

## HEDGING YOUR BETS: IS FANTASY SPORTS BETTING INSURANCE REALLY ‘INSURANCE’?

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### I. INTRODUCTION

Sports betting is an animal of both the past and the future: it goes through the ebbs and flows of federal and state regulations and provides both positive and negative repercussions to society. While opponents note the adverse effects of sports betting on the integrity of professional and collegiate sporting events and gambling habits, proponents point to massive public interest, the benefits to state economies, and the embracement among many professional sports leagues. Fantasy sports gaming has engaged people from all walks of life and created its own culture and industry by allowing participants to manage their own fictional professional teams from home. Sports betting insurance—particularly fantasy sports insurance which protects participants in the event of a fantasy athlete’s injury—has prompted a new question in insurance law: is fantasy sports insurance really “insurance?” This question is especially prevalent in Connecticut—a state that has contemplated legalizing sports betting and recognizes the carve out for legalized fantasy sports games. Because fantasy sports insurance—such as the coverage underwritten by Fantasy Player Protect and Rotosurance—satisfy the elements of insurance, fantasy sports insurance must be regulated accordingly. In addition, the Connecticut legislature must take an active role in considering what it means for fantasy participants to “hedge their bets:” carefully balancing public policy with potential economic benefits.

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## II. WHAT IS SPORTS BETTING?

“[M]an is a gaming animal. He must always be trying to get the better in something or other.”<sup>1</sup> Gambling<sup>2</sup> is defined as a “payment of a *price* for a chance to gain a *prize*,”<sup>3</sup> and consists of three elements: consideration,<sup>4</sup> chance, and a prize or reward.<sup>5</sup> The legality of a game boils down to whether it is a game of chance or a game of skill.<sup>6</sup> Sports betting, similar to slot machines and roulette games, are often considered games of chance.<sup>7</sup> But if sports betting was just a game of luck, why have Americans become so invested, why have industries been created, and why have channels for betting grown?

A. *Off to the Races: A French Tradition*

Pari-mutuel betting began in France<sup>8</sup> in the late nineteenth century as the first pooling-based system where a monetary pool is split amongst the winners based on their original bet amount.<sup>9</sup> Pari-mutuel betting was popularized in

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<sup>1</sup> Charles Lamb, *Mrs. Battle's Opinion of Whist*, in THE ESSAYS OF ELIA (1823).

<sup>2</sup> While each may be defined individually, the terms “gambling,” “betting,” and “wagering” may be used interchangeably throughout this Note.

<sup>3</sup> *Boies v. Bartell*, 310 P.2d 834, 837 (Ariz. 1957).

<sup>4</sup> “Consideration is a benefit which must be bargained for between parties to a contract. It must be of value to the parties and is exchanged for the performance or promise of performance.” See RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

<sup>5</sup> Sarah Remes, *Legalizing America's New Pastime: Teaming Up with the House for Pari-Mutuel Sports Betting*, 16 WAKE FOREST J. BUS. & INTELL. PROP. L. 551, 557 (2016) (citing I. NELSON ROSE & MARTIN D. OWENS, JR., INTERNET GAMING LAW 11 (1<sup>st</sup> ed. 2005)).

<sup>6</sup> “More often than not, the legality of such activities turns on whether or not they can be considered predominantly games of skill, rather than chance, even if they have elements of both.” *Id.* For example, consider a game of chess where participants A and B bet against one another while spectators X and Y bet on the outcome. “[A]lthough chess is a game of skill, X and Y are involved in a game of chance because neither have an impact on the outcome of the game between A and B.” *Id.* (Footnotes omitted.). See also I. NELSON ROSE & MARTIN D. OWENS, JR., INTERNET GAMING LAW 27 (2d ed. 2009).

<sup>7</sup> See Remes, *supra* note 5 at 557. But see Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New legal Approach to Prize Games?*, 4 NEV. L.J. 197, 200 [hereinafter *The Games People Play*].

<sup>8</sup> See *id.* at 568 (“Pari-mutual betting developed in France in the late 19<sup>th</sup> century. Its name is a combination of ‘wager’ (from the French *pari*) and ‘reciprocal interest’ or ‘in common’ (*mutuel*), and commonly understood to mean ‘to wager among themselves.’”) (Footnotes omitted.).

