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FRAUDDUEL AND DRAFTKROOKS: CHANCE OR SKILL?

Erica M. Boos*

I. INTRODUCTION

When one turns on the news, scrolls through Twitter, or actually looks at the news app on his or her iPhone, an article regarding daily fantasy sports (“DFS”) is inevitable. It is even more likely to turn on a television or radio and hear an advertisement for one of the DFS companies- “join now and enter this promo code for a free $200 to start your team!” or “I won thousands, and you can too!” Controversies are running rampant regarding these big name companies (such as their payment of big money for advertising). The media has brought attention to their legal issues and the million (potentially billion) dollar question is: are DFS a game of chance or skill? This question then turns into other interesting legal issues, such as patent infringement claims by other gaming companies, and use of athletes’ images and likenesses.  

How will the legal world respond to the popularity of these sites and make a decision about the legality of DFS? Will the current media firestorm carry any weight? With all of the recent events and changes, will these legal issues be answered soon?

This article will delve into the history of DFS, and how these issues entered the crosshairs of the legal world. The resolved and unresolved issues involving DFS will be explored through case law and current events, while attempting to reconcile these issues with the shift in perspective regarding this hot-button topic. Finally, the future of DFS will be analyzed and potential points of concern and alternatives to daily fantasy will be examined.

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II. HISTORY OF DAILY FANTASY SPORTS

DFS has recently seen a boom in popularity, and are becoming a controversial topic within the areas of law and athletics. DFS is like a game played online, and works similar to traditional fantasy sports. Competitors choose sports players to create their lineups or rosters for the day or week (depending on the sport), and points are accumulated based on how well the chosen players perform in real games. The competitor’s roster will depend on how well he or she allocates the budget, because better players have higher “salaries,” and would require more money to add to the roster. Competitors invest imaginary money on players based on values set by the respective fantasy sports site.

A central strategy common to these games is to find players that are undervalued, so one can add them to his or her roster for a low price, with the hope that the chosen players perform better than other combinations of player rosters. The point of the game is to create a team that will score the most points, by gaining the most yards, hitting the most home runs, etc. Competitors with teams that performed the best that day or week receive payouts or winnings, and the winnings reflect the “relative knowledge and skill of the participants.”

Fees are required to enter games that pay out awards and prizes for the best performers, and this is where legal issues can arise. Some argue that these fees are actually wagers, which would in turn constitute gambling. However, due to prior legislation, DFS are not federally outlawed, regardless of recent developments in a handful of states regarding their legality. Current legislation provides an exemption for season-long fantasy sports if they adhere to certain crite-

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3 Id.
4 Id.
6 See Bien, supra note 2.
7 See How Daily Fantasy Sports Work, supra note 5.
8 See Bien, supra note 2.
9 Id.
10 Id.
11 Id.
ria, and the question surrounding DFS is whether they require enough skill to also be exempted.

The Passage of PASPA and UIGEA

In 1992, Congress passed the Professional and Amateur Sports Protection Act ("PASPA"). PASPA effectively outlawed sports betting across the Nation, save for a few states. Some states (e.g., New Jersey and Iowa) are currently trying to repeal PASPA and to legalize sports betting. The logic is that it is unfair for some states (e.g., Delaware, Montana, Nevada, and Oregon) to allow legalized sports gambling while others do not.

In 2006, Congress passed the Unlawful Internet Gambling Enforcement Act ("UIGEA"). The UIGEA exempted fantasy sports from the federal regulations of gambling, and mandates that all prizes offered to winners need to be established and made known to the participants in advance of the game, with the value not being determined by the number of participants or the amount of any fees paid by those participants. Also, it mandates that all winning outcomes must reflect the relative knowledge and skill of the participants and be determined predominantly by accumulated statistical results of the performance of individuals in real-world sporting events. Further, the UIGEA mandates that no winning outcome can be based on the score, point-spread, or any performances of any single real-world team or solely on any single performance of an individual athlete in any single real-world sporting event.

Humphrey and Beyond

In the 2007 case of Humphrey v. Viacom, the United States District Court for the District of New Jersey was the first court to take inter-

15 Id.
pret fantasy sports and gambling. Humphrey sought to invoke the *qui tam* laws of multiple states in an attempt to recover losses incurred by the residents of each state who participated in defendants’ fantasy sports games. The Court found that the entry fees did not constitute wagers, and also recognized the absurdity in determining that the combination of an entry fee plus a prize equaled gambling. The Court further found that entry fees did not constitute wagers because the fees were paid unconditionally, the prizes were for amounts certain and guaranteed, and defendants were neutral parties in the fantasy sports games who did not compete for the prizes, but rather administered information and provided support services for the games. Humphrey’s argument likened DFS to gambling on other sports because of its aspect of chance (e.g., injuries, etc.). The Court stated that the question of whether the money awarded was a bona fide prize could be determined without deciding whether the outcome of the game was determined by skill or chance. There are three elements to gambling: prize, chance, and consideration. Humphrey went on to state that these elements are essential to a lottery, but the court reiterated that lotteries have a different statutory scheme, and that lotteries, in this case, were not at issue.

