from entering contests, requirements allowing individuals to self-exclude themselves from daily fantasy sports websites, requirements for segregating player funds from general company accounts, and rules requiring an annual third-party audit.⁴⁵ The punishment for violating any of these requirements is a fine of up to \$1,000 for each instance of misconduct.⁴⁶

The proposed bill, however, leaves many unsettled questions about both its purpose and its scope.⁴⁷ First, the bill fails to explain why, as a matter of public policy, daily fantasy sports should be treated more favorably than other forms of online gaming. In addition, while the bill only applies to contests based on “the relative knowledge and skill of the participants,” it fails to explicitly stipulate what type of daily fantasy sports contests meet this threshold.⁴⁸ Third, it is unclear as to whether the Illinois Fantasy Contests Act applies to online contests that involve predicting the performance of individual athletes who themselves compose a team such as those competing in sports such as golf and NASCAR.⁴⁹ Finally, it is also uncertain whether any contest

43. *Id.* at 2–3.

44. *Id.*

45. *Id.*

46. *Id.* at 4.

47. See *infra* notes 49–51 and accompanying text (showing ambiguities in the proposed bill to legalize daily fantasy sports in Illinois).

48. H.B. 4323, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).

49. The problem is that the performance of a single golfer or NASCAR racer generally represents the performance of an entire “team” in his or her event, and the winning performances in a daily fantasy golf or daily fantasy NASCAR tournament are generally based on just a single real-world event (whether that be a golf tournament or a NASCAR race). See generally Edelman, *Navigating the Legal Risks*, *supra* note 5, at 147 (noting the same problem with the argument

protected under the bill would separately violate the federal Professional and Amateur Sports Protection Act.⁵⁰

Nevertheless, these questions about how exactly to interpret the Illinois Fantasy Contests Act became moot when Representative Zalewski decided, at the last minute, not to put the bill up for vote.⁵¹ In an unusual turn of events, another state representative, Representative Rita Mayfield,⁵² purportedly “became privy to an email in which a lobbyist working for FanDuel and DraftKings suggested he could get support from members of the House Legislative Black Caucus in exchange for contributions to their foundations.”⁵³ This email created such a stir that Illinois legislators tabled their vote on the Fantasy Contests Act, even though FanDuel, DraftKings and Jeremy Kudon all staunchly deny the allegations of any lobbyist misconduct.⁵⁴ Thus, at present, daily fantasy sports remains governed in Illinois by the state’s more general gambling laws.

that DraftKings daily fantasy golf or daily fantasy NASCAR would comply with the Unlawful Internet Gambling Enforcement Act’s carve-out for fantasy sports).

50. See Professional and Amateur Sports Protection Act, 28 U.S.C. § 3702 (2012) (making it illegal for any private person or state to operate “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate.”). Any reasonable interpretation of the Professional and Amateur Sports Protection Act is likely to be read in conjunction with the more recent Unlawful Internet Gambling Enforcement Act, which exempts from the scope of that law any fantasy or simulation sports contest in which three specific criteria are met: (1) “All prizes and awards offered to winning participants are established . . . in advance of the game or contest;” (2) “All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals . . . in multiple real-world sporting or other events;” and (3) “No winning outcome is based on the score . . . of any single real-world team or any combination of such teams; or . . . any single performance of an individual athlete in any single real-world sporting event.” See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix) (2012).

51. See Ivan Moreno, *Illinois Daily Fantasy Sports Betting Bill Shelved*, ASSOCIATED PRESS THE BIG STORY (May 29, 2016, 9:39 PM), <http://www.bigstory.ap.org/article/31cf61cda13c44239c2e1670d9225795/illinois-daily-fantasy-sports-betting-bill-shelved>.

52. *Repetitive Rita Mayfield*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/house/rep.asp?MemberID=1969>.

53. Moreno, *supra* note 51; see also Tina Sfondeles, *Fantasy Sports Bill Hits Snag Amidst Lobbyist Scandal*, CHI. SUN TIMES (May 27, 2016, 7:31 PM), <http://chicago.suntimes.com/news/fantasy-sports-bill-sna-lobbyist-scandal/> (quoting Illinois Representative Mayfield about a purportedly “illegal” letter sent by a lobbyist for FanDuel and DraftKings).

