

COMMENT

**NOT JUST A FANTASY: THE REAL BENEFITS OF
DAILY FANTASY SPORTS LEGISLATION FOR
WISCONSIN**

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INTRODUCTION

In mid-November of 2015, protestors chanting “GAME OF SKILL! GAME OF SKILL!” clamored outside New York Attorney General Eric Schneiderman’s office.¹ The crowd protested Schneiderman’s recent declaration that Daily Fantasy Sports (DFS) contests are illegal “games of chance,” under New York’s gaming

1. Darren Rovell, *Hundreds Protest New York Attorney General’s Stance on Daily Fantasy Sports*, ESPN (Nov. 13, 2015), http://www.espn.com/chalk/story/_/id/14119804/hundreds-protest-new-york-attorney-general-eric-schneiderman-stance-daily-fantasy-sports [https://perma.cc/2APX-L23Q].

laws.² Schneiderman denounced DFS websites as “totally unregulated gambling venues,” and banned their operations in New York.³ Echoing the protestors’ chants, proponents of DFS argue that DFS contests are legal “games of skill.”⁴

A fantasy sports contest is a type of online game in which participants choose from professional athletes in an online selection process, known as a draft, to assemble a virtual team.⁵ The participants’ virtual teams compete and accumulate points based on the statistical performances of professional athletes in real sporting events.⁶ “Players track how their fantasy team is doing using various web sites or mobile apps. Some players join leagues with friends and compete against only people they know. Others join public leagues hosted by web sites and compete against strangers.”⁷

During the summer of 2015, casual television viewers and football fans alike were bombarded by DFS advertisements.⁸ In a campaign to raise awareness about DFS, the two industry titans—FanDuel and DraftKings—spent over \$750 million on advertising that summer alone.⁹ The companies aired “get-rich-quick” style commercials every ninety seconds,¹⁰ and the onslaught of advertising worked. FanDuel and DraftKings amassed an astounding \$3 billion in DFS contest entry fees

2. *Id.*

3. Dustin Gouker, *New York Attorney General: DFS Sites are ‘Unregulated Gambling Venues’*, LEGAL SPORT REP. (Oct. 8, 2015, 11:15 AM), <http://www.legalsportsreport.com/4826/new-york-ag-talks-dfs/> [<https://perma.cc/GB2G-6T9B>]; David Purdam & Darren Rovell, *N.Y. AG Declares DraftKings, FanDeul are Illegal Gambling, Not Fantasy*, ESPN (Nov. 11, 2015), http://www.espn.com/chalk/story/_/id/14100780/new-york-attorney-general-declares-daily-fantasy-sports-gambling [<https://perma.cc/XV7J-RZ5X>].

4. Some reporters found it odd that the protestors were chanting a gaming law term of art—game of skill—and as it turns out, many of the protestors were employees of the two major DFS companies, FanDuel and DraftKings. Kurt Wagner, *FanDuel, DraftKings Supporters (And Employees) Protest in New York*, RECODE (Nov. 13, 2015, 7:25 AM), <https://www.recode.net/2015/11/13/11620626/fanduel-draftkings-supporters-and-employees-protest-in-new-york> [<https://perma.cc/UF3L-9BXR>]; Rovell, *supra* note 1 (discussing the skill versus chance debate); Purdam & Rovell, *supra* note 3 (same).

5. Chris Isidore, *Fantasy Sports: What Is It, Anyway?*, CNN (Oct. 6, 2015, 5:13 PM), <http://money.cnn.com/2015/10/06/news/companies/fantasy-sports-101/> [<https://perma.cc/LV2P-YZSC>].

6. *Id.*

7. *Id.*

8. Don Van Natta Jr., *Welcome to the Big Time*, ESPN (Aug. 24, 2016), http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel [<https://perma.cc/7VN9-H83H>].

9. *Id.*

10. *Id.*

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in 2015.¹¹ The two companies successfully grabbed the public’s attention (and many of their wallets), but lawmakers and politicians watch television too. The questions everyone began asking were: How is this any different from sports gambling? How is this legal?¹²

Congress enacted the Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006 to stymie illegal online gambling.¹³ The UIGEA restricts financial institutions, credit card companies, and other financial transaction providers from processing transactions tied to illegal online gaming,¹⁴ but the Act itself does not define what constitutes an illegal game or contest. Instead, the Act defers to state law gaming definitions and restricts credit card transactions that originate in states where the transaction is tied to a game or contest deemed illegal under that state’s gaming laws.¹⁵

State gaming statutes are not uniform, but nearly every state employs some form of balancing test to determine whether it is legal to wager money on a specific game or contest.¹⁶ Essentially, the balancing tests ask: is this a game of skill or a game of chance, i.e., is skill or chance the predominant component in deciding the outcome of the game?¹⁷ Generally speaking, it is legal to wager money on games of skill and illegal to do so on games of chance.¹⁸

The UIGEA contains a few exemptions, including one for “fantasy or simulation sports game[s] . . . or contest[s]” that meet certain criteria.¹⁹ In 2006, when the UIGEA was enacted, only Traditional Fantasy Sports (TFS) existed; the DFS format was not yet invented.²⁰

11. *Id.*

12. FanDuel and DraftKings announced a merger in November 2016. Since the two companies make up an estimated ninety percent of the DFS market, the Federal Trade Commission, along with attorney generals from California and the District of Columbia, filed suit to block the merger over anti-trust concerns. Facing these concerns, in June 2017, FanDuel and DraftKings abandoned the merger and moved forward as separate companies. David Purdum, *Planned Merger Between DraftKings, FanDuel is Off*, ESPN (July 14, 2017), http://www.espn.com/chalk/story/_/id/20002903/in-abrupt-fashion-draftkings-fanduel-merger-off [<https://perma.cc/G4VB-EM7Y>].

13. 31 U.S.C. §§ 5361–5367 (2012).

14. 31 U.S.C. § 5363 (2012); 31 U.S.C. § 5367 (2012).

15. 31 U.S.C. § 5362(10)(A) (2012).

16. States use one of three different balancing tests: the Dominant Factor Test, Material Element Test, and Any Chance Test. *See infra* Part I.B.

17. *Id.*

18. *Id.*

19. § 5362(1)(E)(ix).

20. Dustin Gouker, *UIGEA Author: “No One Ever Conceived” that Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REP. (May 8, 2015, 8:15 AM), <http://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/> [<https://perma.cc/84SN-N8JU>].

Accordingly, the fantasy sports exemption embodies the TFS contest format, and whether TFS contests are legal games of skill is not a contested issue.²¹ Since DFS contests were not considered during the passage of the UIGEA, and arguably do not fall within the fantasy sports exemption, DFS contests are exempt from the Act only if they constitute games of skill under state law balancing tests. Questions loom over DFS contests' legal status because there are significant structural differences between TFS and DFS contest formats.²²

The primary distinguishing feature between TFS and DFS contests is their length. TFS contests span a full season, the nature and length of which require competitors to make hundreds or thousands of strategic decisions throughout the contest.²³ In contrast, DFS contests usually span only a few hours and restrict competitors from making *any* strategic decisions once the contest begins.²⁴ DFS opponents argue that DFS contests, in terms of risk and structure, are akin to sports or casino gambling because of their expediency and restricted decision-making format.²⁵ DFS advocates counter that even if DFS contests are quicker and involve less decision-making than TFS contests, DFS contests are still primarily skill-based and more analogous to picking stocks than to throwing dice or spinning a wheel.²⁶

Since states' gaming statutes are similar in nature but different in construction, the ways in which states apply their gaming statutes to DFS contests vary. In 2015, after a few state attorney generals declared

21. See generally *id.*; § 5362(1)(E)(ix).

22. *Goodell Weighs in on DFS vs. Season-Long*, SCOUT FANTASY (Nov. 24, 2015), <https://scout.com/fantasy/Article/Goodell-Big-Distinction-Between-DFS-Season-Long-Fantasy-101596591> [<https://web.archive.org/web/20171121182449/https://scout.com/fantasy/Article/Goodell-Big-Distinction-Between-DFS-Season-Long-Fantasy-101596591>]; *Compare Default League Settings, Scoring, and Stats in Fantasy Football*, YAHOO, <https://help.yahoo.com/kb/SLN6489.html> [<https://perma.cc/2WRQ-UC3B>], *with Rules & Scoring*, FANDUEL, <https://www.fanduel.com/rules> [<https://perma.cc/46LX-ACQA>].

23. See *Season Long vs. Daily Fantasy Sports*, MY FANTASY LEAGUE, <http://home.myfantasyleague.com/fantasy-sports-legislation/season-long-vs-daily-fantasy-sports/> [<https://perma.cc/T94R-GDLA>].

24. *Id.* For example, participants pay a DFS contest entry fee in the morning, draft/compile their team, and the winner is determined that evening.

25. See *infra* Part II.A.1; Joshua Brustein, *Fantasy Sports and Gambling: Line is Blurred*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html> [<https://perma.cc/2KR4-W46M>]; see also Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports are Games of Skill Under the Dominant Factor Test*, 26 MARQ. SPORTS L. REV. 5, 33 (2015) ("Sports law experts cite the lack of control that players have once lineups are set as being akin to placing a bet with a bookmaker.").

26. See *infra* note 130.

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DFS contests illegal and banned their operations from their states, three paths emerged. Some state legislatures did not rebuke their attorney general's opinion and DFS operations remain illegal in those states.²⁷ Between 2015 and 2017, sixteen state legislatures expressly legalized DFS contests and enacted regulations governing their operations,²⁸ including five states where the state attorney general had previously opined that DFS operations were illegal.²⁹ Many states have never publicly questioned the legality of DFS operations and have not placed any regulations on the industry.³⁰

Other than perhaps freedom from the DFS advertising blitz, why were legislators and politicians even concerning themselves with a game like fantasy sports? The sheer size of the industry and its links with influential corporate players make fantasy sports hard for them to ignore. There are an estimated fifty-nine million people who play fantasy sports in the United States and Canada,³¹ with about thirty-six percent of participants playing some form of daily format.³² Between 2015 and 2016, the DFS industry collected more than \$6 billion in contest entry fees.³³ Every NFL, MLB, and NBA team, as well as

27. Alabama, Georgia, Idaho, Nevada, Texas. Dustin Gouker, *Attorney General Opinions on Daily Fantasy Sports*, LEGAL SPORTS REP. (Nov. 1, 2017), <http://www.legalsportsreport.com/state-legality-of-dfs/> [https://perma.cc/B6GV-6H8H]. In Illinois, although the attorney general's opinion is that DFS is illegal gambling, almost all DFS sites remain active in the state. *Illinois Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/illinois/> [https://perma.cc/X29J-NVW4].

28. Arkansas, Delaware, Colorado, Indiana, Kansas, Maine, Massachusetts, Mississippi, Missouri, New Jersey, New Hampshire, New York, Pennsylvania, Tennessee, Vermont, and Virginia. Dustin Gouker, *Legislative Tracker: Daily Fantasy Sports*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-bill-tracker/> [https://perma.cc/PBN6-SA3N].

29. Delaware, Mississippi, New York, Tennessee, and Vermont. *Id.*; Gouker, *supra* note 27.

30. *See* Gouker, *supra* note 27; Gouker, *supra* note 28.

31. *Industry Demographics: Actionable Insights & Insightful Data*, FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> [https://perma.cc/W2GH-2EPQ].

