



## FANTASY SPORTS — WILL REGULATORS THROW A YELLOW FLAG?

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Since fantasy sports industry leader FanDuel<sup>1</sup> was founded in 2009, the growth of the on-line fantasy sports market in North America has been phenomenal. For example, the Fantasy Sports Trade Association (“FSTA”) estimates that the number of people playing fantasy sports in the U.S. and Canada more than doubled between 2009 and 2015, from 28.4 million to 56.8 million.<sup>2</sup> The average annual spending per fantasy sports player over this time has increased at an even greater pace, from \$80 in 2012 to \$475 in 2015.<sup>3</sup> Total 2015 spend by fantasy sports participants in the U.S. and Canada is estimated to be almost \$27 billion.<sup>4</sup>

Fantasy sports prize payouts have similarly exploded.<sup>5</sup> In 2014, FanDuel alone awarded \$560 million in prizes,<sup>6</sup> and the industry No. 2, DraftKings,<sup>7</sup> which launched in 2012, gave out \$300 million in 2014.<sup>8</sup> FanDuel has estimated that it will award more than \$2 billion in prizes in 2015,<sup>9</sup> while DraftKings plans to give away \$1 billion.<sup>10</sup> (FanDuel and DraftKings are reported to control an estimated 90% of the fantasy sports market.<sup>11</sup>) By comparison, the Massachusetts Lottery announced that in its fiscal year which ended June 30, 2015, the Lottery set a new sales record of \$5.011 billion, and paid \$3.641 billion in prizes.<sup>12</sup>

As participation in fantasy sports has skyrocketed, fantasy sports operators have become significant businesses. In July, 2015,

FanDuel announced financing of \$275 million from investors, including KKR, Google Capital and Time Warner, along with “[a] number of NFL and NBA team owners.”<sup>13</sup> This brought its valuation to a reported \$1.275 billion.<sup>14</sup> That same month, Draft Kings announced that it obtained an additional \$300 million in financing.<sup>15</sup> Its latest financing round included investments from Fox Sports, Major League Baseball, the National Hockey League, Major League Soccer, as well as Legends Hospitality (owned by the New York Yankees and Dallas Cowboys) and the Madison Square Garden Company (owner of the New York Knicks and Rangers).<sup>16</sup> The Kraft Group, which owns the New England Patriots and Revolution, invested in a prior round.<sup>17</sup> Draft Kings is valued at approximately \$1.2 billion.<sup>18</sup> Professional sports leagues covet the increased viewership that results from fantasy sports contests. “If there is a statistic that puts dollar signs in the heads of league commissioners, it’s this one: Fans consume 40% more sports content—across all media—once they start playing FanDuel. ‘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. ‘That’s a pretty amazing statistic.’”<sup>19</sup>

Clearly, professional sports leagues and the capital markets view fantasy sports

1 <https://www.fanduel.com/> (All cited websites were last accessed on August 18 or 19, 2015, unless otherwise noted).

2 See FSTA “Industry Demographics” at <http://www.fsta.org/?page=Demographics>.

3 Id.

4 Id.

5 Fantasy sports contests can be offered for no cost to enter, and with or without prizes, but the types of contests that are the most popular (and that are the mainstay of the industry) are those involving a fee to enter and valuable prizes awarded to the winners. This type of fantasy sports contest is the focus this article.

6 <https://www.fanduel.com/about>.

7 <https://www.draftkings.com/lobby/#/featured>.

8 “DraftKings obtains additional \$300M in financing,” by Darren Rovell, ESPN.com, July 27, 2015, at [http://espn.go.com/chalk/story/\\_/id/13326551/draftkings-obtains-additional-300m-financing](http://espn.go.com/chalk/story/_/id/13326551/draftkings-obtains-additional-300m-financing).

9 “FanDuel to Announce It Has Raised \$275 Million More,” by Michael J. de la Merced, nytimes.com, July 14, 2015 at <http://www.nytimes.com/2015/07/14/business/dealbook/fanduel-to-announce-it-has-raised-275-million-more.html>.

10 “Daily fantasy sports is more than a game,” by Jonathan Berr, cbsnews.com, July 31, 2015, at <http://www.cbsnews.com/news/for-big-media-companies-fantasy-sports-isnt-childs-play/>.