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21 Id. at 6 (*Qui Tam* statutes derive from the 1710 Statute of Queen Anne, an English statute that authorized gambling losers and informers to sue to recover losses incurred “at any [t]ime or sitting by playing at [c]ards, [d]ice, [t]ables or other [g]ame or [g]ames whatsoever or by betting on the [s]ides or [h]ands of such as do play at any of the [g]ames aforesaid”); id. at 7 (Although the specific elements of the *Qui Tam* statutes vary, they share a common origin and purpose. They were intended to prevent gamblers and their families from becoming destitute due to gambling losses -- and thus becoming wards of the State -- by providing a method for the gambler's spouse, parent or child to recover the lost money from the winner...The statutes were also intended to supplement states' general anti-gaming provisions in an era when local governments' own regulatory and enforcement powers were much less effective than they are today.).
22 Id. at 5.
23 Id. at 20.
24 Id. at 19.
25 Id. at 6 (Humphrey concluded that “…the Defendants' fantasy sports leagues constitute gambling because the participant “wagers” the entry fee for the chance to win a prize and the winner is determined predominantly by chance due to potential injuries to players and the vicissitudes of sporting events in general.”).
26 Id.
27 Id. at 2–21 (“A prize or premium differs from a wager in that in the former, the person offering the same has no chance of his gaining back the thing offered, but, if he abides by his offer, he must lose; whereas in the latter, each party interested therein has a chance of gain and takes a risk of loss…”).
28 Id. at 22.
30 Id. at 22.
Court found that the entry fees for defendants’ fantasy sports leagues were not bets or wagers because the entry fees were paid unconditionally, the prizes offered to fantasy sports contestants were for certain specified amounts that were guaranteed to be awarded, and defendants did not compete for the prizes. The Court granted defendants’ Motion to Dismiss Humphrey’s Complaint, and the score had been settled: fantasy sports was not subject to internet gambling legislation.

Post-Humphrey, another notable case followed: Langone v. Patrick Kaiser & FanDuel, Inc. Langone, an Illinois lawyer, decided to sue over the illegality of DFS. Langone claimed that DFS were illegal gambling, and sought to recover money that FanDuel and Kaiser allegedly won from participants. The case was dismissed on procedural grounds, but Langone subsequently filed a suit with similar claims (which ended in a confidential settlement).

There is no concrete case law, in recent years, regarding this topic, but from the cases that are available, it is clear that statutory construction and plain language should be given deference. Questions then arise: is it better to keep laws regarding DFS uniform across the nation? Or is it simply easier to outlaw DFS altogether?

III. CURRENT EVENTS IN A CHANGING LEGAL WORLD

A. State by State Decisions

There have been many new developments regarding the legality and controversy surrounding DFS just within the last year. In October 2015, Nevada ruled that DFS are considered a form of gambling, and that persons would be required to have a license in order

31 Id. at 24–5.
32 Id. at 32.
34 Id. at 1–2.
35 Id. at 3.
36 Id. at 24.
to operate in that state. Since Nevada decided that DFS are a form of gambling, but are exempt from PASPA, doesn’t it follow that daily fantasy is outlawed in all other states subject to PASPA? As of now, no DFS operators/companies have applied for a gambling license in the state of Nevada, possibly due to a fear that the application for a license would amount to an admission of engaging in gambling operations.

New York has experienced noteworthy developments since December 2015, and sought an injunction against daily fantasy companies, which was granted and then stayed until the issue could be resolved. After the stay was granted, DraftKings stated that it would remain operational pending the court decision in New York. The statute at issue in the New York case is the New York Penal Law § 225.00(1), which defines a contest of chance.

This dispute in New York is once again based on the question of whether or not DFS are a game of chance or skill.

Within one month, Illinois followed suit, declaring DFS illegal. Illinois Attorney General Lisa Madigan stated that DFS constitutes illegal gambling under state law, and that Illinois residents are not eligible to compete unless and until the Illinois General Assembly passes legislation exempting DFS from state gambling law.

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42 Id.

43 NY CLS Penal § 225.00(1) (2016).

44 See FanDuel and DraftKings Lose Major Battle in NY, supra note 41.


DraftKings and FanDuel have since expressed support for Representative Mike Zalewski of the Illinois House of Representatives. Zalewski has proposed legislation to regulate DFS betting, and says his bill would: (1) define what is considered DFS in Illinois; (2) bar anyone younger than 18 from playing; (3) establish best practices for the industry, including limits on how often a person plays; let sites check participants for child support liens, and establish audit standards; and (4) prohibit athletes and industry insiders from playing.

Illinois Representative Mike Zalewski has emphasized the lack of clarity on DFS and the skill versus chance debate. Zalewski even went so far as to call DFS new technology, because of the lack of clarity, making it independent of anything else. Zalewski’s hope is that this bill would not only protect participants, but also small companies in Illinois that provide fantasy sports games and similar services. Zalewski stated that he is less interested in resolving the chance versus skill debate, and focuses more on allowing adults to continue playing the games. The CEO of FanDuel stated that he wishes to continue to work with lawmakers in Illinois to ensure consumer safety, and aspires to create standards that the entire fantasy industry could adhere to in order to allow Illinois residents to continue to play DFS.