<sup>9</sup> *Id.* (citing 2013 State of the States: The AGA Survey of Casino Entertainment, AM. GAMING ASS'N (2013), [http://www.theinnovationgroup.com/maint/docs/aga\\_sos2013\\_fnl.pdf](http://www.theinnovationgroup.com/maint/docs/aga_sos2013_fnl.pdf))).

America by horse racing<sup>10</sup> following the English tradition, and was first utilized in the 1908 Kentucky Derby.<sup>11</sup> Today, most legalized gambling in America is a form of pari-mutuel betting.<sup>12</sup>

*B. Lotteries: A Government Fundraiser*

The institution of today's gambling systems began with the foundations of America.<sup>13</sup> "Unlike the commercial world 'in which the market is the principal determinant,' the forty-four states operating lotteries today demonstrate that legalized gambling is instead the result of government action."<sup>14</sup> In an effort to fund schools, libraries, and churches, the original thirteen colonies created lottery systems.<sup>15</sup> Anti-gambling efforts and fear quickly grew, however, as scandals occurred in the lottery system and proceeds disappeared.<sup>16</sup> Lacking the ability to securely and effectively run lotteries, states dismantled their contests and were nonexistent by 1894.<sup>17</sup>

More recently, states have turned back to lotteries for the same reason the colonies did: to raise money for the public welfare. New Hampshire created the first state lottery in 1963<sup>18</sup> and by 2014 forty-four states authorized residents to participate in the Powerball drawing.<sup>19</sup> A handful of states, however, were

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<sup>10</sup> See Artur Loss, *The Story of Pari-Mutuel Betting in the US: Saving Horse Racing*, CDC GAMING REPS. (Feb. 24, 2014, 8:03 PM), <http://www.cdcgamingreports.com/commentaries/the-story-of-pari-mutuel-betting-in-the-us-saving-horse-racing/>.

<sup>11</sup> See *id.*

<sup>12</sup> See Remes, *supra* note 5, at 569 ("Pari-mutuel betting is the common form of legalized betting in America today; aside from allowable use in dog racing and jai-alai, some states, like California, utilize a pari-mutuel structure for their state lotteries.") (Footnotes omitted).

<sup>13</sup> See *id.*

<sup>14</sup> *Id.* (Footnotes omitted).

<sup>15</sup> Roger Dunstan, *History of Gambling in the United States*, CAL. RSCH. BUREAU (1997), <https://www.library.ca.gov/Content/pdf/crb/reports/97-003.pdf>; see also NAT'L. GAMBLING IMPACT STUDY COMM'N., LOTTERIES, <https://govinfo.library.unt.edu/ngisc/research/lotteries.html>.

<sup>16</sup> See *id.*

<sup>17</sup> *Id.*; see also Remes, *supra* note 5, at 570 ("The federal government prohibited the use of US mail for lotteries and used the Commerce Clause to ban shipments of lottery tickets or advertisements across state lines.") (Footnotes omitted.).

<sup>18</sup> I. NELSON ROSE & MARTIN D. OWENS, JR., INTERNET GAMING LAW 11, 30 (2d ed. 2009).

<sup>19</sup> See *The 6 States Where You Can't Play Powerball*, ABC NEWS (Jan. 13, 2016, 9:47 AM), <http://abcnews.go.com/US/states-play-powerball/story?id=36267614>.

resistant to lottery participation for reasons such as competition with the casino industry<sup>20</sup> or religious opposition.<sup>21</sup>

### C. *America's Favorite Pastime*

America's obsession with sports betting began with baseball.<sup>22</sup> Unsurprisingly, "America's pastime" has had more than its share of scandalous betting affairs.<sup>23</sup> In the 1919 World Series, for example, "Shoeless" Joe Jackson and seven other Chicago White Sox players received payments to "throw" the game.<sup>24</sup> In the late 1980s, Pete Rose—baseball's all-time leader in total career base-hits—received a life suspension from Major League Baseball (MLB) after evidence leaked that he had bet on games he played.<sup>25</sup> The integrity of other professional sports have similarly been challenged by sports-betting rumors and involvement.<sup>26</sup> Nevertheless, the excitement and participation nationwide in sports betting has led some to deem it "America's new national pastime."<sup>27</sup>

### D. *Sports Betting Today*

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<sup>20</sup> Remes, *supra* note 5, at 570 ("The chances of a lottery in Nevada seem slim due to staunch opposition from a potential rival, the casino industry.").