32. "82% of all players play in a season-long league; just 19% exclusively play daily formats; and 17% play both formats." *Fantasy Sports Participation in North America Rises to 57.4 Million Players*, FANTASY SPORTS TRADE ASS'N, <http://fsta.org/fantasy-sports-participation-in-north-america-rises-to-57-4-million-players/> [https://perma.cc/HQL2-A3JC].

33. Zack Hall, *Daily Fantasy Sports Metrics for 2015: NBA, MLB Made In-Roads on NFL in Entry Fees*, LEGAL SPORTS REP. (Jan. 22, 2016, 10:00 AM), <http://www.legalsportsreport.com/7487/dfs-industry-money-in-2015/> [https://perma.cc/GH5T-YT3L]; Dustin Gouker, *Daily Fantasy Sports Revenue Data From New York Shows Importance Of 2016 Law*, LEGAL SPORTS REP. (Mar. 3, 2017, 11:24 AM), <https://www.legalsportsreport.com/13243/ny-daily-fantasy-sports/> [https://perma.cc/M6YD-SFZC].

many NHL teams and European soccer clubs, inked sponsorship deals with either FanDuel or DraftKings.³⁴ Television networks and media companies are also profiting from DFS's rise in popularity; fantasy players are more engaged with television, media, and personal electronic devices as a result of the popularity of fantasy sports. In a study commissioned by the Fantasy Sports Trade Association (FSTA), sixty-four percent of respondents said they are watching more live sports because of fantasy, and sixty-one percent said they read more about sports because of fantasy.³⁵ Simply put, there is a lot of money at stake, and powerful players have invested in the success of the DFS industry.³⁶ However, as a multibillion dollar industry, open and unregulated DFS operations, the current status in most states, pose serious risks to consumers and the public.

In October 2015, a story in the New York Times alleged that a DraftKings employee won \$350,000 in a DFS contest hosted on FanDuel by using nonpublic company information concerning ownership and lineup data.³⁷ Further allegations insist that this “insider-trading like” situation was not an isolated incident and that “employees had competed for years on each other’s platforms, despite the practice being frowned upon by some lobbyists and industry consultants.”³⁸ Both companies were also hit with multi-million dollar false advertising and consumer fraud suits.³⁹ Additionally, opposition groups have raised concerns about compulsive gaming, underage play, professionals exploiting novices, and the presence and unfair advantage of algorithmic scripts.⁴⁰ Consumer protection concerns arising from a

34. Dustin Gouker, *DFS Partnership/Sponsorship Tracker*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/dfs-sponsorship-tracker/> [https://perma.cc/BTA3-GGFX]. A handful of the sponsorship deals have lapsed and were not renewed, although the majority of the sponsorships are still active. *Id.*

35. *Fantasy Sports Participation in North America Rises to 57.4 Million Players*, *supra* note 32.

36. Yahoo!, ESPN (owned by Disney), NFL.com, and CBS are the biggest fantasy sports website operators and highlight some of the powerful corporate players involved. Matt Burke, *Yahoo or ESPN Fantasy Football League? Best Site Platform to Host?*, METRO (Aug. 30, 2017), <https://www.metro.us/sports/yahoo-or-espn-fantasy-football-league-best-site-platform-to-host> [https://web.archive.org/web/20171121182735/https://www.metro.us/sports/yahoo-or-espn-fantasy-football-league-best-site-platform-to-host].

37. *See* Van Natta Jr., *supra* note 8.

38. *Id.*

39. *Id.*; Dustin Gouker, *Once Again a Daily Fantasy Sports Opponent, New York AG Schneiderman Defends Law in New Filing*, LEGAL SPORTS REP. (Jan. 13, 2017, 11:46 AM), <https://www.legalsportsreport.com/12650/schneiderman-and-fantasy-sports> [https://perma.cc/549T-SDJN].

40. *See infra* Part II.A.1; Walt Bogdanich & Jacqueline Williams, *For Addicts, Fantasy Sites Can Lead to Ruinous Path*, N.Y. TIMES (Nov. 22, 2015),

virtually unregulated multi-billion dollar industry are not unique to DFS and should come as no surprise; these same concerns permeate through the financial sector and legal gaming industry.⁴¹ “The self-regulation the fantasy sports operators claim to utilize is inefficient. . . . [but] [t]here’s a cure and the remedy is regulation.”⁴²

Although DFS contests are illegal in some states, while other states do not interfere with their operations at all, the trend is toward legalization and regulation. The regulatory schemes enacted in states like New York and Massachusetts garnered considerable support, and together, they specifically address every consumer protection concern noted above. Most states’ DFS regulations also include high taxes on DFS company revenues that generate millions of dollars for the state, and industries interconnected with DFS realize associated economic benefits from the game’s success.⁴³ It is not hard to determine why politicians are getting behind enacting DFS regulations: the game’s popularity among fans (i.e., voters); the powerful corporate players involved; the need for consumer protections; millions of dollars of new tax revenues; associated economic benefits; and more pointedly, “campaign donations from all the people and companies that” profit from the DFS industry’s continued success.⁴⁴ The writing is on the wall, and it is time for Wisconsin to follow suit.

Wisconsin is one of the many states whose attorney general has not offered an opinion regarding the DFS industry’s legal status.⁴⁵ In January 2016, Wisconsin legislators introduced a bill to legalize and regulate DFS operations, but after receiving only one hearing, the bill stalled and was disposed of at the end of the legislative session pursuant

<https://www.nytimes.com/2015/11/23/sports/fantasy-sports-addiction-gambling-draftkings-fanduel.html> [<https://perma.cc/A7RD-G8F3>].

41. *Id.*

42. Jacob Pramuk, *From Fantasy to Nightmare? Fan Sports Sparks Regulation Concerns*, CNBC (Oct. 11, 2015, 9:00 AM), <http://www.cnbc.com/2015/10/09/fantasy-sports-scrutiny-sparks-regulation-concerns.html>

[<https://web.archive.org/web/20171208164010/https://www.cnbc.com/2015/10/09/fantasy-sports-scrutiny-sparks-regulation-concerns.html>] (quoting Attorney Daniel Wallach, Becker & Poliakoff).

43. *See infra* Part II.B.1., II.B.2.

44. 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/#7313d2ea5f25> [<https://web.archive.org/web/20171115043638/https://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/>].

45. Gouker, *supra* note 27.

to senate rules.⁴⁶ In September 2017, Representative Tyler Vorpapel renewed efforts to implement the Wisconsin DFS bill, and the Wisconsin Public Radio reported that “state congress has revived debates on [the issue].”⁴⁷

By allowing DFS companies to operate without any state oversight, Wisconsin is exposing consumers to unnecessary risk, foregoing millions of dollars in new tax revenues, and losing out on additional economic benefits associated with DFS. The New York DFS regulations, coupled with a few consumer protections from the Massachusetts bill, provide a solid framework for Wisconsin to follow. More specifically, any Wisconsin DFS legislation should include the Massachusetts provisions that require DFS operators to offer contests that exclude highly experienced players and the prohibition on DFS operators from extending credit to players. However, Wisconsin has an additional concern: The state has gaming compacts with all eleven federally recognized Tribes of Indians in Wisconsin.⁴⁸ Thus, any Wisconsin DFS legislation is more complete by including language that directly addresses the state’s gaming compacts. By enacting the New York DFS regulations, with the addition of a few consumer protections from the Massachusetts bill and language addressing the state’s gaming compacts, Wisconsin will better protect consumers, generate new tax revenues, and stimulate related economic benefits. The foregoing also makes DFS legislation an attractive proposition for Wisconsin politicians. Instead of sitting on the sidelines, Wisconsin’s interests are better served by joining the legislative trend and enacting DFS legislation.

I. BACKGROUND: SKILL-VERSUS-CHANCE? PUNT IT TO THE LEGISLATURE

Fantasy sports, invented around 1980,⁴⁹ are contests in which individual participants act as the manager of a virtual sports team. Fantasy sports contests exist for nearly all professional sports,

46. AB800, 2015–16 Reg. Sess. (Wis. 2016).

47. *Id.*

48. *Tribal Compacts and Amendments*, WIS. DEP’T ADMIN., <http://www.doa.state.wi.us/divisions/gaming/indian-gaming/compacts> [https://perma.cc/9J5P-GA9P].

49. Nico Newman, *History of Fantasy Sports*, FANTASY-SPORT.NET (Apr. 4, 2016), <https://fantasy-sport.net/history-of-fantasy-sports/> [https://perma.cc/2RE6-2V44]. Some argue that fantasy sports were started in the 1960s, but most generally accept the story about Daniel Okrent inventing “roisserie” baseball that morphed into fantasy sports. *See id.*

however, fantasy football is by far the most popular.⁵⁰ Each participant selects combinations of professional athletes from a pool of players, known as a draft, and their selections form a virtual team.⁵¹ Participants' virtual teams compete against each other and accrue points based on the real-life statistical performances of professional athletes in actual sporting events.⁵² For example, if Player A drafts Tom Brady of the New England Patriots to his or her fantasy team, and Tom Brady throws a touchdown in the Patriots' real football game that weekend, Player A's fantasy team receives points.⁵³

As previously noted, participants use various web sites or mobile apps to track the performance of their fantasy teams.⁵⁴ Some play only against friends, while others compete against strangers in public leagues.⁵⁵ Participants typically pay a contest entry fee and receive money based on the performance of their team when the contest ends.⁵⁶

Originally, fantasy sports contests stretched the length of the season of the corresponding professional sport. In the traditional, season-long format, participants draft players to form their team before the corresponding professional season begins. For example, in fantasy football, leagues generally hold their draft sometime in July or August, and after competing for an entire season, a winner emerges sometime in December or January. Participants use their knowledge of players, teams, coaches, the sport, and external factors, in making countless strategic decisions to manage their team over the course of the season. In traditional fantasy football contests, participants must make weekly decisions about which players to start, sit, cut, acquire, trade, etc. Common sense dictates that to be a successful general manager of a real sports franchise—which is essentially the basis of traditional fantasy

50. *Industry Demographics: Actionable Insights & Insightful Data*, *supra* note 31 (stating that the favorite fantasy sport is football).

51. *ESPN Fantasy Football Rules: Introduction*, ESPN, <http://games.espn.com/ffl/resources/help/content?name=introduction> [https://perma.cc/2X8Y-CLBM]. The draft process above is the most common TFS format. Holding an "auction" is the second most common TFS format. In an auction, participants are allotted the same number of points, which participants use to "bid" on players and form a virtual team. *ESPN Fantasy Football Rules: Drafts: Auction*, ESPN, <http://games.espn.com/ffl/resources/help/content?name=drafts-auction> [https://perma.cc/47CY-JC27].

52. *Id.*

53. The amount of points Player A's fantasy team receives for Tom Brady's touchdown pass depends on the format and scoring system of Player A's fantasy league/contest. The possible fantasy league/contest formats and scoring systems are endless.

54. Isidore, *supra* note 5.

55. *Id.*

56. Van Natta Jr., *supra* note 8.

sports—participants must know something about what they are doing in order to beat their opponents; participants must have skill to win.

DFS contests are newer creations, invented around 2006.⁵⁷ Instead of drafting a team at the beginning of a professional sports' season and managing that team for months, contestants select players to form a team for a contest that lasts only a few hours.⁵⁸ The statistical performances from that day dictate the outcome of the contest,⁵⁹ and such contests may be based on the performances of as few as two games.⁶⁰ In the DFS format, once a contestant drafts his or her team, there are no more strategic decisions to make. There are no decisions about trades, player acquisitions, free agency, or the many other managerial decisions that the traditional, full-season format requires.⁶¹ While knowledge and skill undoubtedly boost DFS contestants' odds of winning—for example, assessing injury statuses, strength of an individual player against an opponent, assessing a team's game plan, etc.—exactly how much skill is involved, and whether DFS should be treated the same as TFS under the state gaming statutes, is hotly contested.