In January 2016, Texas became the most recent state to deem DFS illegal. Texas Attorney General Ken Paxton published a nonbinding opinion, which stated that DFS were inconsistent with current Texas law, but did not go so far as to force the industry completely out of the state. An attorney for DraftKings retorted that Paxton’s classification of daily fantasy as illegal derived from a fundamental

49 Id.
50 Id.
51 Id.
52 Id.
55 Id.
misunderstanding of the industry. Paxton responded and further clarified that the legislature, not the Attorney General’s office or the courts, had the responsibility to alter the legal structure regarding DFS.

FanDuel and DraftKings sued Texas after Paxton’s opinion was issued, with FanDuel eventually settling but DraftKings soldiering on. FanDuel’s settlement with Texas allows it to continue operating its free games/contests, but DraftKings is seeking further clarification on the ruling. DraftKings’s attorney has stated the company’s confidence in its position, and that it looks forward to presenting evidence in order to prove DFS are legal under Texas law, that these games are skill-based, and that they are no less legal than other skill-based games.

The Mississippi Attorney General’s office also succumbed to numerous requests for guidance regarding DFS and issued an opinion on its legality. The opinion stated in no uncertain terms, “[f]antasy sports wagering is illegal in the state of Mississippi under current law both on a licensed gambling floor and outside of a licensed gaming floor. Any change to the law would be a matter within the purview of the Legislature.” Mississippi further determined that DFS are not allowed in a licensed gaming establishment pursuant to the Mississippi Gaming Control Act, highlighting language which states that “...no wagering shall be allowed on the outcome of any athletic event.” The opinion also points out that the Mississippi gambling code finds in violation anyone encouraging, promoting or playing any game for money, making DFS illegal anywhere in the state, not just licensed facilities. The opinion stipulates that the amount of skill required for daily fantasy is irrelevant, but posits that playing a game, such as foosball, is not prohibited but that betting on such

56 See Weber, supra note 54.
57 Id.
59 Id.
60 Id.
62 Id.
63 Id.
64 Id.
games should be.\textsuperscript{65}

As of March 2016, Virginia became the first state to legalize DFS.\textsuperscript{66} The new “Fantasy Contests Act” states that DFS sites in Virginia will now be overseen by its Department of Agriculture and Consumer Service.\textsuperscript{67} Virginia legislators recognized daily fantasy as games of skill rather than chance, allowing the sites avoid the federal ban on online gambling.\textsuperscript{68} The law requires bi-yearly independent audits, all participants to be over the age of eighteen, and a $50,000 fee for a license to operate in Virginia.\textsuperscript{69}

Indiana has also recently passed a similar bill through its House and Senate.\textsuperscript{70} Like Virginia’s statute, the Indiana bill designates fantasy sports as games of skill, requires a $50,000 licensing fee per year (with a $5,000 per year renewal fee), requires participants to be over the age of eighteen, requires companies to keep player funds and business funds separate, and prohibits college and high school sports betting.\textsuperscript{71} It is not obvious if the NCAA had any impact on the language of the bills/amendments, or if it was merely a result of compromise among the legislatures. This language could be attributable to all ten major college conferences and the NCAA sending a request to DraftKings and FanDuel to discontinue college game competitions on their sites in August 2015.\textsuperscript{72} DFS companies have also been banned from advertising during the College Football Playoffs and any basketball tournaments.\textsuperscript{73}

DraftKings has publicly thanked Indiana representatives for advocating for and pushing forward with the legislation, in order to continue a dialogue with lawmakers to create a regulatory framework for fantasy sports.\textsuperscript{74} Rhode Island has proposed a similar bill, which would feature a lower yearly licensing fee of $10,000, but require

\textsuperscript{65} Id.
\textsuperscript{66} See Laura Lorenzetti, This is the First State to Legalize Daily Fantasy Sports, FORTUNE (Mar. 8, 2016), http://fortune.com/2016/03/08/daily-fantasy-sports-virginia/; VA S.B. 646 (2016).
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{71} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
daily fees for each contest run ($1,000 for NFL games, $300 for NBA and MLB games, $500 for car racing, and $200 for NHL and “other” events).75

The state of Georgia has yet to pass any laws regarding fantasy sports, but the Georgia Lottery Corporation requested information from Georgia Attorney, General Sam Olens, about DFS. Olens’s office offered informal advice that DFS are not authorized under Georgia law.76 The Georgia Attorney General’s Office also did not comment or have an official stance on whether participation in DFS is a violation of current Georgia law.77 However, the President of the Georgia Council on Problem Gambling has conveyed his concerns about the addictiveness and proliferation of DFS and the difficulty of putting any consumer protections into action.78

The state of Florida has been making headway on two bills that would make DFS legal in the state.79 One bill even survived the state senate, despite objections from the chairman of the Senate Regulated Industries Committee.80 On the same day, a similar bill passed the House Finance and Tax Committee, leaving it only one committee stop short of going to the Florida House for a vote.81 The main focus of the Florida bill is a provision that the Fantasy Sports Trade Association has struggled for, which would confirm once and for all that DFS games are not forms of gambling and not subject to state gaming regulations.82 Florida Senator Joe Negron has stated his reluctance to call the bill a slam-dunk, but hopes it is a working model, which would include reasonable regulations in order to protect consumers.83 Negron sees his bill as an alternative to declaring DFS illegal under current laws.84