<sup>21</sup> *Id.* (noting that religious resistant creates a "barrier" in some states).

<sup>22</sup> *See id.* at 552 ("The tradition of American sports betting fittingly has its origins in baseball, with the first betting booths appearing at baseball parks in 1860."); *see also* George Fenich, *A Chronology of (Legal) Gaming in the U.S.*, 3 GAMING RES. & REV. 65, 68 (1996).

<sup>23</sup> Remes, *supra* note 5, at 552.

<sup>24</sup> *See* Sarah Pruitt, *Did Shoeless Joe Jackson Conspire to Throw the 1919 World Series?*, HISTORY (Feb. 20, 2013), <http://www.history.com/news/ask-history/did-shoeless-joe-jackson-conspire-to-throw-the-1919-world-series>.

<sup>25</sup> Remes, *supra* note 5, at 552

(citing Rick Weinberg, *5: Pete Rose Banned from Baseball*, ESPN (Sept. 4, 2004), <http://espn.go.com/espn/espn25/story?page=moments/5>).

<sup>26</sup> *See, e.g.*, Ashley Branca, *Ex-NBA Ref Tim Donaghy: Organized Crime Will Always Have A Hand In Sports*, GUARDIAN (May 22, 2015, 10:04 AM), <http://www.theguardian.com/sport/2015/may/22/ex-nba-ref-tim-donaghy-organized-will-always-have-a-hand-in-sports>

(discussing how the National Basketball Association (NBA) was effected when Tim Donaghy, a referee, was sentenced to fifteen months in prison after "point shaving"—the act of influencing the scores and outcome of a game through intentional acts of officiating—and gambling on the games he was officiating).

<sup>27</sup> Press Release, Am. Gaming Ass'n, Nevada Record Shows Sports Betting is America's New National Pastime (Feb. 8, 2016) (on file with author) (quoting American Gaming Association President and CEO Geoff Freeman that "the record amount wagered—legally and illegally—on Super Bowl 50 offers further proof that sports betting has become America's new national pastime").

As of 2015, the sports betting industry reached multibillion-dollar status, with \$4 billion being legally spent each year in Las Vegas alone.<sup>28</sup> More importantly, between \$80 to \$380 billion were suspected to be wagered illegally at that time through “offshore online betting houses, office pools, and smaller bookmakers each year.”<sup>29</sup> In fact, during the 2015 football season, approximately 98.7 percent of bets (equaling \$93 billion of the total) were placed illegally.<sup>30</sup> With the popularity and growth of Fantasy Sports—beginning around the 1960s, the capacity of daily sports gambling has grown exponentially.<sup>31</sup> As attorney Alex Hall stated, despite all of the historic moments in sports over the last few years, “none was more influential than the ‘American Sports Gambler,’ who earned the top spot on *Sports Business Journal*’s 2018 list of the most influential people in sports”<sup>32</sup> just seven months after the United States Supreme Court found the federal ban on state-sponsored sports betting unconstitutional.<sup>33</sup>

#### E. *The Future of Sports Betting and eSports*

Particularly in light of the COVID-19 pandemic and the limited audience participation or televising of live-sports, eSports have become a popular way to

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<sup>28</sup> Will Hobson, *Sports Gambling in U.S.: Too Prevalent To Remain Illegal?*, WASH. POST (Feb. 27, 2015), [https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c\\_story.html](https://www.washingtonpost.com/sports/sports-gambling-in-us-too-prevalent-to-remain-illegal/2015/02/27/f1088e4c-b7d3-11e4-9423-f3d0a1ec335c_story.html).

<sup>29</sup> Remes, *supra* note 5, at 554 (citing Hobson, *supra* note 28).