A. *Fantasy Sports and the UIGEA*

On October 13, 2006, President George W. Bush unknowingly became the founding father of Daily Fantasy Sports when he signed the Unlawful Internet Gambling Enforcement Act (UIGEA).⁶² Congress Enacted the UIGEA as a response to the spread of illegal online poker websites.⁶³ The law restricts banks, credit card companies, and other

57. *Id.*

58. *Id.*

59. *See generally id.* (discussing how participants' selection of players they believe will perform well, based in part on past performance, is part of the "skill set" needed to win).

60. *Id.* "[FanDuel & DraftKings] offered hourly fantasy contests, with an evening's slate of NBA and NHL games carved into smaller and smaller slices with fewer and fewer players to draft—"turbo" contests for three NBA games tipping off at 8 p.m. ET, for example, or a fantasy contest based on two West Coast NHL games in which fantasy players would assemble lineups from only four teams." *Id.*; see 31 U.S.C. § 5362(1)(E)(ix)(III)(bb) (2012).

61. *Compare Default League Settings, Scoring, and Stats in Fantasy Football*, *supra* note 22, with *Rules & Scoring*, *supra* note 22; Ezra Fischer, How Does DFS or Daily Fantasy Sports Football Work?, DEAR SPORTS FAN (Sept. 16, 2015), <http://dearsportsfan.com/2015/09/16/how-does-dfs-or-daily-fantasy-sports-football-work/> [https://perma.cc/P2XU-FTAK].

62. Van Natta Jr., *supra* note 8.

63. Nathan Vardi, *Will Online Poker in the U.S. Stop Today?*, FORBES (Jun. 1, 2010, 10:40 AM), <https://www.forbes.com/sites/docket/2010/06/01/will-online-poker-in-the-u-s-stop-today/#5e23d2e62008> [https://perma.cc/5F6F-SQ38].

financial transaction providers from processing transactions tied to businesses engaged in “unlawful internet gambling.”⁶⁴ Under the Act, “unlawful internet gambling” is defined as “transmit[ting] a bet or wager by any means . . . involv[ing] . . . the Internet[,] where such bet or wager is unlawful *under any . . . state law . . .* in which the bet or wager is initiated, received, or otherwise made.”⁶⁵ In other words, the Act permits the states to determine whether a bet or wager on a specific game or contest is illegal.

“With the blessing of the major sports leagues, a carve-out in the law was made for the wildly popular season-long fantasy leagues,”⁶⁶ an exemption for “fantasy or simulation sports game[s] . . . or contest[s]” that meet certain criteria.⁶⁷ Since the Act incorporated TFS contest formats into the fantasy sports exemption criteria,⁶⁸ and was written with the intent to cover TFS contests, whether TFS contests are legal under the Act is not a contested issue;⁶⁹ however, DFS contests did not exist when the Act was executed. One element of the fantasy sports exemption is that contest outcomes “reflect the relative knowledge and skill of the participants,”⁷⁰ leading to the “game of skill” versus “game of chance” debates. The structural differences between TFS and DFS contests cast uncertainty about whether DFS contests fit within the letter or the spirit of the exemption, making the legality of DFS a state-by-state determination.⁷¹

64. 31 U.S.C. § 5363 (2012); § 5367.

65. § 5362(10)(A) (emphasis added).

66. Van Natta Jr., *supra* note 8.

67. The elements of the fantasy sports exemption are: (1) the fantasy contest may not be based upon the performance of amateur athletes; (2) all prizes must be made known to the participants in advance of the game or contest; (3) the contest outcomes reflect the relative knowledge and skill of the participants; (4) the contest must involve multiple real-world sporting events (a contest may not be based on only one professional sporting event); (5) no winning outcome is based on the game score, point-spread, the performance of any single real-world team; (6) no winning outcome is based on the single performance of an individual athlete in any single real-world sporting event. § 5362(1)(E)(ix).

68. *Id.*

69. Although there are many lawsuits contesting the DFS industry’s legal status, similar lawsuits have not been levied against TFS contests.

70. § 5362(1)(E)(ix)(II).

71. There is some discussion that The Professional and Amateur Sports Protection Act of 1992 (PASPA) may pose an obstacle for states trying to legalize DFS. PASPA:

[P]rohibits states from legalizing new forms of sports betting. A state like New York might declare DFS to be a contest of skill, but a federal court is free to disregard that the state is actually legalizing sports betting. But, this is unlikely to happen because the suits will never be brought. Prosecutors have no interest in pursuing operators of games that have been expressly

B. State Law Balancing Tests

State gaming statutes vary in construction, but generally, every state uses one of three balancing tests: (1) the Dominant Factor Test (also known as the “Predominance Test”); (2) the Material Element Test; and (3) the Any Chance Test.⁷² Although slightly different, each test weighs the elements of chance versus skill involved in determining the outcome of a specific game.⁷³ The calculation is relatively simple in all-chance casino games such as dice or roulette, but “legal analysis gets dicey when the game has [mixed] elements of [] chance and skill.”⁷⁴ “The test lacks guidance for how to evaluate mixed games, even though courts designed the test for that very reason.”⁷⁵

Under the Dominant Factor Test, “[m]ost states have concluded that where the elements of skill, whatever they may be, predominate over the elements of chance, whatever they may be, in determining [the] outcome [of a game], then the ‘chance’ element is lacking and the game involved does not violate that state’s anti-gambling law.”⁷⁶ Some courts interpret “predominate” to mean that skill must account for more than fifty percent of the game’s outcome to pass the test.⁷⁷ Even if that is the correct interpretation, how *exactly* is a trier of fact to determine whether skill or chance accounts for more than fifty percent of a game’s outcome in mixed games like DFS? Such a murky test generates inconsistent results,⁷⁸ and unsurprisingly, attorney generals in states with nearly identical Dominant Factor Test statutes have come out differently when applying such statutes to DFS. For example, Georgia and Kansas effectively have the same Dominant Factor Test statute,⁷⁹

made legal by state legislatures. And no one else with standing is likely to bring suit.

Walter T. Champion Jr. & I. Nelson Rose, *Daily Fantasy Sports And The Presidential Debate*, 27 MARQ. SPORTS. L. REV. 301, 327 (2017). For a more in-depth discussion about how PASPA might affect DFS legislation, see generally *id.*

72. Meehan, *supra* note 25, at 15–19.

73. *Id.*

74. Gerard Dondero, *Poker: Game of Skill but Tested by a Game of Chance*, JURIST (Sept. 26, 2012, 12:00 PM), <http://www.jurist.org/dataline/2012/09/gerard-dondero-gambling-law.php> [<https://perma.cc/74KE-GNEK>].

75. *Id.*

76. Chuck Humphrey, *State Gambling Law Summary: Summary Chart*, <http://www.gambling-law-us.com/State-Law-Summary/> [<https://perma.cc/3LFU-3THV>].

77. Meehan, *supra* note 25, at 15–16.

78. *Id.* at 21–22. “The result of such subjectivity has been the inconsistent application of the Predominance Test in analyzing mixed-games.” *Id.* at 22.

79. “‘Bet’ means a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement.” KAN. STAT. ANN. § 21-6403(a) (2012); “‘Bet’ means an agreement that, dependent upon

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but Georgia’s attorney general declared DFS constitutes illegal gambling⁸⁰ whereas Kansas’s attorney general issued an opinion supporting the legality of DFS.⁸¹ Wisconsin uses the same Dominant Factor Test as Georgia and Kansas,⁸² making any prediction about how the Wisconsin judiciary might rule on this issue purely guesswork.

The Material Element Test is a stricter standard than the Dominant Factor Test. Under this test, it is illegal to wager on a game if “the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”⁸³ Some courts find the usage of “material” in the statute to mean “substantial,” where even if a game is more than fifty percent skill-based (i.e., there is more skill involved in the outcome of the game than chance) it may still be illegal because it involves a “material degree” of chance.⁸⁴ Again, this hardly clarifies how a court is to assess whether the chance involved in a mixed-game like DFS is “material” or “substantial”; what is the threshold? While DFS is less likely to pass legal scrutiny under the Material Element Test than under the Dominant Factor Test,⁸⁵ conflicting attorney general opinions and the highly subjective nature of both tests provides the Wisconsin judiciary with little useful guidance.

A small number of states follow a different test altogether: the Any Chance Test. If chance plays *any* role in determining the outcome of a game, then the game is illegal under the state’s gambling laws.⁸⁶ Seemingly, no game can survive this level of scrutiny since every game

chance even though accompanied by some skill, one stands to win or lose something of value.” GA. CODE. ANN. § 16-12-20(1) (2017).

80. Jim Galloway, *Fantasy Sports Games = Illegal Gambling*, *Says Sam Olens’ Office*, AJC.COM (Mar. 1, 2016), <http://politics.blog.ajc.com/2016/02/29/opinion-from-sam-olens-office-fantasy-sports-games-illegal-gambling/> [<https://perma.cc/2HNX-SXMT>].

81. Kan. Att’y Gen. Op. No. 2015-9 (Apr. 24, 2015).

82. “A bet is a bargain in which the parties agree that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value specified in the agreement.” WIS. STAT. § 945.01(1) (2015–16).

83. Meehan, *supra* note 25, at 17.

84. *See Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984) (holding that under Missouri’s Material Element Test, “chance must be a material element in determining the outcome of a gambling game,” but “[i]t need not be the dominant element” for the game to be illegal under the test).

85. In deeming DFS contests legal games of skill under the Dominant Factor Test, Rhode Island’s Attorney General noted that under the Material Element Test, like the one used in New York, the outcome may be different. The opinion stated that determining whether chance is “substantial,” as used in the Material Element Test, is a lower burden than determining whether chance is the “dominant factor.” Letter from Peter F. Kilmartin, Att’y Gen., R.I., to Gina Raimondo, Governor, R.I. (Feb. 4, 2016).

86. *See Meehan, supra* note 25, at 18.

involves some element of chance. Even chess, the quintessential skill game, involves some element of chance. The initial draw of white and black chess pieces is an all-chance scenario, and chess theorists generally agree that the “first-move advantage” inherent in chess gives white a fifty-six percent likelihood of winning compared to black’s forty-four percent likelihood.⁸⁷ Interestingly, two states that follow this demanding test enacted legislation legalizing and regulating DFS.⁸⁸

C. *Framing the Skill Versus Chance Debate*

In addition to the confusion created by ambiguous state law balancing tests, there is also no consensus about whether to assess chance and skill based on the performance of a single lineup in a single DFS contest or the performance of multiple lineups over many contests.⁸⁹ In *Joker Club, L.L.C. v. Hardin*,⁹⁰ the North Carolina Court of Appeals faced a similar question when considering whether poker is a game of skill or chance. The court noted that “[a]ll witnesses appeared to agree that in a single hand, chance may predominate over skill, but that over a long game, the most skilled players would likely amass the most chips.”⁹¹ Even so, the court held that poker is a game of chance.⁹² Without explicitly stating that the skill-chance assessment must be based on a single poker hand, the court impliedly did so by holding that poker is a game of chance, despite previously stating that “over a long game, the most skilled players would likely amass the most chips.”⁹³

Poker and DFS share some similarities, but the skillsets are very different. Poker requires “skills such as knowledge of human psychology, bluffing, and the ability to calculate and analyze odds,”⁹⁴ whereas speculating about the performances of professional athletes requires a different, more evaluative skillset and certainly does not involve bluffing. The differences between poker and DFS, and the different skillsets involved, indicate that poker is hardly a perfect

87. *Id.*

88. Arkansas and Tennessee both follow the Any Chance Test and passed DFS legislation. Meehan, *supra* note 25, at 18, 18 n.74; Gouker, *supra* note 28; *see also* Chris Grove, *What Are The States Where You Can Play Daily Fantasy Sports?*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> [<https://perma.cc/56XM-FYSZ>].