11 “Gambling or game of skill? Debate swirls over fantasy sports,” by Howard

Stutz, Las Vegas Review-Journal, July 11, 2015, at <http://www.reviewjournal.com/business/casinos-gaming/gambling-or-game-skill-debate-swirls-over-fantasy-sports>.

12 Massachusetts Lottery “Lottery News,” July 14, 2015, at <http://www.masslottery.com/about/news.html>.

13 “FanDuel Announces Series E Financing of \$275 Million from KKR, Google Capital and Time Warner,” businesswire.com, July 14, 2015, at <http://www.businesswire.com/news/home/20150714005506/en/FanDuel-Announces-Series-Financing-275-Million-KKR#.VdM0P02FPCh>.

14 “Fantasy Sports Create Billion-Dollar Startups,” by Lora Kolodny, wsj.com, July 14, 2015, at <http://www.wsj.com/articles/fantasy-sports-create-billion-dollar-startups-1436846402>.

15 Rovell, ESPN.com, see footnote 8.

16 Id.

17 Id.

18 “The Billion Dollar Startup Club,” by Scott Austin, Chris Canipe and Sarah Slobin, wsj.com, Feb. 18, 2015, at <http://graphics.wsj.com/billion-dollar-club/>.

19 “Leagues see real benefits in daily fantasy sports,” by Brent Schrottenboer, USA TODAY Sports, January 1, 2015, at <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

favorably. But is it gambling? Amid the tremendous growth in daily fantasy sports have been calls for its regulation by licensed operators of gambling activities who object to the distinction between their activities as “gambling” and fantasy sports as non-gambling. “[Daily fantasy sports] is gambling,” asserts Joe Asher, CEO of William Hill US, whose company operates sports books throughout Nevada and handles football parlay card wagering in Delaware. “Any suggestion that [fantasy sports] is not gambling is the biggest bunch of baloney I’ve ever seen.”<sup>20</sup> Asher also stated: “I think daily fantasy sports betting should be legal, just like I think traditional sports betting should be legal. But let’s not pretend one is OK and the other is not. Drawing some artificial line between the two makes no sense as a matter of law or policy.”<sup>21</sup> John McManus, MGM Resorts International’s General Counsel echoed this, stating: “MGM Resorts International would like to see daily fantasy sports made legal and properly regulated, similar to our position on all forms of gambling.”<sup>22</sup>

Perhaps as a result of these and other complaints from licensed gambling operators, Nevada’s Gaming Control Board,

the regulatory body that oversees gambling in that state, stated in July of this year that it had begun to analyze the legality of daily fantasy sports.<sup>23</sup>

### What are “Fantasy Sports” Contests?

The term “fantasy sports” has become shorthand for many different forms of sports-related contests. Most involve participants creating a simulated team of players in a particular amateur or professional sport by selecting actual players from throughout the applicable sports league. Participants compete against others who have similarly created teams, and contest outcomes are based on the statistical performances of the players on their respective teams. Contests may last throughout an entire season of the sport or be as short as a single day—i.e., “daily fantasy sports”—in which case they involve only players playing and games occurring on that day. Teams may consist of fewer members than an actual team would put in play, depending on the rules of each contest. By way of example, in DraftKings daily NFL fantasy football contests, a fantasy football team consists of nine players and must include players from

20 Stutz, Las Vegas Review Journal, see footnote 11.

21 “Daily fantasy sports land in gambling industry crosshairs,” by Liana B. Baker, Reuters, Aug. 3, 2015, at <http://www.reuters.com/article/2015/08/03/us-dailyfantasysports-insight-idUSKCN0Q80DH20150803>.

22 Id.

23 Id.



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at least two different NFL teams, representing players involved in at least two different football games. Each team consists of a quarterback, two running backs, three wide receivers, a tight-end, a flex player (running back, wide receiver or tight-end) and a defense or special teams player, and scoring is based on a specified point structure set forth in the rules (e.g., 4 points for throwing a touchdown, 6 points for receiving a touchdown pass, minus one point for throwing an interception, etc.).<sup>24</sup> DraftKings assigns each eligible NFL player a hypothetical “salary” based on his past performance, and each contest participant must stay within a \$50,000 “salary cap” when selecting his or her team.<sup>25</sup> In season-long fantasy sports contests, usually a player may not be on more than one team at the same time, trades are permitted, and participants decide each week which players to play from a participant’s roster of players. In the daily game, participants in the contest may draft the same player(s) and, since the contest lasts only for a single series of games or events (usually a single day), there is no trading of players nor decisions as to whom to play or bench.