<sup>30</sup> *Id.* (citing Press Release, Am. Gaming Ass’n, Football Bets to Total \$95 Billion This Season (Sept. 9, 2015); see also Rebecca Bryan, *Americans Will Bet Billions Illegally During NFL Season, Group Says*, YAHOO SPORTS (Sept. 9, 2015), <http://sports.yahoo.com/news/americans-bet-billions-illegally-during-nfl-season-group-000816050--nfl.html> (stating that \$3.8 billion worth of illegal bets were placed on the 2015 Super Bowl alone).

<sup>31</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 10 (2012) [hereinafter *A Short Treatise on Fantasy Sports*]; see also Larry Copeland, *Americans Give Thumps Up to Free Time—Mostly TV*, USA TODAY (Dec. 23, 2010, 3:02 PM), [http://usatoday30.usatoday.com/news/americanwants/2010-12-22-leisure-main\\_N.htm](http://usatoday30.usatoday.com/news/americanwants/2010-12-22-leisure-main_N.htm).

<sup>32</sup> Alexander J. Hall, *Place Your Bets Tennessee’s Sports Gaming Act Begins July 1*, TENN. B.J. at 14 (July 2019) (summarizing some of the most significant events to take place in sports during 2018: “Tiger Woods returned to triumph on the PGA tour, LeBron James took his talents to Los Angeles, Danica Patrick suited up for the last race of her iconic 14-year career, and Robert Kraft owned the New England Patriots without being implicated in a massage parlor prostitution sting.”); David Purdum, *The ‘American Sports Gambler’ Beats Out Adam Silver, Roger Goodell in ‘18 Rankings*, ESPN (Dec. 17, 2018, 12:06 PM).

<sup>33</sup> See *Murphy v. NCAA*, 138 S. Ct. 1461 (2018) (holding the Professional and Amateur Protection Act unconstitutional because it violates the anticommandeering principle).

engage with others and live bet on virtual games.<sup>34</sup> eSports are defined as “competitive, organized video gaming” where “[c]ompetitors from different leagues or teams face off in the same games that are popular with at-home gamers” and “are watched and followed by millions of fans all over the world, who attend live events or tune in on TV or online.”<sup>35</sup> Although betting on eSports was present prior to the pandemic,<sup>36</sup> it “previously [was] sitting in the peripherals of many major sportsbooks.”<sup>37</sup> Bookmakers have recently recognized that not only have betting on eSports increased,<sup>38</sup> but it has also drawn new participants to sports betting.<sup>39</sup> In fact, even large sports leagues, such as the NBA, have created their own simulation games and sponsored eSports tournaments which can be bet on.<sup>40</sup> Additionally, because individual eSports games tend to be

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<sup>34</sup> Cody Luongo, *ESI Gambling Report: Esports Betting, a Global Lifeline for Operators*, ESI (Apr. 7, 2020), <https://esportsinsider.com/2020/04/esi-gambling-report-esports-betting/> (“The ongoing COVID-19 pandemic has spared few industries. Mandatory stay-at-home orders at each corner of the earth have forced people, schools, and businesses indoors to work within a new digital framework.”).

<sup>35</sup> AJ Willingham, *What is eSports? A Look at an Explosive Billion-Dollar Industry*, CNN (Aug. 27, 2018, 2:18 PM), <https://www.cnn.com/2018/08/27/us/esports-what-is-video-game-professional-league-madden-trnd/index.html> (noting that “[S]treaming services like Twitch allow viewers to watch as their favorite gamers play in real time, and this is typically where popular gamers build up their fandoms”).

<sup>36</sup> Luongo, *supra* note 34 (recognizing that “[B]etting on esports is by no means a new concept”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (“In conversation with Quentin Martin, CEO of Luckbox, he told Esports Insider: ‘The uptick is across the board and globally. As well as an increase in registrations, we’ve noticed an increase in average bet size – almost double since February.’”).

<sup>39</sup> *Id.* (“On March 18th, esports betting platform Luckbox reported a 54 percent upswing in new player registrants following cancellation of the English Premier League.”).