89. Meehan, *supra* note 25, at 23.

90. 643 S.E.2d 626 (N.C. Ct. App. 2007).

91. *Id.* at 629.

92. *Id.* at 631.

93. *Id.* at 629.

94. *Id.* at 630.

analogy to DFS for legal analysis, but it is one that commentators often use and thus seems likely to arise in DFS skill-versus-chance debates. Yet, when viewed under either lens—a single lineup in a single contest or multiple lineups over many contests—statistical evidence indicates that skill predominates over chance in DFS. The evidence strongly supports this position when viewed under the multiple lineup lens, and under the single lineup lens, it is at the least a close call.

In its legal battle against Attorney General Schneiderman in New York, FanDuel prepared a brief arguing that DFS contests are games of skill when analyzed under either lens.⁹⁵ In an all-chance game, the expected winning percentage between head-to-head players is an even fifty-fifty. Chess represents the other end of the spectrum. A chess grandmaster is expected to beat an amateur player nearly one hundred percent of the time.⁹⁶ FanDuel's brief pointed out that in a single DFS contest, the top ten percent of DFS players score more points than the bottom ten percent of DFS players fifty-nine percent of the time.⁹⁷ A fifty-nine percent winning percentage for skilled players in a single contest, nine points above the fifty percent all-chance threshold, indicates that there is some skill involved in DFS contests when examined under the single lineup lens, but there is also a significant degree of chance.⁹⁸

When examining multiple lineups over a longer period, the numbers forcefully support the argument that DFS contests involve a very high degree of skill. FanDuel noted that approximately fifty percent of all the prize money is won by one percent of the contestants.⁹⁹ Other analysts found that figure modest; a report released by Business Insider in 2015 found that about one percent of high-skilled DFS contestants won nearly ninety percent of the prize money.¹⁰⁰ In a game where chance is the dominant factor, probabilities dictate more evenly distributed prize money over time.¹⁰¹

95. Peter Hammon, *Analyzing FanDuel's Statistical Arguments on Skill vs. Chance at the New York Hearing*, LEGAL SPORTS REP. (Dec. 1, 2015, 2:13 PM), <http://www.legalsportsreport.com/6605/fanduels-skill-vs-chance-arguments/> [<https://perma.cc/92WC-77SU>]; Affidavit of Anette (Peko) Hosoi at 3, *People v. FanDuel, Inc.*, No. 453056/2015 (N.Y. Sup. Ct. Dec. 11, 2015).

96. Hammon, *supra* note 95.

97. *Id.*

98. *Id.*

99. *Id.*

100. Andrew Stern, *1% of Daily Fantasy Players Take Home Almost All of the Payouts*, BUS. INSIDER (Nov. 24, 2015, 12:16 PM), <http://www.businessinsider.com/deep-end-inside-world-of-daily-fantasy-sports-2015-11> [<https://web.archive.org/web/20171121182449/https://scout.com/fantasy/Article/Goode-II-Big-Distinction-Between-DFS-Season-Long-Fantasy-101596591>].

101. Hammon, *supra* note 95.

D. DFS's Legal Status in Wisconsin

Like most states, Wisconsin's gaming statutes embody the Dominant Factor Test.¹⁰² Wisconsin courts interpret the language to mean that skill must "predominate" over chance in controlling the award."¹⁰³ Unfortunately, there is very little Wisconsin case law that discusses how the test applies to a mixed skill-chance game like DFS, and there is no guidance about the proper lens for analyzing the skill-chance debate.¹⁰⁴ When numerous state attorney generals weighed in on DFS amidst the highly publicized insider-trading accusations in 2015, advocates both for and against DFS legalization in Wisconsin sought an opinion from Attorney General Schimel, but his office never provided one.¹⁰⁵ The lack of Wisconsin case law applying the Dominant Factor Test to mixed skill-chance games, no guidance from the state judiciary about DFS, as well as opposing attorney general opinions from states employing the same test as Wisconsin, paints an unclear picture about DFS's legal status in the state.

E. The Regulatory Trend

The maze of inconsistent judicial and attorney general opinions does not provide a dependable framework to evaluate DFS contests under Wisconsin's Dominant Factor Test, leaving the issue best left for the legislature. Between 2015 and 2017, sixteen states enacted legislation legalizing and regulating the DFS industry,¹⁰⁶ and there are

102. WIS. STAT. § 945.01(1) (2015–16).

103. *State v. Hahn*, 586 N.W.2d 5 (Wis. Ct. App. 1998). "[C]hance rather than skill must . . . be the dominant factor controlling the award. . . . The requirement that chance *predominates* over skill gives sufficient warning to persons of reasonable intelligence who desire to comply with the law what conduct is proscribed . . . and provides a sufficiently objective standard for the trier of fact." (emphasis added) *Id.* at 10–11.

104. *State v. Hahn* involved video poker machines. The court reiterated and applied Wisconsin's Dominant Factor Test, but the case centered on the definition of a "gambling machine." The court did not apply Wisconsin's Dominant Factor Test to analyze whether skill or chance is the dominant factor in determining the outcome of poker and did little to clarify the application of Wisconsin's balancing test to mixed games like DFS. *Id.* at 10–12.

105. Jessie Opoien, *Republican Bill Would Allow, Regulate Daily Fantasy Sports Companies in Wisconsin*, CAP. TIMES (Jan. 28, 2016), http://host.madison.com/ct/news/local/govt-and-politics/republican-bill-would-allow-regulate-daily-fantasy-sports-companies-in/article_891ac257-409f-5403-acf1-1973f09b896f.html [https://perma.cc/QZ3T-M2RN].

106. Gouker, *supra* note 28.

seven more states with active DFS bills pending.¹⁰⁷ The Wisconsin attorney general's non-opinion implies that the office is leaving the question for the legislature to decide, and wisely so. In five states where the attorney general previously declared DFS contests illegal, the legislature overruled the attorney general and enacted legislation legalizing and regulating DFS.¹⁰⁸ Nearly all of the attorney general opinions, whether finding DFS legal or illegal, suggested that if DFS is legalized, it must be accompanied by regulatory oversight.¹⁰⁹

The New York DFS legislation, coupled with consumer protections from the Massachusetts bill, provides a solid framework for Wisconsin to follow. The New York bill expressly states that “interactive fantasy sports are not games of chance because . . . teams are selected based upon the skill and knowledge of the participants.”¹¹⁰ The intent of the legislation is to “safeguard the integrity of the games and participants and to ensure accountability and the public trust.”¹¹¹ Some of the New York and Massachusetts DFS consumer protections include: prohibitions on minors from participating; ensuring advertisements depict accurate representations concerning the chances of winning; identifying highly experienced players; limiting the number of entries that can be submitted to any contest; restricting DFS company employees from participating; prohibiting the use of third-party scripts or algorithmic scripting programs; prohibiting any contests based on collegiate or high school games; licensure and registration requirements; among others.¹¹² The New York regulations also include a fifteen percent tax on contest entry fees collected from state residents and directs that money to the state lottery fund, which is used to fund New York's public education system.¹¹³ This regulatory scheme effectively protects consumers, creates a new and abundant source of tax revenues, and fosters additional economic benefits.

Wisconsin's best path forward is to adopt DFS legislation that follows the New York model while adding two consumer protections from the Massachusetts bill: (1) the requirement that operators offer contests excluding highly experienced players, and (2) the ban on

107. Illinois, Connecticut Michigan, North Carolina, Ohio, Rhode Island, and Washington have active DFS bills pending. *Id.*

108. Delaware, Mississippi, New York, Tennessee, and Vermont. *Id.*

109. Gouker, *supra* note 27.

110. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016).

111. *Id.* at 2.

112. *Id.* at 3, 6–7.

113. *Id.* at 9; *New York Lottery's Mission: Where the Money Goes*, N.Y.

LOTTERY,

<http://nylottery.ny.gov/wps/portal/Home/Lottery/About+Us/Mission+for+Education/Where+the+Money+Goes> [<https://perma.cc/7QU2-S3LS>].

extensions of credit. However, Wisconsin must also consider such legislation's impact on gaming compacts between the state and federally recognized Tribes of Indians in Wisconsin. Wisconsin's gaming compacts with the Tribes of Indians in Wisconsin give Tribes the power to operate enumerated gaming ventures in the state.¹¹⁴ The Tribes pay the state a premium to have a quasi-monopoly over casino gaming and "electronic games of chance."¹¹⁵ DFS legislation declares that DFS contests are "not games of chance;"¹¹⁶ but to avoid litigating whether DFS contests fall within tribal gaming compacts' quasi-monopoly on "electronic games of chance," any Wisconsin DFS legislation is more complete by including specific language that addresses and preserves the tribal gaming compacts and incorporates any other concerns that may be raised by the Tribes during the legislative process. Doing so allows the expansion and regulation of the DFS industry without disrupting the gaming compacts.

A lack of case law concerning mixed skill-chance games under the Dominant Factor Test, Attorney General Schimel's silence on the issue, and national legislative trends all provide a legal foundation for Wisconsin to move forward with DFS legislation. The game's intense popularity combined with much needed consumer protections, potential tax revenues, and associated economic benefits have ripened Wisconsin for DFS legislation. Accordingly, it is in Wisconsin's best interests to enact the New York DFS regulatory scheme combined with consumer protections from the Massachusetts bill and language that addresses the state's tribal gaming compacts.

II. DFS LEGISLATION BENEFITS WISCONSIN

The primary purposes of DFS legislation are to provide consumer protections and facilitate economic benefits. Combining consumer protections from the New York and Massachusetts DFS bills effectively safeguards consumers and properly addresses concerns levied against the DFS industry. Immediate economic benefits are realized by new tax revenues, and the various businesses that are interconnected with the DFS industry benefit from the game's success. New York's DFS bill denotes that DFS contests are games of chance, but the New York bill does not reference tribal gaming compacts. It is wise for Wisconsin to denote that DFS contests are games of chance in any DFS legislation, but also to specifically address the gaming compacts to best preserve them. Moreover, the political climate in Wisconsin makes the state

114. *Tribal Compacts and Amendments*, *supra* note 48.

115. *Id.*

116. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016).

poised for DFS legislation, and the state's aching economy warrants enacting such legislation sooner rather than later. The following analysis addresses each of these issues in turn.

A. *DFS Consumer Protections*

Consumer protection concerns raised by opponents of DFS legislation are effectively quelled by combining the New York and Massachusetts regulatory schemes. Similar to the financial sector, DFS contests involve speculation about future events, and many DFS regulations reflect financial sector regulations. Other DFS regulations mirror those in the legal gaming industry.¹¹⁷ Such regulations are not novel to DFS as they have been cemented in the financial sector and legal gaming industry for decades. Naturally, a few DFS regulations are unique to the DFS industry. Opponents of such legislation do not necessarily argue that these regulations do not effectively protect consumers. Instead, they argue an ideological principle against gambling itself.¹¹⁸ Since finance and gaming regulations provide adequate consumer protections and allow those industries to flourish, it follows that extension of analogous regulations to the DFS industry, combined with a few regulations unique to DFS, will provide the necessary consumer protections.