54. See *Lawmakers Make Little Progress: Fantasy Sports Bill Delayed; Budget Impasse Remains Unresolved*, HERALD & REV., May 30, 2016, at A (quoting Jeremy Kudon as stating “We categorically reject the implication that DraftKings or FanDuel would partake in such behavior”); Sfondeles, *supra* note 53.

VI. CONCLUDING THOUGHTS

The process of attempting to affirmatively legalize daily fantasy sports in Illinois has been similar to many other states, including Tennessee and New York.⁵⁵ First, daily fantasy sports companies launch their businesses despite an undeniable ambiguity in state law. Next, the state attorney general issues a written opinion concluding that the underlying contests violate state law. Then, the daily fantasy sports operators, through a lobbyist, work with state legislators to propose a new statute to affirmatively legalize daily fantasy sports. Finally, these bills are signed into law by the state governor.

In Tennessee, the new state bill legalizing daily fantasy sports has already been voted upon favorably by the state legislature and signed into law.⁵⁶ The same is now true in New York.⁵⁷ Meanwhile, in Illinois, the state legislature ultimately failed to vote on the bill—leaving the legal status of daily fantasy sports still very much in doubt.⁵⁸

As of the date of publishing this article, both FanDuel and DraftKings, nevertheless, continue to operate their contests in Illinois despite Attorney General Lisa Madigan's negative advisory opinion.⁵⁹ Rather than act in a risk averse manner, the leadership of both FanDuel and DraftKings are all but daring the state of Illinois to bring a legal action against their companies. Perhaps, these companies truly believe that, if challenged, they will be able to convince a court that their contests fall within Illinois "bona fide contest" exception.⁶⁰ Al-

55. See *infra* notes 57–58 and accompanying text (discussing how New York and Tennessee have both passed legislation legalizing daily fantasy sports).

56. See Dustin Gouker, *Tennessee Governor Signs Fantasy Sports Bill; Third State To Enact DFS Law*, LEGAL SPORTS REP. (Apr. 28, 2016, 9:18), <http://www.legalsportsreport.com/9774/tennessee-governor-signs-daily-fantasy-sports-bill-law-third-state-regulate-dfs>.

57. See Yancey Roy, *Fantasy Sports Games Legalized in NY After Cuomo Signs Bill*, NEWS-DAY (Aug. 3, 2016), at <http://www.newsday.com/news/region-state/gov-cuomo-signs-bill-legalizing-fantasy-sports-games-in-ny-1.12129947>; c.f. Evan Grossman, *What's the Holdup with Daily Fantasy Sports in NY? Ask Gov. Cuomo*, N.Y. DAILY NEWS (June 27, 2016, 1:50 PM), <http://www.nydailynews.com/sports/holdup-daily-fantasy-ny-gov-cuomo-article-1.2689891> ("More than a week after the landmark DFS bill cleared the Senate and Assembly in Albany, it has not been delivered to [Governor Andrew] Cuomo. When it does arrive, Cuomo will have 10 days to sign or veto it before it becomes law and DFS players can resume participating in the contests.").

58. See Moreno, *supra* note 51.

59. See *FanDuel Terms of Use* § 3, FANDUEL, <https://www.fanduel.com/terms> (last updated Aug. 3, 2016) (listing the states where users are prohibited from entering FanDuel contests, including "Alabama, Arizona, Delaware, Hawaii, Idaho, Iowa, Louisiana, Montana, New York, Nevada, Texas or Washington"); *DraftKings Terms of Use*, DRAFTKINGS, <https://www.draftkings.com/terms-of-use> (last updated July 21, 2016) (listing the states where users are prohibited from entering DraftKings contests, including "Alabama, Arizona, Delaware, Hawaii, Idaho, Iowa, Louisiana, Montana, Nevada, New York, and Washington").

60. See 720 ILL. COMP. STAT. 5/28-1(b)(2) (2016).

ternatively, with the strong backing from private equity firms and the professional sports leagues, legal advisors for FanDuel and DraftKings may simply believe their businesses are already “too big to fail.”⁶¹

61. Mudhar, *supra* note 18.