<sup>40</sup> *Id.* (“Even the National Basketball Association (NBA) has entered the ring with its own activation surrounding basketball simulation game NBA 2K. The NBA 2K Players Tournament will take 16 of the league’s most well-known and pit them against one another live on ESPN. These collaborations are putting esports in the public eye, and its betting precinct is beginning to see the benefit.”).

shorter than professional sporting events, bettors are able to place wagers at a higher frequency.<sup>41</sup> The future and popularity of eSports is likely to only grow.<sup>42</sup>

### III. LEGAL BACKGROUND

Historically, gambling was not illegal when “practiced innocently and for recreational purposes.”<sup>43</sup> Despite the usage of lotteries to raise proceeds for the government, anti-gambling movements in America have existed since 1633 when the Puritans passed the first statute in opposition to gambling.<sup>44</sup> Centuries later, anti-gambling sentiment still exists despite changing cultural attitudes.<sup>45</sup> The government’s “pendulum-like attitude”<sup>46</sup> towards gambling activities has brought along with it statutes, regulations, and case law with every swing.

#### A. *Game of Chance v. Game of Skill: Common Law and Gambling*

The three elements of gambling are consideration, reward, and chance.<sup>47</sup> Traditionally, all three elements must be found for an activity to be considered illegal gambling under a statute. Satisfying the elements of consideration and reward are not challenging in gambling or sports betting. The entry fee that is paid to participate in the activity establishes<sup>48</sup> the element of chance, however, often spurs disagreement with regard to sports betting and gambling in general.<sup>49</sup>

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<sup>41</sup> *Id.* (quoting Malte Hegeler, Head of Product Development for OddsMatrix, as stating “At EveryMatrix, esports now adds 65% turnover on top of the traditional offering, and it’s growing. For bookmakers, the adoption rate of FIFA and NBA 2k among traditional bettors is a blessing during this crisis. We actually see players betting more often as FIFA matches only take between 8-15 minutes while a football match lasts close to 2 hours.”).

<sup>42</sup> *Id.* (stating that “the global esports betting market [is] forecast to reach \$17.2 billion . . . by the end of 2020”).

<sup>43</sup> *See* Remes, *supra* note 5, at 559 (citing 38 AM. JUR. 2D *Gambling* § 29 (“Where the players bet against each other and settle with each other, the game is not a banking game and the mere payment of rental by the players for the use of a table, cards, and chips, or the acting by the proprietor or dealer as a stakeholder does not convert a game into a banking game.”)).

<sup>44</sup> *Id.* at 552 (“Such laws, and those that were mimicked in other colonies over the next few centuries, were passed to combat laziness, wasted time, and to alleviate the rising fears of fraud and corruption of the youth.”).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 570.

<sup>47</sup> Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 662 (2017) [hereinafter *Regulating Fantasy Sports*].

<sup>48</sup> Marc Dib, *A Game of Skill or Chance? Why Texas Should Legalize Daily Fantasy Sports*, 51 TEX. TECH L. REV. 361, 375 (2019); *Regulating Fantasy Sports*, *supra* note 47, at 662.

<sup>49</sup> Dib, *supra* note 48, at 375; *Regulating Fantasy Sports*, *supra* note 47, at 663.

When participants win money from “games of chance” they are considered to be illegally gambling, but not if they win money from “games of skill.”<sup>50</sup> The popular arcade game of pinball, for example, was at one point considered to be a game of chance in many jurisdictions and thus held to be a form of illegal gambling.<sup>51</sup> When players and fans were able to prove to government officials that there was an element of skill involved in the game—the ability to control the movements of the pinball by the controlled pulling of the spring-loaded plunger to start, the handling of the flippers to keep the ball in play, and the use of bumpers and holes to score points—they were justified as legal activities of amusement.<sup>52</sup>

A majority of courts and jurisdictions considering this issue utilize the “predominant purpose test,”<sup>53</sup> in which the court must determine what “is the dominating factor in determining the result of the game.”<sup>54</sup> If over fifty percent of the gambling activity is based upon skill, it is legally a game of skill and not illegal.<sup>55</sup> The difficulty with applying this test, however, is that some games, such as poker, are truly based on a mix of both skill and chance.<sup>56</sup> Therefore, courts have to take a subjective approach to decide what the predominant deciding factor of the game is—skill or chance.<sup>57</sup> Other jurisdictions utilize the “material element test”<sup>58</sup> which considers the game to be based on chance “even if 51% or more of the game has an element of skill.”<sup>59</sup> This test is typically hostile to gambling or sports betting activities as any existence of chance within the game

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<sup>50</sup> Dib, *supra* note 48, at 376 (citing Mark Dourmashkin, *Examining the Legalization of Daily Fantasy Sports*, 25 CATH. U. J.L. & TECH. 414, 429 (2017)).