1. DFS REGULATIONS MIRROR FINANCIAL SECTOR REGULATIONS

DFS regulations mirror financial sector regulations that govern analogous issues. Both industries involve speculation about future events, and the participants with the most knowledge, best research, and most accurate information can place themselves in a statistically advantageous position to earn money. Consequently, both implicate

117. Registration with the State Gaming Commission; background checks of company officers; subject to a third-party audit whenever requested; minimum age of play; warnings about addictive play; and advertisements must state accurate representations concerning the chances of winning are also found in most gaming statutes. Compare S.B. 8153 § 1404(1)(D), (E), (M) 2015–16 Legis. Sess. (N.Y. 2016), with *Responsible Gaming Statutes and Regulations*, AMERICAN GAMING ASS'N (2008), https://www.americangaming.org/sites/default/files/research_files/statutes_and_regs_final_091709.pdf [<https://perma.cc/46C3-CA2B>] (Most states that license legal gaming operations have statutes requiring gaming establishments to post warnings about and offer assistance for compulsive play, although Wisconsin is not one of them).

118. Seth Stevenson, *Think of the Children!*, SLATE (Sept. 29, 2015, 1:32 PM), http://www.slate.com/articles/sports/sports_nut/2015/09/draftkings_and_fanduel_the_moral_panic_over_fantasy_sports_betting_is_misguided.html [<https://perma.cc/ZJ5L-HCLD>].

similar consumer protection concerns. A chief complaint about the DFS industry is that “highly-experienced players” and professionals prey upon unsuspecting beginners.¹¹⁹ Two specific concerns are that: (1) many highly-experienced players use algorithmic scripts that create an unfair advantage, and (2) highly-experienced players are not easily identifiable, resulting in beginners unknowingly competing against professionals.¹²⁰ The financial sector faces similar criticism over professionals swindling ordinary citizens out of their savings as well as continued criticism over the proliferation of algorithms and High-Frequency-Trading (HFT).¹²¹ Additionally, concerns about insider trading stemming from employees’ access to advantageous, non-public information, as well as concerns about false and deceptive advertising, are found in both DFS and the financial sector.¹²² Combining the New York and Massachusetts DFS consumer protections addresses each of these issues with regulations that are comparatively stricter than their financial sector counterparts.

New York’s DFS regulations ban the use of algorithmic scripts.¹²³ DFS algorithmic scripts are used as forecasting models that use tens of thousands of data points to automate and optimize a DFS contestant’s lineup.¹²⁴ These scripts allow contestants to simultaneously enter thousands of lineup variations in thousands of contests through computer automation, not by personally selecting their lineups.¹²⁵ Such scripts irrefutably increase a participant’s odds of winning.¹²⁶

The DFS industry faced heavy backlash when it surfaced that mathematicians and hedge fund types were running algorithmic scripts

119. Van Natta Jr., *supra* note 8; FanDuel defines “highly-experienced players” as a player who has entered more than 1,000 total contests or won \$1,000 or more dollars in four or more contests. DraftKings attaches different badges next to a participant’s username when that player has participated in over 500 or 1,000 contests or has won over a specified amount of money. *Experienced Player Indicators*, FANDUEL, <https://www.fanduel.com/experienced> [<https://perma.cc/5FWQ-6T4D>]; *Experience Badges*, DRAFTKINGS, <https://www.draftkings.com/experience-badges> [<https://perma.cc/WR9H-NYXA>].

120. Van Natta Jr., *supra* note 8.

121. Michelle Fox, ‘Flash Boys’ Michael Lewis: Markets Still Rigged, CNBC (Mar. 23, 2015, 2:17 PM), <http://www.cnbc.com/2015/03/23/flash-boys-michael-lewis-markets-still-rigged.html> [<https://perma.cc/74BB-24E8>].

122. See Van Natta Jr., *supra* note 8.

123. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016);

124. Joshua Brustein & Ira Boudway, *You Aren’t Good Enough to Win Money Playing Daily Fantasy Football*, BLOOMBERG BUSINESSWEEK (Sept. 10, 2015, 7:00 AM), <https://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> [on file with author].

125. *Id.*

126. *Id.*

on DFS platforms.¹²⁷ Similarly, the financial sector faces criticism over the proliferation of HFT algorithms, which are used to make financial trades in large volumes, automatically, and at extremely high speeds.¹²⁸ While there are many useful algorithmic scripts in the financial sector and beneficial purposes for their use, there remains seething criticism over HFT algorithms, particularly the ones used to front-run stock orders.¹²⁹ In support of DFS scripts, some argue that the preparation, knowledge, commitment, and strategy required to create and run DFS scripts is more akin to the work of an investment banker or high-frequency trader than a casino gambler, and that such skill should not be stymied by overly burdensome regulation.¹³⁰ An example of a highly-skilled DFS player's preparation lends credence to the analogy:

[Sud] spends between eight and [fifteen] hours working from his two-bedroom apartment . . . During baseball season he puts about 200 entries into tournaments each night, and he can play more than 1,000 times in the weekly contests during NFL season. The first step is scraping data from various public resources online and plugging the numbers into his custom-built predictive models, which generate hundreds of lineups based on his forecasts. There are publicly available tools that do some of this work for daily fantasy players, but Sud created bespoke software to make sure no one else can access his data. He also has a technique for identifying

127. Dustin Gouker, *Not According to Script: DraftKings Gets Backlash In Terms Of Service Controversy*, LEGAL SPORTS REP. (July 9, 2015 12:08 PM), <https://www.legalsportsreport.com/2197/draftkings-scripting-controversy/> [<https://perma.cc/Q2RU-FZUV>]; David Purdum, *Are Computer Scripts Bad for Daily Fantasy Sports?*, ESPN (July 15, 2015), http://www.espn.com/fantasy/baseball/story/_/id/13261582/are-computer-scripts-bad-daily-fantasy-sports [<https://perma.cc/M2QJ-6UQF>].

128. See Fox, *supra* note 121.

129. MICHAEL LEWIS, FLASH BOYS: A WALL STREET REVOLT 44–53 (2014).

New York senator Charles Schumer wrote a letter to the SEC—then issued a press release telling the world what he had done—condemning the stock exchanges for allowing “sophisticated high-frequency traders to gain access to trading information before it is sent out widely to other traders. For a fee, the exchange will ‘flash’ information about buy and sell orders for just a few fractions of a second before the information is made publicly available.”

Id. at 44–45.

130. Chris Korman, *DraftKings and FanDuel Are Fun, Addictive, and Completely Unfair for Most Fans*, USA TODAY (Sept. 18, 2015, 11:57 AM), <http://ftw.usatoday.com/2015/09/daily-fantasy-sports-football-draftkings-fanduel-commercials> [<https://perma.cc/9SR2-3QGF>]; see also Brustein & Boudway, *supra* note 124.

athletes who aren't going to end up on a lot of other team's rosters, which is important, because there's a particular advantage in choosing players no one else has noticed.¹³¹

Predatory HFT algorithms remain legal in the financial sector (and praised by financial insiders);¹³² yet, as fitting as the analogy is between HFT and DFS scripts, DFS legislation unequivocally bans all non-public scripts because of their undeniable advantages.¹³³ Thus, the New York DFS regulation banning scripts is stricter than its financial sector analogue and properly protects consumers.

DFS regulations specifically eliminate the lack-of-notice issue concerning highly-experienced players. New York's DFS bill requires DFS operators to identify highly-experienced players by attaching an identifiable symbol to their individual usernames.¹³⁴ The Massachusetts DFS legislation requires DFS operators to offer contests that exclude highly-experienced players altogether, and FanDuel and DraftKings now offer such contests in all states where they operate.¹³⁵ This system allows beginners to avoid being preyed on by highly-experienced players and professionals, and beginners are put on notice if they choose to enter a contest with such players.¹³⁶

131. Brustein & Boudway, *supra* note 124.

132. See Fox, *supra* note 121; Michael Lewis, *Michael Lewis Reflects on His Book Flash Boys, A Year After It Shook Wall Street To Its Core*, VANITY FAIR (Apr. 2015), <https://www.vanityfair.com/news/2015/03/michael-lewis-flash-boys-one-year-later> [<https://perma.cc/7KCC-U6D4>].

133. S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016); FanDuel and DraftKings only allow scripts that are made accessible to all users prior to entering a contest, which fulfills the legislative requirement that the scripts are public. See *Rules & Scoring: Scripts*, FANDUEL, <https://www.fanduel.com/rules> [<https://web.archive.org/web/20171208164124/https://www.fanduel.com/rules>]; *Change in Automated Tools Policy*, DRAFTKINGS (Jan. 22, 2016), <https://www.draftkings.com/playbook/press/draftkings-statement-12216> [<https://perma.cc/8USE-C3VP>].

134. S.B. 8153 § 1404(1)(G).

135. 940 MASS. CODE REGS. § 34.12(6)–(7) (2016); see *Beginner Contests*, FANDUEL, <https://www.fanduel.com/beginner-contests> [<https://perma.cc/JJZ9-WPD6>]; *Beginner Games*, DRAFTKINGS, <https://www.draftkings.com/lp/beginner-games> [<https://perma.cc/E87W-KC7S>].

136. After the New York DFS bill was signed into law, FanDuel and DraftKings changed their platforms so that there is an identifiable icon next to all participants' usernames denoting whether the participant is a highly-experienced player. *Experienced Player Indicators*, *supra* note 119. This change alone defeats lack-of-notice concerns, but incorporating this requirement in a Wisconsin DFS bill ensures that all DFS operators abide by this requirement. It also ensures that FanDuel and DraftKings cannot remove this icon for contests offered in Wisconsin in case the companies attempted to do so as a way to attract high-volume DFS players to the state.

DFS regulations effectively address insider-trading concerns as they forbid any employee of DFS operators from participating in DFS contests.¹³⁷ The regulation also forbids entry by athletes whose performance may be used to determine the outcome of a contest, any sports agent, team employee, or league officials, and even family members living with DFS company employees.¹³⁸ This DFS insider-trading prohibition is farther reaching than its financial sector parallel since it restricts a larger group of individuals from participating in contests compared to the financial sector's insider trading prohibitions. Broadly speaking, in the financial sector, individuals possessing material, non-public information are barred from trading on those accounts (or having others trade those accounts by proxy).¹³⁹ In contrast, the DFS regulation prohibits DFS employees from participating in contests altogether. It does not simply apply to employees possessing material, non-public information. In the legal gaming industry, most casino employees are not barred from casino gaming.¹⁴⁰ If more relaxed insider-trading regulations establish adequate consumer protections for finance and the legal gaming industry, the comparatively stricter DFS insider-trading regulation will likely do the same.

Interestingly, financial and DFS companies are making the “*exact same pitch*” to consumers.¹⁴¹ Consider the recent E-Trade ad where the woman in it is so focused on spotting investment opportunities that she ignores everyone around her.¹⁴² The woman is looking at E-trade's insights center and complex dashboard.¹⁴³ The narrator tells her it is all about using her perceptive smarts to beat the crowd: “When others focus on one thing, you see what's coming next. You see opportunity.”¹⁴⁴ Compare that with this DraftKings ad, in which contestants are so focused on their teams that they ignore everyone around them.¹⁴⁵ There's a shot of them looking at a complex dashboard of statistics when the narrator chimes in telling them it's about using

137. S.B. 8153.

138. *Id.*

139. Insider Trading and Securities Fraud Enforcement Act of 1988, H.R. 5133, 100th Cong. (1988).

140. See Mark Gruetze, *Casino Dealers, Workers Get OK to Play in Pennsylvania*, TRIBLIVE (Jun. 8, 2012, 6:10 PM), <http://triblive.com/aande/1934241-74/million-players-revenue-casino-pennsylvania-paid-percent-slot-meadows-9004> [<https://perma.cc/BP3V-QS6J>].