77 Id.
78 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
B. An Industry Embroiled in Scandal

The DFS industry is on the defensive—it has hired seventy-five lobbyists in over thirty states.85 Paul Charchian, president of the Fantasy Sports Trade Association, has stated that the goal is to win its fight in “... 50 small battles, not one big battle.”86 Jeremy Kudon, an attorney for the DFS industry, has stated that state attorney generals’ ignorance of the industry, especially the way the games are played, is critical.87 Charchian, however, is optimistic, and estimates to have garnered around ten victories by this time in 2017, and assures that the DFS industry will survive this firestorm.88

There have also been controversies surrounding FanDuel and DraftKings regarding insider information, which illustrates the lack of oversight within DFS. In September 2015, a DraftKings employee won $350,000 playing daily fantasy on FanDuel, and had posted some information about ownership of players on fantasy sports sites before that week’s games had been played.89 A third-party investigation did not reveal any improprieties, but the U.S. Attorney General and New York Attorney General are investigating to confirm that no fraud was perpetrated.90 FanDuel and DraftKings have since banned employees from playing on competing sites. Is this too little too late? And where will the line be drawn: will spouses, family members, and friends of employees also be unable to play on competing sites?

A major development for DFS in 2016 is the news that a payment processing company which handled a majority of transactions for FanDuel and DraftKings will no longer handle these payments.91 The payment processing company, Vantiv Entertainment Solutions, has actually made the decision to leave the DFS industry altogether.92

86 Id.
87 Id.
88 Id.
90 See Atkinson, supra note 89.
92 Id.
Starting February 29, Vantiv will suspend all processing of payment transactions regarding DFS. Vantiv alluded to recent opinions from attorney generals in several states, declaring DFS illegal, as reasoning for withdrawing from the industry. DraftKings fired back, stating that it had no knowledge of Vantiv’s plans to leave the industry, and reminded Vantiv publicly of its requirement to fulfill contractual obligations with DraftKings through a statement from its lawyer.

Payment processors, such as Vantiv or PayPal Holdings Inc. (another major player in the daily fantasy industry), handle player deposits and withdrawals for companies like FanDuel and DraftKings. A PayPal spokesperson confirmed the company’s knowledge of Vantiv’s plans, and reiterated its continued review and consideration of DFS. Vantiv listed the uncertainty in the DFS world as a reason for disengaging, but has said that if the legal landscape and regulations change, they may return. If other credit card companies, banks, or payment processors follow Vantiv’s lead, the nearly two-billion-dollar DFS industry could suffer a serious blow.

The Major League Sports Syndicate

Commissioners of Major League Baseball, the National Basketball Association, and the National Football League have made their feelings known regarding DFS, and do not consider it gambling, but agree that the games need regulation. NFL Commissioner Roger Goodell stated, “when you are making money directly from it, people will question or at least [have a] perception of whether that influenced any actions, and we want to stay above that.” MLB Commissioner Rob Manfred said, “You want to make sure that the fantasy organizations have appropriate safeguards in place to ensure that things are fair, that there's not an inappropriate use of information and that fans who engage on these platforms have an opportunity to win.” NBA Commissioner Adam Silver professed:

93 Id.
94 Id.
95 Id.
96 Id.
97 Drape, supra note 91.
98 Id.
100 Id.
101 Id.
In terms of the integrity of those businesses, the confidence that fans have, that consumers have in playing those games, I think regulation is in order…People should know what percent of the pool of money is paid out in the same way you would at a track or at any other event where wagering is involved.\footnote{Id.}

Interestingly, Major League Baseball owns an undisclosed stake in DraftKings.\footnote{Id.} The NBA also holds an equity stake in FanDuel.\footnote{Id.} The NFL has its own rule that individual teams cannot hold a stake in any DFS company, but two owners have stakes in the companies (New England Patriots owner Robert Kraft and Dallas Cowboys owner Jerry Jones).\footnote{Id.} Also, after Texas Attorney General Paxton issued his opinion calling DFS illegal, Dallas Mavericks owner Mark Cuban tweeted his disappointment about Paxton’s ruling.\footnote{Id.} Cuban felt it necessary to further emphasize that his stance and support of DFS had nothing to do with his investment and ongoing advertising revenue from DFS companies.\footnote{Id.}

In addition to owning an NBA team, Cuban is also an investor in Fantasy Labs, a DFS analytics platform.\footnote{Id.} Although Cuban’s investment amount in Fantasy Labs has not been disclosed, the co-founder of the company has said it is a “significant enough amount of money to bring on a bunch of talented people so we can really scale our product development to create new tools and expand to new verticals, as well as ramp up marketing efforts.”\footnote{Id.} Cuban’s interest in DFS is becoming more apparent through his investments, but also through his actions: On January 20, 2016, Cuban was the keynote speaker at the Fantasy Sports Trade Association’s Winter Conference.\footnote{Id.} During his speech, Cuban states his belief that the
DFS industry could lead to legalized gambling.\textsuperscript{111} Cuban further stated that DFS might change what gambling is, without “...nuanced definitions depending on what state you’re in and who’s reading it.”\textsuperscript{112}