This article concerns fantasy sports contests involving a fee to enter and the award of prizes to the winners. There are a variety of forms of such fantasy sports contests. In addition to the season-long and daily varieties in which participants compete against each other, some operators have begun to offer formats that allow participants to compete directly against the host site. For example, as stated in an article by Professor Marc Edelman:

BetAmerica, which is a longstanding online horse and greyhound wagering website, operates a contest that it describes as “daily fantasy sports,” which allows contestants to pay a \$1 “entry fee for the chance to win \$1 million by correctly picking nine players that will hit a home run on any given day”—a task with approximate odds of one in two-million. Meanwhile, Game Sports Network recently launched HotRoster, a contest in which participants compete “against the house” in attempting to select between four and ten consecutive, correct player events.<sup>26</sup>

Other fantasy sports operators have reduced the lineup sizes to three or fewer players. “These contests market themselves as user friendly and easy to enter, even though many ‘daily fantasy sports’ players would acknowledge that the skill-to-luck ratio of these games is lowered.”<sup>27</sup>

Each different form of fantasy sports offering requires a separate legal analysis to determine whether or not it is lawful in the jurisdiction in which it is intended to be offered.

## The Legality of Fantasy Sports Contests Generally

The legality of fantasy sports contests is predicated upon their being contests of skill rather than games of chance. Under federal law and the law of most states, contests of skill are treated differently than games of chance. True skill contests involving an entry fee and pre-established prizes usually are lawful because they are neither a “lottery” nor “gambling” under applicable statutes and/or case law.

Most states define a “lottery” as an activity in which persons give consideration for an opportunity to win something of value, where the outcome is determined by chance. If the element of chance is removed—i.e., if the activity meets the applicable state test for a contest of skill – the activity is not a lottery (and thus cannot be an unlawful lottery).

A different type of law prohibits betting on the outcome of events outside the bettor’s control. Generally states and courts construing state and federal laws define “gambling” in a manner similar to that of New Jersey, which defines “gambling” as “staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the actor’s control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”<sup>28</sup> In true skill contests, the outcome of the contest depends on the participant’s relative knowledge, judgment, decision-making ability, experience, skill, dexterity, quickness, athletic ability and/or understanding of the contest and its rules (collectively, “skill”). Gambling laws do not apply to true skill contests because the outcome is within the control of the participant. Thus, properly designed fantasy sports contests require, among other things, the material involvement of the participants via the exercise of their skill, where the exercise of that skill determines the outcome of the contest. In a properly designed fantasy sports contest, success is within the control of each participant.

## The Unlawful Internet Gambling Enforcement Act (the “UIGEA”)

There is a common misconception that fantasy sports were made lawful by the UIGEA.<sup>29</sup> The UIGEA prohibits a gambling business from knowingly accepting credit, electronic funds transfers, checks or various other financial instruments in connection with another person’s unlawful internet gambling.<sup>30</sup> The UIGEA also requires electronic payment systems, and participants therein, to identify and block such transactions.<sup>31</sup> “Unlawful internet

24 <https://www.draftkings.com/help/nfl>

25 *Id.*

26 “Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law,” by Marc Edelman (March 30, 2015), University of Illinois Law Review, 2016 forthcoming (footnotes and citations omitted). Available at SSRN: <http://ssrn.com/abstract=2587362>.

27 *Id.*, (footnote and citation omitted).

28 N.J. Stat. 2C:37-1.b.

29 31 U.S.C. §§ 5361 - 5367.

30 31 U.S.C. § 5363.

31 31 U.S.C. § 5364.

gambling” is defined, generally, as “to place, receive, or otherwise knowingly transmit a bet or wager [using] the Internet where such bet or wager is unlawful under any applicable Federal or State law ... in which the bet or wager is initiated, received, or otherwise made”<sup>32</sup>

However, the UIGEA expressly excludes from the term “bet or wager” (and thus, from the application of the law):

participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28 [this refers to the Professional and Amateur Sports Protection Act, or “PASPA”] and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based ...