141. Stevenson, *supra* note 118.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

their perceptive smarts to win: “There’s a game within the game that requires a different set of skills. . . . We train, and we win.”¹⁴⁶ While amateur fantasy contestants who play too much will probably lose badly, amateur investors who make too many stock trades are also susceptible to big losses.¹⁴⁷ DFS regulations address these deceptive advertising concerns with regulations that are comparatively stricter than financial service advertising requirements. This is particularly important with regard to previous false advertising claims made against DFS operators.

During the time New York considered DFS legislation, false advertising and fraud cases were pending against DraftKings and FanDuel in state courts.¹⁴⁸ The lawsuits alleged that the companies overstated how easy it was for DFS players to win.¹⁴⁹ “I’m just a regular guy, who goes to work every day. . . . Anybody can win. It’s not just a game against professionals,” says Chris Prince in a FanDuel commercial.¹⁵⁰ Prince is not “just a regular guy” though. He failed to mention that he is a professional DFS contestant who has won significant money from DFS contests.¹⁵¹ In another DFS commercial, Scott Hanson says he turned “\$2 into \$2 million on FanDuel.”¹⁵² The commercial did not mention that Hanson works professionally in the sports analytics industry.¹⁵³ FanDuel and DraftKings eventually settled the suits for twelve million dollars.¹⁵⁴

146. *Id.*

147. *Id.*; “In truth, D.F.S. is more like the stock market, with athletes instead of commodities. No new player attempting to trade stocks has any shot at success without a sizable amount of training.” Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES MAG. (Jan. 6, 2016), <https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html> [<https://perma.cc/46SD-8H2T>].

148. Lucinda Shen, *DraftKings and FanDuel Settle New York Lawsuit for \$12 Million*, FORTUNE (Oct. 26, 2016), <http://fortune.com/2016/10/26/draftkings-fanduel-settlement/> [<https://perma.cc/3GL4-NHLG>].

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*; DraftKings’ founder and CEO, Jason Robins, says:

[H]is biggest regret is selling daily fantasy mainly as a fast way to win big money. “We’ve done a lot of research, and winning money is maybe, like, reason 4 or 5 why people play,” he says. “The main reasons they play are they enjoy the thrill of competition, they like doing things with their friends.” The first impressions created by all those ads will take patience and money to erase. “I think we did ourselves and did the industry a disservice,” Robins says. “That was a mistake . . . It made us come across more like used-car salesmen and less like we have a great luxury automobile here that you’re really going to enjoy.”

New York's DFS advertising restrictions are more stringent than financial services advertising restrictions. For example, one requirement is that all DFS advertisements must include the percentage of winnings awarded to highly-experienced players, and another restricts advertising geared toward minors.¹⁵⁵ Imagine what Charles Schwab might say if it were required to post the percentage of returns that go to their "blue-collar Joe" clients compared to their ultra-wealthy clients in the same way that DFS operators are required to report the percentage of winnings distributed to highly-skilled players? They would not be pleased. After the New York DFS legislation was signed, and the cases against FanDuel and DraftKings were settled, even Attorney General Schneiderman praised the DFS bill's advertising requirements: "DraftKings and FanDuel will now be required to operate with greater transparency and disclosure and to permanently end the misrepresentations they made to millions of consumers . . . [t]hese agreements will help ensure that both companies operate, honestly and lawfully in the future."¹⁵⁶ The New York DFS bill's advertising regulations appeased the concerns of the industry's former staunchest opponent and suitably protects consumers.

2. DFS REGULATIONS REFLECT GAMING INDUSTRY REGULATIONS

Cornerstone gaming industry regulations are incorporated in the New York legislation, including: operators' registration with the State Gaming Commission; background checks of company officers; increased third-party auditing and reporting requirements; minimum age of play requirements; and warnings and assistance for compulsive play.¹⁵⁷ Registration with the State Gaming Commission is an in-depth process that allows the state to ensure companies licensed to offer DFS contests are not illegitimate.¹⁵⁸ In-depth background checks of company officers and increased auditing and reporting requirements are sensible regulations for any industry involving constant financial transactions and access to lucrative, non-public information. The minimum age of play requirements force DFS companies to take specific verification steps to ensure that minors may not participate.¹⁵⁹ Every DFS website must display, in a prominent place, information concerning assistance

Van Natta Jr., *supra* note 8.

155. S.B. 8153 § 1404, 2015–16 Legis. Sess. (N.Y. 2016).

156. Shen, *supra* note 148.

157. S.B. 8153. For more information on Wisconsin gaming industry regulations see WIS. STAT. §§ 945.01–.13 (2013–2014).

158. S.B. 8153 § 1403.

159. *Id.* § 1401(1)(B).

for compulsive play, including a number to call for further resources.¹⁶⁰ Currently, DFS providers may actively operate in Wisconsin without any of the above regulations.¹⁶¹ Applying these longstanding and unchallenged gaming industry regulations to DFS operations is simply common sense.

3. UNIQUE DFS REGULATIONS

On top of consumer protections adopted from gaming and finance, there are several regulations unique to DFS. Users may have only one account per DFS website, and this is strictly enforced.¹⁶² There is also a limit on the number of entries that may be submitted by a player to any contest.¹⁶³ These regulations work together to prevent users from bypassing the scripts restrictions, and prevents participants from “cornering” a contest. Unlike many states’ casino-gaming laws, Massachusetts’s DFS bill restricts DFS operators from extending credit to any participant,¹⁶⁴ which acts as another safeguard against compulsive gaming and is an important provision to include in DFS legislation. Although not included in New York’s bill, Massachusetts’s DFS legislation also requires operators to offer “beginner” contests, i.e., games that exclude highly-experienced players.¹⁶⁵ While FanDuel and DraftKings currently offer such contests in every state where they operate,¹⁶⁶ there is nothing preventing them or other DFS operators from deciding not to offer beginner contests in Wisconsin. These two consumer protection provisions from the Massachusetts bill, which are not found in the New York Bill, should therefore be included in any Wisconsin DFS legislation. Combining these unique DFS regulations with the aforementioned gaming and financed based regulations effectively overcomes DFS consumer protection concerns.

160. *Id.* § 1404(1)(M).

161. FanDuel and DraftKings have instituted requirements for minimum age of play and assistance for compulsive play, but including these requirements in DFS legislation ensures that all operators abide by these rules. It also prevents FanDuel or DraftKings from removing these requirements if they were inclined to do so in the future.

162. S.B. 8153 § 1404(1)(A).

163. *Id.* § 1404(2).

164. 940 MASS. CODE REGS. § 34.11 (2016).

165. *Id.* § 34.12(6)–(7).

166. *See supra* note 135.

4. DFS OPPOSITION

DFS opponents do not necessarily argue that DFS regulations do not protect consumers. They rely on the more traditional critique that fantasy sports are gambling, and that any form of gambling, legal or otherwise, is bad.¹⁶⁷ For example, the Wisconsin Family Action and Citizens Against Expanded Gambling launched a statewide campaign in opposition to Wisconsin DFS legislation.¹⁶⁸ In response to the DFS bills proposed by Representative Vorpapel, the President of Wisconsin Family Action commented, “[t]hey want to call this some other name so it’s not gambling, but it is. . . . It’s going to have the same kinds of addiction problems with other online gambling.”¹⁶⁹ She argued that the bill “represents the largest expansion of gambling in Wisconsin’s history” and opens Pandora’s box for online gambling.¹⁷⁰ However, DFS is not the same as casino-gaming. As Stevenson explains:

The truth is that 80 percent of players on these sites lose less than \$10 per month, a fair price to pay for entertainment, an occasional burst of adrenaline, and feeling more attuned to the sports they spend so much time watching on TV. How is paying for a full day of supercharged sports excitement any worse than buying government-sold lottery tickets?¹⁷¹

There will always be groups resisting any form of entertainment that resembles gambling, but the expansion of the legal gaming industry in the United States over the last several decades indicates that anti-gambling groups’ position is waning. The United Kingdom has allowed online sports betting for many years, not merely fantasy sports.¹⁷² “The issue doesn’t even appear to be particularly controversial over there. . . . Legalized sports betting didn’t lay U.K. society to waste. Nor will daily fantasy sports destroy America.”¹⁷³

167. Stevenson, *supra* note 118.

168. Julaine Appling, *Daily Fantasy Sports Bill is Disguised Legalized Gambling Bill*, RIGHTWISCONSIN (Sept. 16, 2017), <https://rightwisconsin.com/2017/09/16/daily-fantasy-sports-bill-is-disguised-legalized-gambling-bill/> [https://perma.cc/WYS7-88DK].

169. Matthew DeFour, *GOP Lawmaker Drafting Bill to Protect Fantasy Sports in Wisconsin*, WIS. ST. J. (Jan. 7, 2016), http://host.madison.com/wsj/news/local/govt-and-politics/gop-lawmaker-drafting-bill-to-protect-fantasy-sports-in-wisconsin/article_6675959d-9921-50f2-aa49-ba69a8041046.html [https://perma.cc/68GP-FJPY].

170. Appling, *supra* note 168.

171. Stevenson, *supra* note 118.

172. *Id.*

173. *Id.*

B. DFS Legislation's Economic Benefits

Economic interests are also driving the DFS regulatory trend. Nearly every state with DFS legislation includes a relatively high tax on DFS operations.¹⁷⁴ The size and popularity of the industry also cannot be ignored; DFS operators collected more than \$6 billion in contest entry fees from 2015 and 2016 combined.¹⁷⁵ These eye-popping revenues drew the interest of powerful corporate players who are now invested in the DFS industry's success and are contributing sizeable lobbying funds to ensure its viability.¹⁷⁶ DFS's successes bolster these interconnected industries' bottom lines, even if its impact might be marginal.¹⁷⁷

1. TAX BENEFITS

DFS legislation imposes a tax on DFS operators' gross revenue collected within the state.¹⁷⁸ New York's legislation imposes a fifteen percent tax rate (which is on the higher end of the spectrum).¹⁷⁹ New York's DFS legislation went into effect on August 22, 2016, just before football season kicked off. Between the effective date and the end of the year, DFS operators took in \$180.4 million in contest entry fees from New York players, equaling \$18.6 million in gross revenue (or taxable income).¹⁸⁰ New York collected nearly three million dollars of taxes

174. See, e.g., S.B. 8153, 2015–16 Legis. Sess. (N.Y. 2016); see also Gouker, *supra* note 28. Virginia, the first state to enact DFS legislation, is the only state that does not include a tax on DFS revenues. Kevin Horridge, *Virginia DFS Bill Headed to Governor's Desk, State Positioned to Become First to Legalize Daily Fantasy Sports*, CASINO.ORG (Feb. 23, 2016), <https://www.casino.org/news/virginia-dfs-bill-headed-to-governors-desk> [<https://perma.cc/LXW7-APL5>].