Cuban has also likened DFS to playing the stock market, actually citing stocks as riskier options.\textsuperscript{113} Cuban tweeted to Paxton, “...isn't all biz an agreement to win or lose something of value solely or partially by chance? Stocks? Collectibles? Insurance.”\textsuperscript{114} Cuban further stated that more skill is required for DFS, and luck comes into play with stocks, whereas it is not a factor for DFS.\textsuperscript{115}

Surprisingly, these facts have not been scrutinized as carefully as one would think: is this considered a conflict of interest? Do these partnerships and equity stakes cloud judgment of those in charge of major sports leagues and teams? There seems to be a strong argument that if such major players in the sports industries are throwing their support behind this industry, it could inhibit strict regulation of the industry. In an industry surrounded by a lot of legal question marks, it seems like a safer bet for owners, teams, and leagues to hold off on having heavy involvement.

The next hurdle is advertising and how it will be viewed in the eyes of the law and the consumer. These DFS companies are clearly marketing to customers who might be willing to risk money on a sports game, just for a chance to win money. Wrigley Field renovated the “Captain Morgan Club” to the “DraftKings Fantasy Sports Zone” this past season.\textsuperscript{116} How will these partnerships affect the push to make daily fantasy illegal? And will certain sports be able to collaborate with these companies, but others, like the NFL, be left out of potentially lucrative deals due to this gray area of the law?

In February 2016, ESPN and DraftKings ended a contracted, exclusive advertising relationship.\textsuperscript{117} The deal involved Disney (ESPN’s

\textsuperscript{111} See Brent Schrotenboer, \textit{Mark Cuban Stands Up for Daily Fantasy Sports Industry}, USA TODAY (Jan. 21, 2016), http://www.usatoday.com/story/experience/south/my-south-experience/sports/2016/01/20/mark-cuban-stands-up-daily-fantasy-sports-industry/79073124/.

\textsuperscript{112} Id.


\textsuperscript{114} Id.

\textsuperscript{115} Id.


parent corporation) investing $250 million in DraftKings, and DraftKings agreeing to spend an estimated $500 million in advertising on ESPN. At the time the deal was entered into, DraftKings was valued at $900 million. In February 2016, Twenty-First Century Fox marked down the value of its $160 million investment in DraftKings by sixty percent, stating this decision was based on information concerning DraftKings’s current valuation in a recent financing transaction. The recent financing transaction alluded to by Twenty-First Century Fox could be the cancelled advertising contract between ESPN and DraftKings. With more and more states turning their back on daily fantasy, it could spell trouble for the big companies due to others not wanting to delve into such murky legal waters.

Following in Nevada’s footsteps, and pursuant to PASPA, should the states that outlaw gambling outright take this as a sign and outlaw DFS? If any of these companies do apply for a gambling license in Nevada, would that tacitly admit they conduct gambling operations? DFS might be able to survive the current legal battles it faces, but it might be viewed in the sports world as needing some regulation. Advertising might change fan perspective and possibly increase fan participation, which could be a policy selling point for Sport Leagues to lobby to regulate but not outlaw daily fantasy.

C. Pending Legal Affairs

There have been around twenty-five cases filed against FanDuel and DraftKings since October 2015, by numerous plaintiffs. The cases include class action lawsuits claiming negligence, a class action lawsuit accusing the companies of racketeering, fraud and false advertising against the daily fantasy game sites, and the New York case seeking an injunction against DFS. In November, Virtual Gaming Technologies LLC filed three separate claims against Fan-
Duel, DraftKings, and Fox Sports. Virtual Technologies claims that the companies are infringing on inventions of William Junkin, who is considered a pioneer of fantasy sports. The complaint alleges violations of two patents and seeks relief in an amount no less than reasonable royalties for the infringement. There have not been any updates on these proceedings, although Virtual Gaming Technologies has filed subsequent lawsuits against other gaming companies.

Another legal issue for DFS is one that can be brought, and has been, by athletes themselves. Washington Redskins wide receiver Pierre Garcon filed a proposed class action lawsuit against FanDuel in October 2015. Garcon’s claim alleges that FanDuel is attempting to profit on athlete success by using their images, names, and likeness to promote their business. Garcon previously had a business relationship with FanDuel, and had even promoted their company on Twitter. In the alternative, DraftKings was not named as a defendant in the lawsuit, and the NFL recently agreed to a licensing deal with DraftKings. This deal allows DraftKings to use NFL players in their advertising and marketing campaigns.

Unfortunately for Garcon, case law is not on his side. Many have likened this case to the O’Bannon case from 2009, where a former UCLA basketball player sued the NCAA over compensation for college athletes. O’Bannon was first filed in 2009, and claimed that the NCAA and EA Games used player likeness and images without consent. O’Bannon succeeded against EA Games, who settled

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127 Id.