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.<sup>33</sup>

Thus, the UIGEA exempts from its application certain particularly-designed fantasy sports contests. Among other things, for a fantasy sports contest to be exempt from the UIGEA, prizes must be established and made known to participants prior to the contest and cannot be made up or be determined by the entry fees paid, and all outcomes must reflect the relative knowledge and skill of the participants. However, the UIGEA also states:

No provision of [the UIGEA] shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State

compact prohibiting, permitting, or regulating gambling within the United States.<sup>34</sup>

Accordingly, all fantasy sports contests, even if exempted from the UIGEA, are subject to other federal laws and regulations and the laws and regulations of the states from which players are accepted. As a result, whether a particular form of fantasy sports contest is lawful can only be determined by a state-by-state analysis of that form to determine whether it is lawful—even if it is covered by the UIGEA exemption.

Conversely, if a fantasy sports contest is not covered by the UIGEA exemption, that does not mean that it is unlawful. The UIGEA only applies to “unlawful internet gambling” which is defined to mean internet betting or wagering that is unlawful under a different federal law or under an applicable state law. If a fantasy sports contest is not unlawful under another federal law or under the law of a state in which the contest is offered, there will be no UIGEA violation.

### The Professional and Amateur Sports Protection Act (the “PASPA”)

Enacted in 1992 in response to a perceived threat from state lotteries, the PASPA prohibits, generally, the operation of state-sponsored lotteries, sweepstakes, and other gambling schemes. It provides:

It shall be unlawful for ...

(1) a governmental entity<sup>35</sup> to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,

a lottery, sweepstakes,<sup>36</sup> or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>37</sup>

A fantasy sports contest which can be shown to be within the control of the participants, and thus a true game of skill, will be outside the scope of the PASPA. Such a contest will not constitute a “betting, gambling, or wagering scheme,” nor a “lottery” or “sweepstakes” (each of which requires the element of “chance”). The PASPA does not prohibit contests in which the outcome is within the participants’ control.

32 31 U.S.C. § 5362(10)(A).

33 31 U.S.C. § 5362(1)(E)(ix).

34 31 U.S.C. § 5361(b).

35 “Governmental entity” is defined as “a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such

Act (25 U.S.C. 2703(4)).” “State” is defined as “any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.” (See 28 U.S.C. § 3701.)

36 The term “sweepstakes” is not defined in the PASPA. However, it likely would be held to have the meaning given the term by most states – i.e., an activity in which prizes of value are awarded to participants based on chance, and in which no consideration is required in order to participate.

37 28 U.S.C. § 3702.

## The Wire Wager Act

Generally, the Wire Wager Act<sup>38</sup> prohibits an operator's interstate transmission of sports bets or wagers, or information assisting in such wagers. A fantasy sports contest that can be shown to be a true game of skill—i.e., within the participants' control—will not involve "bets or wagers" as those terms are used in the Wire Wager Act. Thus, if properly designed, fantasy sports contests will not be subject to the Wire Wager Act's prohibitions.

## Other Federal Laws

Other federal laws relevant to online fantasy sports contests require an underlying violation of state law or of a different federal law. For example, the Travel Act prohibits certain conduct with respect to an "unlawful activity." For purposes of the Travel Act, the term "unlawful activity"<sup>39</sup> means "any business enterprise involving gambling ... in violation of the laws of the State in which they are committed or the United States, ..." <sup>40</sup> Thus, if no other law is violated, no "unlawful activity" is occurring, and the Travel Act will not apply. Similarly, the Illegal Gambling Business Act<sup>41</sup>

is violated if one "conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business." To constitute an "illegal gambling business," a gambling business must, among other things, violate "the law of a State or political subdivision in which it is conducted."<sup>42</sup> Thus, if a gambling business does not operate in violation of a state's laws, the Illegal Gambling Business Act is not triggered.

## Are Fantasy Sports Contest True Skill Games under State Laws?

The law of each state will determine whether a particular form of fantasy sports contest may lawfully be offered in that state, even if the contest complies with the PASPA and Wire Wager Act. To be lawful in a particular state, each form of fantasy sports contest offered must meet the applicable state test for "skill" and not otherwise be prohibited. As discussed above, state law is not superseded by the UIGEA, and the express carve-out for certain fantasy sports contests contained in the UIGEA does not exempt such contests from state law.

38 18 U.S.C. §§ 1081; 1084.

39 18 U.S.C. § 1952.

40 18 U.S.C. § 1952(b).

41 18 U.S.C. § 1955.