175. Philip Marcelo, *Fantasy Sports Companies Fold as Legislative Battle Resumes*, AP NEWS (Apr. 18, 2017), <https://apnews.com/7f177d75361745c192600cf0bba80422> [<https://perma.cc/W56W-543D>]. “From 2015 to 2016, the total amount of entry fees paid by players grew 4 percent to about \$3.3 billion and net revenues for companies rose about 15 percent to \$350 million” *Id.*

176. *Id.*

177. See *infra* Part II.B.2.

178. See, e.g., S.B. 8153 § 1407; see also Gouker, *supra* note 28.

179. S.B. 8153 §1407; see also Gouker, *supra* note 28.

180. Matthew Hamilton, *New York Reaps \$3M in Daily Fantasy Sports' First Five Months*, TIMES UNION (Mar. 3, 2017, 9:00 AM), <http://blog.timesunion.com/capitol/archives/272745/new-york-reaps-3m-in-daily-fantasy-sports-first-five-months/> [<https://perma.cc/58SS-ZQCY>]. Since the NFL season starts in September and the NBA season starts in October, between October and the end of the year is the most profitable time for DFS operators. Ben Fischer, *FanDuel Quadruples Revenue, Draws 1 Million Users in Football Season*, N.Y. BUS. J. (Jan. 13, 2015, 10:22 AM),

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after only five months of DFS operations.¹⁸¹ While three million dollars is not exactly the windfall that some had expected, “[it] is nothing to sneeze at, and it doesn’t account for an entire year’s worth of revenue from DFS”¹⁸² or future industry growth.

The figures from New York provide a reasonable baseline to analyze how much tax revenue Wisconsin might expect to collect by regulating DFS operations. Wisconsin ranks second among all states in “fantasy sports” related Google searches per capita,¹⁸³ and more than 900,000 Wisconsinites play fantasy sports.¹⁸⁴ In fact, the very first fantasy sports magazine was founded in Iola, Wisconsin in 1989.¹⁸⁵ There is no public data indicating how much money Wisconsinites contributed to the \$3.3 billion in contest entry fees in 2016, but the Google search data and number of Wisconsin players indicate that is was probably their proportional share. New York accounts for about ten percent of the DFS market, and is expected to collect \$6 million over the first fiscal year of DFS operations.¹⁸⁶ With the population of Wisconsin being about thirty percent that of New York,¹⁸⁷ Wisconsin

<https://www.bizjournals.com/newyork/blog/techflash/2015/01/fanduel-triples-revenue-draws-1-million-users-in.html> [https://perma.cc/JX53-LMVC?type=image]; Kurt Wagner, *FanDuel Rides NFL, NBA Popularity to Biggest Quarter Ever*, RECODE (Jan. 13, 2015, 7:00 AM), <https://www.recode.net/2015/1/13/11557688/fanduel-rides-nfl-nba-popularity-to-biggest-quarter-ever> [https://perma.cc/G2N8-N7RH].

181. Hamilton, *supra* note 180.

182. Gouker, *supra* note 33. *See also*, Kurt Erickson, *Missouri On Track to Collect Less Than \$1 Million From Fantasy Sports Tax*, ST. LOUIS POST (Sept. 21, 2017), http://www.stltoday.com/news/local/govt-and-politics/missouri-on-track-to-collect-less-than-million-from-fantasy/article_0af565db-64f9-598f-8331-e3e563fe9bc3.html [https://perma.cc/4XGD-4CPZ].

183. Andrew Powell-Morse, *The Unstoppable Rise of Fantasy Sports*, SEATSMART (Nov. 4, 2015), <https://seatsmart.com/blog/fantasy-sports-unstoppable-rise/> [https://perma.cc/Y5YL-HZVH]. Only Minnesota has more “fantasy sports” related Google searches per capita than Wisconsin. *Id.*

184. Bryan Polcyn & Stephen Davis, *“Uncharted Territory:” Wisconsin Set to Determine If Betting on Fantasy Sports is Gambling*, FOX6 NEWS (Feb. 5, 2017, 1:02 PM), <http://fox6now.com/2017/02/05/unchartedterritory-wisconsin-set-to-determine-if-betting-on-fantasy-sports-is-gambling/> [https://perma.cc/6VPB-RMES].

185. DeFour, *supra* note 169.

186. Gouker, *supra* note 33; Dustin Gouker, *Regulated Fantasy Sports Generates Nowhere Near The Tax Revenue Of Regulated Online Casinos*, LEGAL SPORTS REP. (June 16, 2017, 5:00 PM), <https://www.legalsportsreport.com/14392/fantasy-sports-vs-online-gambling/> [https://perma.cc/ZTT5-KNJM].

187. The population of Wisconsin is 5.8 million and the population of New York is 19.75 million, meaning that the population of Wisconsin is 29.4% the size of New York’s population. *Population by State*, U.S. CENSUS BUREAU, <https://www.census.gov/en.html> [https://perma.cc/GS23-ND22]. The uptick from 29.4% to 33%—Wisconsin could expect to collect roughly one third as much tax revenues as New York—is to account for Wisconsin’s higher per capita DFS fandom.

could expect to collect roughly one third as much in tax revenues as New York, or in the ballpark of \$2 million per year. While this will not dent the state's multibillion-dollar debt,¹⁸⁸ new revenue streams are nonetheless needed to keep the state afloat.¹⁸⁹ The alternative is doing nothing, which is the state's current position, and doing nothing is leaving millions on the table.

2. ASSOCIATED ECONOMIC INTERESTS

DFS' popularity and profitability quickly caught the attention of major corporate players. Fantasy sports is an estimated \$7.2 billion industry,¹⁹⁰ and DFS operators have raised more than \$1.2 billion of funding.¹⁹¹ Investors include Fox (which broadcasts NFL and MLB games), Comcast, NBC Sports, Turner Sports, and influential owners Robert Kraft and Jerry Jones.¹⁹² Some of the biggest fantasy sports website operators (accounting for both TFS and DFS) include Yahoo!, ESPN (owned by Disney), NFL.com, and CBS.¹⁹³ On top of investor support, DFS maintains support from all the professional sporting leagues. The NBA is even an equity investor in FanDuel.¹⁹⁴ FanDuel or DraftKings also signed sponsorship deals with every NFL, MLB, and NBA team, the NHL, and many European soccer clubs.¹⁹⁵ Bottom line, billions of dollars are in play and influential players are invested in the industry's success.

Professional sports leagues are naturally banking off the DFS boom. The primary source of money for professional sports leagues is

188. *Wisconsin State Budget and Finances*, BALLOTPEDIA (June 2017), https://ballotpedia.org/Wisconsin_state_budget_and_finances [https://perma.cc/6W5V-UHET].

189. How many other seemingly obvious, but perhaps small, revenue streams are being overlooked? While perhaps a small figure standing alone, the aggregate of many small, but obvious revenue streams (like DFS legislation) could make a dent in the state's debt.

190. *Press Release: Fantasy Sports Now A \$7 Billion Industry*, FANTASY SPORTS TRADE ASS'N (June 20, 2017), <http://fsta.org/press-release-fantasy-sports-now-a-7-billion-industry/> [https://perma.cc/DX7Q-5HV2].

191. *Daily Fantasy Sports Investment & Acquisition Tracker*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/dfs-investment-and-acquisition-tracker/> [https://perma.cc/6ZMY-YRZK]. DraftKings has raised more than \$750 million in funding and FanDuel has raised more than \$350 million. *Id.*

192. *Id.*

193. Burke, *supra* note 36.

194. Brent Schrottenboer, *Leagues See Real Benefits in Daily Fantasy Sports*, USA TODAY (Jan. 1, 2015, 6:50 PM), <https://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/> [https://perma.cc/DVX4-9PMW].

195. *See DFS Partnership/Sponsorship Tracker*, *supra* note 34.

television contracts, which are more valuable than ever before, partly thanks to DFS.¹⁹⁶ “With money on the line every day, daily fantasy participants want to see the results as they happen. So they watch more live games until the end, boosting advertising and television viewership, which fatten the golden goose of American sports: TV rights contracts.”¹⁹⁷ Fantasy sports give fans more reasons to watch sporting events and keeps fans more engaged with the sport. “If there is a statistic that puts dollar signs in the heads of league commissioners, it’s this one: Fans consume forty percent more sports content—across all media—once they start playing FanDuel.”¹⁹⁸ In addition to increased TV rights’ values, fantasy sports lead to “‘increased consumption of our digital content and overall interest in our sport,’ said Sal LaRocca, the NBA’s president of global operations and merchandising.”¹⁹⁹ The benefits to professional sporting leagues seem obvious, but they are not the only ones profiting off the fantasy gold rush.

Advertisers, cable providers, and telecommunications companies are also getting their share of the action. Schrotenboer notes:

Viewers of TV comedy shows and dramas are known to record those programs on their DVRs and then skip through the commercials that are helping fund the content. By contrast, sports fans are known to watch games live with commercials, especially if there’s money on the line. Advertisers love this. So do the cable companies that sell subscriptions to watch it.²⁰⁰

Higher ratings and more lucrative television contracts means that television networks can sell more expensive advertising slots. Advertisers were particularly pleased in the summer and fall of 2015, when FanDuel and DraftKings were in the top five companies in television advertising spending, which was more than the *entire* American beer industry during that same period.²⁰¹ Additionally,

196. Schrotenboer, *supra* note 194.

197. *Id.*

198. *Id.* “This is the stat that helped us at FanDuel get our deal with the NBA,” said Paul Martino of Bullpen Capital, an investment company with a stake in FanDuel.” *Id.*; The FTSA found that sixty-four percent of fantasy players reported watching more live sports because of fantasy and sixty-one reported reading more sports because of fantasy. *Industry Demographics*, *supra* note 31.

199. Schrotenboer, *supra* note 194.

200. *Id.*

201. Van Natta Jr., *supra* note 8 (emphasis added). See also *The Lucrative and Growing Fantasy Football Industry*, SPORTS MGMT. DEGREE HUB (2015), <https://www.sportsmanagementdegreehub.com/fantasy-football-industry/>

fantasy players show increased engagement with their mobile devices and other emerging platforms like gaming consoles and smart-TVs.²⁰² The fantasy sports money web entangles professional sporting leagues, advertising, television, and communications businesses, who now all have an interest in keeping the industry legal and growing.²⁰³ “Many technology companies that are part of the fantasy sports industry, such as Madison-based Rotowire.com, are located in Wisconsin, according to Peter Schoenke, Rotowire.com president and chairman of the Fantasy Sports Trade Association.”²⁰⁴ Legalizing and regulating DFS within Wisconsin creates more prosperity for the numerous and varying Wisconsin business that are part of the fantasy sports money web.

Instead of setting a concrete amount for yearly registration fees paid to the state by DFS operators, New York’s DFS bill includes a yearly registration fee equal to half of one percent of contest entry fees collected within the state and not to exceed \$50,000.²⁰⁵ Setting the yearly registration amount as a percentage of the operator’s collected entry fees (including a cap) ensures that smaller operators are not priced out of the market. Other states set the yearly registration fee at \$50,000, regardless of the operator’s revenue.²⁰⁶ For DraftKings and FanDuel, who control approximately ninety percent of the national DFS market, \$50,000 may be “chicken feed.”²⁰⁷ But many smaller DFS operators and season-long fantasy sports sites have criticized flat registration fees as preventing competition within the market.²⁰⁸

[<https://perma.cc/Z79J-QERC>] (discussing how FanDuel and DraftKings are “among the top 5 spenders in TV ads” in September 2015).