128 Id.

129 Id.

130 See Why Pierre Garcon’s Lawsuit Vs FanDuel is a Loser, supra note 1.

131 Id.

132 O’Bannon v. NCAA, 802 F.3d 1049, 1053 (9th Cir. 2015); see also Daniel Roberts, Here’s Why an NFL Player is Suing FanDuel, FORTUNE (Oct. 30, 2015), http://fortune.com/2015/10/30/fanduel-garcon-lawsuit/.

133 Id; see Everything You Need to Know About the DraftKings and FanDuel Data Scandal, supra note
their part of the lawsuit for forty million dollars in 2014.\textsuperscript{134}

The United States Court of Appeals for the Ninth Circuit later affirmed the other ruling in the case and sided with O’Bannon, stating that certain NCAA amateurism rules violate federal antitrust laws.\textsuperscript{135} However, the court also narrowed the scope of this finding, stating that member schools of the NCAA only need to provide up to the cost of attendance, and an injunction that had been filed to require member schools to pay a stipend to Division I football and basketball players was therefore unnecessary.\textsuperscript{136} The court further stated that granting student athletes money unrelated to education expenses would move college sports outside of amateurism, and constitute compensation.\textsuperscript{137} The court did however agree that the plaintiffs showed an injury in fact as a result of the NCAA using their likeness in video games.\textsuperscript{138} Although these cases are completely analogous, \textit{O’Bannon} demonstrates that courts believe players have a valid injury when their images or likeness are appropriated without consent.\textsuperscript{139}

Another case commonly brought up in comparison is the \textit{C.B.C. Distribution and Marketing, Inc. v. Major League Baseball Advanced Media, L.P.} case from the United States Court of Appeals in 2007.\textsuperscript{140} In \textit{C.B.C.}, plaintiffs wanted to establish the right to use player names and information for fantasy baseball products without a license.\textsuperscript{141} The lower court ruled in favor of C.B.C, and held that the use of player names and information was not done with intent to obtain a commercial advantage.\textsuperscript{142} The court even went so far to state that even if C.B.C had infringed on player publicity rights, the First Amendment served as preemption to those rights.\textsuperscript{143}

Therefore, Garcon would have to prove that FanDuel used his name, likeness, image, etc. for commercial advantage or in a way to suggest he was endorsing or sponsored by FanDuel. Because of Gar-
con’s own prior acts (on social media, his apparent prior endorsement, etc.), it could seem as though he endorsed FanDuel. But FanDuel using Garcon’s name in marketing to show how to select a fantasy team might not suggest he is endorsing FanDuel.

However, presumably to avoid these tough legal hurdles, Garcon has dropped his case against FanDuel and agreed to a settlement. Garcon was seeking upwards of $5 million on behalf of himself and other NFL players whose names and images were allegedly used by FanDuel without permission. The parties had agreed to confidential terms, leading to a voluntary dismissal, but the price tag for settlement was most likely a hefty one.

Most recently, a Northern Illinois football player, Akeem Daniels, has filed suit on behalf of a class of college athletes claiming that DraftKings has employed an advertising campaign that uses the name and likeness of players without permission. The suit contends that this use of player images and likeness amounts to blatant misappropriation of their names and attendant rights, and that regular use of Daniels’s name on the DraftKings website will likely create confusion among DraftKings users as to Daniels’s approval of their company. This lawsuit highlights another legal issue, brought up in O’Bannon: compensating college athletes would violate the NCAA’s Principles of Amateurism. College athletes who participate in DFS leagues would violate those NCAA rules and threaten their eligibility. These rules also expressly prohibit companies from negotiating directly with college athletes for rights to their likeness, which might give DraftKings the right to exploit college athlete’s publicity rights without permission or compensation.

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145 Id.
146 Id.
148 Id.
150 Id.
151 Id.
With the upcoming 2016 presidential election, it is no surprise that such a controversial topic is a talking point for candidates. From the beginning of the race to the White House, DFS were on each party’s radar, and many candidates voiced their opinions about the industry. On the Democratic side, Bernie Sanders has stated his reluctance for legalization of online gambling in light of how many states are against it.\footnote{See Megan Messerly, Caucosing 101: How It Works, and Where Clinton and Sanders Stand on Key Issues, LAS VEGAS SUN (Feb. 18, 2016), http://lasvegassun.com/news/2016/feb/18/caucusing-101-how-it-works-and-where-clinton-and-s/} 

During an October 2015 Republican Debate, Jeb Bush (a former candidate for the Republican Party) stated his opinion about reigning in DFS.\footnote{See Fred Imbert, Jeb Bush: Daily Fantasy Sports is Day Trading, CNBC (Oct. 28, 2015), http://www.cnbc.com/2015/10/28/jeb-bush-daily-fantasy-sports-is-day-trading.html.} Bush further stated that DFS needed to be looked at further in terms of regulation because, “[e]ffectively, it’s day trading without any regulation at all.” \footnote{Id.} Chris Christie, however, voiced his incredulity regarding the focus on DFS during the debate; Christie challenged, “[w]e have $19 trillion in debt, we have people out of work, we have ISIS and Al-Qaeda attacking us, and we’re talking about fantasy football?” \footnote{Id.} 