42 18 U.S.C. § 1955(b)(1)

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Most states will determine a contest to be one of skill rather than chance (and thus, not a “lottery” or “gambling” activity), if skill, rather than chance, is the “predominant factor” in determining whether the participant wins or loses. A significant number of other states will determine a contest to be one of skill only if chance does not play a “material role” in determining the outcome. A small number of states will consider a contest to be one of skill only if there is no chance (or almost no chance) involved in determining the outcome. In these states, which include Arkansas, Iowa and Tennessee,<sup>43</sup> fantasy sports face greater risk than in other states, because contests involving any chance (or more than a de minimis amount of chance) are deemed games of chance, and pay-to-play games of chance for prizes are generally illegal gambling.

Whether a fantasy sports contest is one of skill within the control of the participant is a question of fact, not law. As such, it cannot be opined upon by lawyers. For a fantasy sports contest to be deemed one of skill, the operator must be able to demonstrate that the outcome of the contest meets the applicable state test for a game of skill. Usually this means showing through expert math testimony that the contest is within the control of the participants and the contest outcomes reflect each participant’s relative knowledge and understanding of the contest and its rules, and the participant’s judgment, decision-making ability and experience. In the standard daily fantasy sports contests offered by major operators such as FanDuel and DraftKings, participants must evaluate the relative worth of players and draft their teams to maximize scoring potential while remaining under the salary cap. This involves an assessment of past statistical performance and assessing probable future performance, taking into account available information such as weather, injuries and “fit” within the team’s over-all strategy against a particular opponent—again always keeping in mind how the contest is scored. It is argued that this assessment process is similar to the process that coaches and managers go through in determining what line-up they will use against a specific opponent—a job which most would agree requires skill, given the salaries paid to top coaches in various professional and college sports and given that certain coaches and managers are consistently more successful than their peers. Those participants in standard daily fantasy sports contests who are consistently more successful than others tend to spend many hours each week (and in some cases each day) reading information about player performance and contest strategies

so that they can better predict the future performance of eligible athletes against a given opponent. At the end of the day, however, if a fantasy sports contest is challenged as being a game of chance, the ultimate decision will be made by a trier of fact, and thus the operator should be able to show that accomplished participants consistently outperform inexperienced or poor participants.<sup>44</sup>

Some states prohibit pay-to-play fantasy sports for prizes notwithstanding the skill argument, however. For example, in Arizona, the State Department of Gaming website states that fantasy sports contests are “legal as long as only the participants receive the winnings. A league operator may not take a cut.”<sup>45</sup> In Montana: “It is lawful to conduct or participate in a fantasy sports league . . . , [but] [i]t is unlawful to wager on a fantasy sports league by telephone or by the internet.”<sup>46</sup> While some uncertainty as to legality remains, as of this writing, FanDuel, DraftKings, DraftDay, CBS Sports, Yahoo and USA TODAY<sup>47</sup> allow play in 45 U.S. states and the District of Columbia, and prohibit play from a uniform list of U.S. states: Arizona, Iowa, Louisiana, Montana and Washington.<sup>48</sup>

### What Does the Future Hold for Fantasy Sports Operators and Contests?

The key question going forward is whether U.S. gaming regulators will decide to regulate fantasy sports operators, systems and contests. As mentioned above, the Nevada Gaming Control Board is reviewing the legality of daily fantasy sports contests. AG Burnett, Chairman of the Nevada Gaming Control Board, who is leading that review, stated:

When you start offering daily fantasy contests, then you start to blur the line between skill and chance . . . When chance begins to govern the outcome more than skill, you have a form of gaming, and that’s when the need for regulation kicks in.<sup>49</sup>

In response, FanDuel and DraftKings said in a joint statement that they “are speaking with gaming industry representatives to educate them on the fantasy sports industry as our products are fundamentally separate from, and not competitive with casinos and gaming businesses.”<sup>50</sup>

However, as the fantasy sports industry continues to grow and participation increases, fantasy sports operators may decide to embrace self-regulation or some form of cooperative regulation by

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43 “Out of Bounds?: A Legal Analysis of Pay-To-Play Daily Fantasy Sports,” by Nathaniel J. Ehrman, *The Sports Lawyers Journal*, Vol. 22, No. 1, Spring 2015, p 98.

44 For a detailed discussion of the different skills that must be utilized in daily fantasy sports contests vs. season-long fantasy sports contests, see Ehrman, at 101-108.

45 Arizona Department of Gaming, “Gambling Tips to Remember,” at <https://gaming.az.gov/sites/default/files/documents/files/socialgamblingtips.pdf>, p. 6.