202. “Mobile [devices] and other emerging platforms (i.e. gaming consoles, internet-connected TV) continue to grow as the predominant way (61%) players consume fantasy. This figure grew from 56% in 2014 and just 32% in 2013.” *Fantasy Sports Participation in North America Rises to 57.4 Million*, *supra* note 32.

203. Korman, *supra* note 130:

Think about the cycle playing out now: A large chunk of the NFL’s revenue comes from TV rights, which are more valuable than ever before because they offer a captive audience (in part due to fantasy sports) and networks are making the most of their investment in those rights by selling ads to DraftKings and FanDuel, which in turn are making their money by giving you another reason to more closely watch football.

Id.

204. DeFour, *supra* note 169.

205. S.B. 8153 § 1407, 2015–16 Legis. Sess. (N.Y. 2016).

206. Katie Barlowe, *Virginia Daily Fantasy Sports Get Licensed, But Steep Fees Separate Out Big Fish From Small Fry*, CASINO.ORG (Mar. 8, 2016), <https://www.casino.org/news/virginia-daily-fantasy-sports-gets-licensing-approval> [<https://perma.cc/B7PF-CUW8>].

207. *Id.*; *see also* Purdum, *supra* note 12.

208. Barlowe, *supra* note 206. The operator of a smaller DFS company in Virginia, where the registration fee is \$50,000 dollars per year, feels the hit, “it

Including extortionate registration fees seems counterproductive in Wisconsin's entrepreneurial economy.²⁰⁹ Instead, a yearly registration fee that represents a percentage of the operator's collected entry fees, with a predetermined hard cap, encourages Wisconsin entrepreneurs to seek and develop new and small DFS companies without unduly hindering larger operations in the state.

C. *DFS and Wisconsin's Tribal Gaming Compacts*

The New York DFS regulations include express language that DFS contests are games of skill, but they do not address gaming compacts between the state and federally recognized Tribes of Indians. Wisconsin has gaming compacts with all eleven federally recognized Tribes of Indians in Wisconsin.²¹⁰ The express statement that DFS contests are games of skill places the contests outside of the scope of the tribal gaming compacts, but nonetheless, Wisconsin is better off specifically addressing the tribal gaming compacts to ensure their preservation.

Wisconsin's tribal gaming compacts are individually negotiated with each Tribe,²¹¹ however, the compacts give Tribes exclusive casino rights²¹² and rights to "Electronic Games of Chance."²¹³ Essentially, this provides the Tribes with a quasi-monopoly over casino and other gaming in the state of Wisconsin in exchange for yearly premiums.²¹⁴ These compacts provide vast revenues to the state—hundreds of millions of dollars in the last decade—but they do not cede *all* gaming

essentially prices the smaller brands out of the market" and "puts us out of business in your state." *Id.*

209. The Wisconsin DFS bill proposed in 2016 included a \$150,000 initial registration fee, with a \$30,000 yearly registration fee. Opoien, *supra* note 105.

210. *Tribal Compacts and Amendments*, *supra* note 48.

211. *Id.*

212. *Id.*

213. *Tribal Compacts and Amendments*, *supra* note 48. *See, e.g., Bad River Band of Lake Superior Chippewa Indians and State of WI: Gaming Compact of 1991* 15–24,

http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/BR_Compact.pdf [<https://perma.cc/Q35F-L3SP>] (discussing Electronic Games of Chance regulations for Bad River Band of Lake Superior Chippewa Tribe); *Wisconsin Winnebago Tribe and State of WI: Gaming Compact of 1992* 15–26, http://www.doa.state.wi.us/Documents/DOG/Indian%20Gaming/Compacts/HCN_Compact.pdf [<https://perma.cc/36SC-4ZS8>] (discussing Electronic Games of Chance regulations for the Ho-Chunk Nation Tribe (previously the Wisconsin Winnebago Tribe)).

214. WIS. LEGIS. REFERENCE BUREAU, THE EVOLUTION OF LEGALIZED GAMBLING IN WISCONSIN, RES. BULL. 00-1 at 12 (May 2000).

rights to Indian Tribes in Wisconsin.²¹⁵ The state is permitted to conduct lotteries, license dog racing, bingos, raffles, *and contests of skill* (examples are snowmobiling, darts, or pool).²¹⁶ The compacts do not relinquish rights for the state to license determined games of skill, and the DFS legislation places DFS contests in the licensed-games-of-skill category.

Generally speaking, Tribes across the country have stayed on the sidelines in the DFS battle,²¹⁷ although the industry has met some resistance from Tribes in California, Florida, Oklahoma, and Arizona, who view it as an impermissible expansion of gambling in their states.²¹⁸ The Indian Tribes of Wisconsin have remained relatively quiet on the issue and have not expressed their concerns publicly.²¹⁹ But nearby, the Ojibwe Tribe of Minnesota launched DFS contests in eleven states including Wisconsin.²²⁰ If the state of Wisconsin commences operations of games not presently operated or licensed by the State, the Tribes may also commence operation of any such games, subject to the same State operational rules and regulations.²²¹ The Tribes of Indians in Wisconsin already possess the necessary institutional framework to sustain a legal gaming industry, which makes them particularly well-equipped to expand into the DFS marketplace.

215. See, e.g., *Bad River Band of Lake Superior Chippewa Indians and State of WI: Gaming Compact of 1991*, *supra* note 213, at 3 (discussing prohibitions on Class III gaming); *Wisconsin Winnebago Tribe and State of WI: Gaming Compact of 1992*, *supra* note 213, at 3–4 (same).

216. See WIS. STAT. §§ 565.01–.50, 562.001–563.02, 563.02–.99 (2015–16).

217. Dustin Gouker, *A Daily Fantasy Sports Site Network For Gaming Tribes? Minnesota Casinos Launch ‘Grand Fantasy Sports’*, LEGAL SPORTS REP. (Sep. 7, 2016, 7:50 AM), <http://www.legalsportsreport.com/11342/minnesota-tribes-launch-dfs/> [<https://perma.cc/D2RE-3ZSC>].

218. *Id.*; Tribal gaming interests took credit for quashing the Oklahoma DFS bill. “Tribes don’t necessarily oppose DFS, on its face, but some do appear to be against legislation that would create a set of rules totally apart from the gaming compacts. That is certainly the case in Oklahoma, as the tribes did not take kindly to the legislation . . .” Dustin Gouker, *Tribal Gaming Interests Waking Up on Fantasy Sports: Oklahoma Coalition Quashes Bill*, LEGAL SPORTS REP. (Mar. 21, 2016, 5:00 AM), <https://www.legalsportsreport.com/9116/tribes-and-fantasy-sports/> [<https://perma.cc/EV6E-GHHV>].

219. *But see* Polcyn & Davis, *supra* note 185. (“Representative Vorpapel has said Native American Tribes have already approached him with concerns about any bill that would sanction fantasy sports in Wisconsin.”). One Wisconsin Tribal representative said that fantasy sports would have to “thread the needle” and not change state law in a way that a judge would interpret as violating the compacts. Dustin Gouker, *Daily Fantasy Sports Industry Increasingly Running into Tribal Gaming Concerns*, LEGAL SPORTS REP. (Dec. 21, 2015, 10:55 AM), <https://www.legalsportsreport.com/6950/dfs-and-tribal-gaming/> [<https://perma.cc/SXK7-VYJ2>].

220. Gouker, *supra* note 218.

221. See WIS. STAT. §§ 945.01–.13 (2015–16).

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The DFS legislation's express statement that such contests are games of skill places the contests outside the purview of Wisconsin's gaming compacts, but since the compacts are highly valuable to the Tribes of Indians in Wisconsin and to the state, both parties' interests are best served by including specific language in the legislation that addresses and preserves the state's gaming compacts.

D. Wisconsin's Political Climate is Ripe for DFS Legislation

Wisconsin's political climate makes the state ripe for DFS legislation. The Federal Reserve Bank announced in February 2016, that Wisconsin is one of seven states that likely has a shrinking economy, despite the growing national economy.²²² In light of the state's economic woes, a new stream of tax revenues and related economic benefits are an easy sell to Wisconsin constituents, especially to the 900,000 who already play fantasy sports.²²³

Corporations with significant lobbying budgets also make DFS legislation an attractive proposal for Wisconsin politicians. When the industry faced increased scrutiny from lawmakers, it wisely ramped up its lobbying efforts.²²⁴ In 2015, before the insider trading scandal landed DFS on the front page and created the urgent need for lobbying, FanDuel, DraftKings, and the FSTA spent at least \$275,000 in lobbying and donations.²²⁵ In 2016, the three entities spent at least \$500,000 on lobbyists, and its employees donated roughly \$380,000 to political campaign committees at the state government level.²²⁶ With upwards of seventy-five lobbyists working in more than thirty states,²²⁷ the industry's lobbying efforts are lining politicians' pockets with campaign contributions.²²⁸ There is also less political risk for Wisconsin

222. Louis Weisberg, *Wisconsinites are Suffering from State's Self-Inflicted Budget Woes*, WIS. GAZETTE (Feb. 12, 2016), <http://wisconsingazette.com/2016/02/12/all-wisconsinites-will-suffer-due-to-states-self-inflicted-budget-problems/> [https://perma.cc/WFL2-P6NP].

223. Polcyn & Davis, *supra* note 184.

224. Marcelo, *supra* note 175.

225. *Id.*

226. *Id.*

227. Ryan Rodenberg, *Daily Fantasy Sports State-By-State Tracker*, ESPN (Aug. 12, 2016, 10:13 AM), <http://abcnews.go.com/Sports/daily-fantasy-sports-state-state-tracker/story?id=38332096> [https://perma.cc/2P37-GBRC].

228. Marcelo, *supra* note 175. In 2016, DraftKings increased its spending by 256 percent from the previous year, while FanDuel's outlay went up 186 percent. Ashley Balcerzak, *Uptick in Lobbying Spending for Merging Companies Facing Antitrust Scrutiny*, OPENSECRETS.ORG (Jan. 27, 2017), <https://www.opensecrets.org/news/2017/01/uptick-in-lobbying-spending-facing-antitrust-scrutiny/> [https://perma.cc/5BKR-2U72].

politicians in becoming the seventeenth or eighteenth state to enact DFS legislation (as would be the case now) compared to being the first or second.

CONCLUSION

It is in Wisconsin's best interests to adopt the New York DFS regulations, including the Massachusetts provisions requiring operators to offer beginner-only contests and banning extensions of credit, and with additional language that addresses the state's gaming compacts. The judiciary's confusion over the skill versus chance debate, as evidenced by a lack of case law on mixed skill-chance games and conflicting attorney general opinions, and the national legislative trend, makes the issue more properly decided by the legislature. A combination of the New York and Massachusetts DFS regulations effectively addresses consumer protection concerns by drawing on regulations from the financial sector, legal gaming industry, and crafting a few regulations specific to the DFS industry itself. While not a windfall, DFS regulations are a low hanging fruit that will create a new source of tax revenues and foster economic benefits to other Wisconsin industries. The express language that DFS contests are "games of skill" minimizes the risk of disrupting the state's gaming compacts. Additionally, including language that specifically addresses and preserves the gaming compacts will better protect the Tribes of Indians in Wisconsin and the state's interests. The game's popularity among Wisconsinites, new tax revenues for the state, and spillover economic benefits, make DFS an easy pitch for Wisconsin politicians. Wisconsin can either ban DFS, legalize and regulate DFS, or continue to stay out of this arena. The mounting evidence strongly indicates that Wisconsin's best path forward is to legalize and regulate DFS.