Christie should know firsthand how federal laws shape the context in which gambling operations function: Christie is the current governor of New Jersey, which has a case currently pending appeal federal court seeking to prohibit New Jersey from allowing sports betting in the state, citing a law from 1992.\footnote{Id.} A conglomerate of sports leagues that did not like the idea of state licensed gambling on their sport contests brought suit against the state and alleged that New Jersey was in violation of PASPA.\footnote{See also NCAA v. Governor of N.J., 730 F.3d 208 (3d Cir. 2013).}

New Jersey argued that the leagues lacked standing to bring the case since they suffered no injury from the State’s legalization of wagering on the outcomes of their games.\footnote{NCAA v. Governor of N.J., 730 F.3d at 214 (3d Cir. 2013).} The state also argued that PASPA is beyond Congress’ Commerce Clause powers to enact and violates important principles underlying our system of dual state and federal sovereignty: (1) The "anti-commandeering” doctrine, arguing that PASPA impermissibly prohibits the states from enacting legisla-
tion to license sports gambling; (2) The "equal sovereignty" principle, arguing that PASPA permits Nevada to license widespread sports gambling while banning other states from doing so.159

The District Court disagreed with each of New Jersey’s contentions, granted summary judgment to the leagues, and enjoined New Jersey from licensing sports betting.160 The Appellate Court held that the leagues bringing suit do have standing to enforce PASPA under Article III of the Constitution, and that PASPA is constitutional.161 New Jersey is once again appealing this decision162, and it seems highly unlikely that Christie is not at least familiar with the discussion and importance surrounding this issue.

Also relating to the presidential election, a new startup is taking a page out of DraftKings and FanDuel’s playbook and getting into the fantasy game. Fantasy Pollster is a fantasy site dedicated to political polling, and provides a prediction market that is legal.163 Two computer science majors at UC Santa Barbara created Fantasy Pollster to operate as a fantasy sports company, looking to engage people and incentivize voters to be well informed.164 Games on the site are currently based on the outcomes of the Democratic and Republican primary elections, but the company plans to innovate in the legal prediction market and shift their focus to the big election in November.165

IV. THE FUTURE OF DAILY FANTASY SPORTS

Currently, the DFS world is under fire. With states wanting to make the industry illegal, and players and consumers bringing numerous lawsuits, it is obvious that the potential future of these companies is undetermined and in jeopardy. With how things stand now and split opinions across the nation, what is on the horizon is unclear.

159 Id.
160 Id. at 214–15.
161 Id. at 215.
164 Id.
165 Id.
A. Government Regulation

The Fantasy Sports Trade Association has appointed former Secretary of Labor Seth Harris to create the Fantasy Sports Control Agency.\(^{166}\) The agency would create a strict, transparent and effective system for self-regulation, and would consist of financial and ethical standards.\(^{167}\) The financial standard would then be audited by a major (most likely Big 4) accounting firm, and ascribe penalties for noncompliance or failure.\(^{168}\) Harris has stated that he is confident that a control agency will prevent any dishonest or unfair behavior, and thinks the agency will help save lawmakers the cost of intervention to spend their time and resources on more important issues.\(^{169}\)

The DraftKings CEO has stated his commitment to complying and working with the FSTA and new Fantasy Sports Control Agency, hoping to keep the DFS industry fair and transparent for all consumers.\(^{170}\) Does this agency’s oversight really mean anything? Observing and monitoring the daily fantasy sport industry with no threat of punishment or method of enforcement until federal legislation might prove to be ineffective. This new agency might be enough to placate the government and avoid writing legislation, but whether or not it will satisfy consumers or athletes has yet to be determined.

Since DFS have been uncharted territory until recently, it might make the most sense to write legislation specific to the issue, in order to provide clarity and proper oversight to this industry. In January 2016, California was the first state to have a committee approve a proposed bill, and now the bill must be approved by the Appropriations Committee and receive a vote by the full Assembly.\(^{171}\) Kansas, in the alternative, enacted legislation earlier in 2015 to legalize fantasy sports.\(^{172}\)

A big question is how far will regulation go? If outlawed, DFS could become a thing of the past, or it could backfire and create a push for gambling to be regulated or licensed nationwide (similar to Nevada). With multiple sports leagues partnering with the DFS in-

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\(^{167}\) Id.

\(^{168}\) Id.

\(^{169}\) Id.

\(^{170}\) Id.


\(^{172}\) Id.
dustry, as well as several large corporations, it might be unlikely for the games to be outlawed completely, and the legality being supported by these partnerships. If regulation is enacted, where will the lines be drawn? Will March Madness pools in the office be outlawed or regulated? Will anyone possibly affiliated with a professional sports organization be banned from competing in daily sports (including equipment managers, cheerleaders, and spouses of players or coaches)?

The skill versus chance debate is one that is far from being settled, and DFS are currently embroiled in the discussion. If season long fantasy sports are exempted from regulation, because they are more games of skill than chance, a shorter timeframe does not suggest any less skill. Since DFS have been heralded as in a class of their own, there might not be a clear line between gambling and daily fantasy just yet, but is likely on the way to at the very least be regulated.