46 Mont. Code 23-5-802.

47 USA TODAY’s fantasy sports contests are operated by FantasyScore, a partnership between USA TODAY Sports Media Group and RT Sports. See: Schrottenboer, USA TODAY Sports, footnote 19.

48 <https://www.fanduel.com/terms>, <https://www.draftkings.com/help/terms>; <https://www.draftday.com/faq#Who%20can%20play%20at%20DraftDay%3F>; <http://www.cbssports.com/fantasy/football/games/prize-leagues/rules>; [https://football.fantasysports.yahoo.com/f1/proleagues\\_rules](https://football.fantasysports.yahoo.com/f1/proleagues_rules) and <http://fantasyscore.com/rules>.

49 Baker, Reuters, footnote 21.

50 Id.



A Pro-Lite window sign is used at the majority of Washington's Lottery retail outlets.

duced results similar to the larger-format (window) sign.

Wade explained that the test method used in each installation was a “different stores, same time” comparison. For each wave of installations, the Research and Development department studied jackpot game sales in the six-month period before

the first installation. They were able to develop a highly reliable prediction of the weekly aggregate jackpot game sales in the set of stores that later got signs, from a larger set of stores that did not get signs. Per Wade, sales in the “test” stores were reliably predictable from sales in “control” stores during the same weeks.

Wade elaborated, “Our expectation was that if the jackpot signs had no effect, sales in the test stores would continue to match this prediction week after week, after the all the signs were installed. Conversely, if the signs had a positive effect, actual sales would consistently exceed the prediction.”

In conclusion, Wade explained that they saw that actual sales consistently exceeded the prediction by 5% to 7%. Seeing this effect in early waves of testing encouraged the Lottery to continue persuading retailers to place the signs. The most recent wave of placements (in 2015) produced results similar to those seen in earlier years.

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regulators, rather than have regulation forced upon them. In this regard, Richard Schuetz, Commissioner of the California Gambling Control Commission, wrote in May:

If any of the participants in the fantasy space believe that they can, in the long run, maintain their present sanctuary from state imposed regulation, it can probably be proposed that they possess a high degree of tolerance toward risk. And while the direct participants in the space may be willing to tolerate this risk, many of the related parties may not, and this would certainly include the payment processors, who do not want to see this layer of golden eggs unduly constrained, and the venture capitalists, who do not want their investments tied up in legal matters for the foreseeable future. What is being suggested is that somebody in the sector better start self-regulating, or running to regulation, and the most logical candidates for providing this impetus are the payment processors and the venture capitalists.

The fantasy sports entrepreneurs are a bit young, unseasoned as to the vagaries of regulation, and are way too busy to appreciate all of this; but the payment processors and the venture capitalists have way too much skin in the game to think that state after state will continue to sit on the sidelines. Pick your poison, be it self-regulation or running to, for the third option state imposed regulation will not make you happy.<sup>51</sup>

Finally, fantasy sports may provide opportunities for state lotteries. The Montana Lottery has operated a NFL-based fantasy-football lottery game since 2008,<sup>52</sup> and also operates a fantasy racing game.<sup>53</sup> In addition, in April, a bill was introduced in Massachusetts that would permit the Massachusetts lottery to offer daily fantasy sports.<sup>54</sup> Expect more state lotteries to explore whether fantasy sports lottery games would enable them to reach a younger player and thereby increase sales and the lotteries' ability to generate revenues for worthy causes. ■

51 “You’re Busted: Fantasy Sports and the Need for Adult Supervision,” by Richard Schuetz, GGB News, May 21, 2015, at <http://ggbnews.com/issue/vol-13-no-20-may-18-2015/article/youre-busted-fantasy-sports-and-the-need-for-adult-supervision>.

52 “State of Montana to Institute Fantasy-Football Lottery Game,” by Nando Difino, *wsj.com*, Aug. 22, 2008, at <http://www.wsj.com/articles/>

SB121935765240561711

53 Montana Lottery, “Montana Sports Action FAQ,” at <http://www.montanalottery.com/msaFAQ>.

54 “Fantasy Sports And The Lottery? Massachusetts Bill Illustrates Another Possible Avenue for DFS,” by Dustin Gouker, *Legal Sports Report*, July 7, 2015, at <http://www.legalsportsreport.com/2115/daily-fantasy-sports-lotteries/>.