B. Alternatives to Current Fantasy Giants

There is also a new kid on the block when it comes to DFS, which might just be the future of the industry. QuickDraft does not require entry fees, but does award cash prizes. By not charging any entry fees, QuickDraft separates itself from the big industry leaders (DraftKings and FanDuel), and could possibly avoid litigation and legal challenges. QuickDraft hopes to appeal to sports fans, not professionals, and limits entry to one per contest for each player. QuickDraft did not go into the daily fantasy industry looking to dole out real money with no entry fees, but decided to go that route once the legal issues started surrounding the industry.

Once the environment settles down, the company plans to build toward a new business model, but thought taking the entry fees out of the equation would be a safe way to enter the DFS world without

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175 Id.
176 Id.
controversy. Of course if revenue is not being generated, it is not a sustainable business model. But, this could start a trend to get fantasy sports back into the hobby and leisure category rather than gambling.

C. Publicity Stunts or Good Faith

DraftKings has also been making offensive moves in light of their bad publicity in recent months. In March 2016, DraftKings announced that it will spend several hundred thousand dollars to pay back participants who lost money on FantasyHub. FantasyHub was a smaller DFS company that was based in Austin, Texas, and left thousands of DFS participants unable to access their funds or promised donations when it ceased operations in February 2016. FantasyHub advertised on its website that it would donate a portion of winnings and deposits to charities, including charities linked to former football players Kurt Warner and Bo Jackson. Some charities had reported donations, while others had not.

DraftKings reported that a few hundred thousand were owed to DFS participants, and an estimated $100,000 was owed to charities by FantasyHub. DraftKings is not acquiring FantasyHub, but merely assigning certain liabilities from FantasyHub to DraftKings in order to promote trust in the fantasy sports industry. With this bail out of FantasyHub, DraftKings is allowing former FantasyHub participants to transfer their balances to an existing or new DraftKings account. Participants will then be able to immediately withdraw funds from their accounts if they choose to do so, and there are no requirements in order to withdraw the funds. This deal does not involve DraftKings acquiring FantasyHub, and no FantasyHub employees will be transferring employment to DraftKings.

The motivation for this transferring of liabilities could genuinely

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178 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
185 DraftKings Covers Outstanding Debts and Donations of FantasyHub, supra note 179.
186 Id.
187 Id.
be related to good will and protection of participants, since DraftKings and FantasyHub have about 80% overlap in participants. However, this could be a move by DraftKings in order to drum up positive publicity, since the DFS industry and DraftKings has come under fire time and time again within recent memory. This also requires FantasyHub participants who don’t currently have DraftKings accounts to open one in order to receive their funds, which could be tempting- why not just keep the funds in the DraftKings account to potentially make more money? This all seems like too little too late to repair a tarnished reputation about the DFS industry, especially with the state by state attacks that have been launched in recent months.

Interestingly, there are also some developments that could taint the already damaged image of DFS. One of the world’s largest adult film companies, Vivid Entertainment, is looking to unveil a DFS site, called Vivid Sports 4 Money, where participants draft a roster of actual players and win or lose based on their performance in reality. Vivid co-founder, Bill Asher, has stated that moving into DFS is a natural progression for the company: When adult content made its way online, Asher figured out ways to work around regulations and keep users, and Vivid is looking forward to putting those lessons to good use and break into the DFS market. Vivid has partnered with DraftDay Gaming Group to launch Vivid Sports 4 Money, and the companies will share profits. Both Vivid and DraftDay welcome regulation, and claim they are ready for such a day when regulations come. Until then, Vivid will use the tactics it employs to promote their adult content to test different graphics, price points, sports, language, and advertisements for effectiveness.

V. Conclusion

With an uncertain future, betting on the stability and longevity of the DFS industry is risky. The nation is split on the legality of the industry, as well as the level of skill or chance required to participate. With these two key elements up in the air, the clear line of whether

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188 Id.
190 Id.
191 Id.
192 Id.
or not DFS constitute gambling is elusive for now. The argument made by companies that these daily fantasy sport games encourage fan participation and get them more engaged in the sport and the players might not hold water. Urging people to engage in potentially illegal conduct is not necessarily the smartest business move, especially when owners of teams and leagues themselves own stakes in the major companies in the industry. The Fantasy Sports Control Agency will likely have an impact on the current state of DFS (with regulation, standards, and penalties for noncompliance), but should not be the only solution to this rising issue.

The history of DFS is a bit unclear and murky, and the present is embroiled in scandal and controversy. Looking to Humphrey, the plain language of the statutes would point to a legal solution of at least regulation daily fantasy. However, with all of the recent proposed legislation, states moving to outlaw it, and lawsuits haunting the industry, it could end in DFS being outlawed altogether. If outlawed, this could prompt a movement for licensed gambling and a repeal of PASPA.

Since the trend seems to be leading more toward regulation currently, rather than a blanket ban, regulation needs to draw clearer lines than previous case law or legislation provide. Strict rules of who is to be banned from playing (athletes, coaches, employees of daily fantasy companies, etc.) need to be clearly outlined to avoid future confusion. The burgeoning DFS market could create legal problems all over the country; it is better to face this head on, deal with it now, interpret the available case law and statutes, and create a somewhat uniform standard for all participants and companies to abide by.