<sup>51</sup> S. R. Shapiro, Annotation, *Coin-operated Pinball Machine or Similar Device, Played for Amusement Only or Confining Reward to Privilege of Free Replays, as Prohibited or Permitted by Antigambling Laws*, 89 A.L.R.2d 815 (1963).

<sup>52</sup> *Id.* at 50. (citing *Calcutt v. McGeachy*, 195 S.E. 49 (N.C. 1938) (“The validity of a statute which included a prohibition against coin-operated machines which ‘may be operated in such manner that . . . the user may secure additional changes or rights to use such machine.’”).

<sup>53</sup> See Joshua Taggart, *Is Daily Fantasy a Form of Gambling Hidden by Skill*, 6 MISS. SPORTS L. REV. 81, 86 (2016).

<sup>54</sup> Jon Boswell, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1264 (2008) (quoting *In re Allen*, 377 P.2d 280, 281 (Cal. 1962)).

<sup>55</sup> Dib, *supra* note 48, at 376; see also Mark Dourmashkin, *Examining the Legalization of Daily Fantasy Sports*, 25 CATH. U. J.L. & TECH. 414, 429 (2017).

<sup>56</sup> Dib, *supra* note 48, at 376 (citing *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. Crim. Ct. 1995)).

<sup>57</sup> Boswell, *supra* note 54, at 1265 (quoting *In re Allen*, 377 P.2d 280, 281 (Cal. 1962)).

<sup>58</sup> See Taggart, *supra* note 53, at 87.

<sup>59</sup> Dib, *supra* note 48, at 376 (quoting Taggart, *supra* note 53, at 87).

is often viewed as “material,” making the game illegal.<sup>60</sup> Thus, under the common law considerations, the legality of gambling is dependent upon how courts consider the element of chance within the particular activity. However, legislators quickly took it upon themselves to regulate sports betting in their jurisdiction.

## B. History of Sports Betting Legislation in America

### 1. Brief History of Federal Legislation

Anti-gambling efforts historically took root on the state level but have steadily risen to the federal arena.<sup>61</sup> Some argue that increased federal anti-gambling legislation should be implemented to assure national uniform application.<sup>62</sup>

#### i. The Wire Act

In 1961, the Wire Act<sup>63</sup> was passed to prevent the illegal activity and “monopoly on sports betting” of the “bankrollers and kingpins” of the mafia who primarily conducted their business through telephones and telegraphs.<sup>64</sup> Thus, the act’s purpose was to prevent the use of wire transmissions to conduct any sports betting or gambling.<sup>65</sup> Despite Congressional efforts to expand the Act to cover all forms of gambling in light of greater access to the internet,<sup>66</sup> the Fifth Circuit held that the Wire Act exclusively applied to sports betting.<sup>67</sup> In 2011, the Office of Legal Counsel for the Department of Justice adopted the Fifth

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<sup>60</sup> *Id.* (citing Taggart, *supra* note 54, at 87 as stating that the element of chance must be material but does not need to be dominant); *see also* Thole v. Westfall, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984).

<sup>61</sup> *See generally* Fenich, *supra* note 22.

<sup>62</sup> Remes, *supra* note 5, at 566.

<sup>63</sup> 18 U.S.C. § 1084 (2012).

<sup>64</sup> Remes, *supra* note 5, at 560 (citing Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, Occasional Paper Series, 29 LAS VEGAS: CTR. FOR GAMING RES. U. LIBR. (2014)).

<sup>65</sup> *Id.* (“The Wire Act comprehensively sought to attack on multiple fronts, prohibiting the use of wire transmissions in order to ‘place[] bets or wagers on any sporting event or contest,’ ‘receive money or credit as a result of bets or wagers,’ and pass ‘information assisting in the placing of bets or wagers’”) (Emphasis added.) (citing 18 U.S.C. § 1084(a) (2012)).

<sup>66</sup> *Id.* (citing Michelle Minton, *The Original Intent of the Wire Act and Its Implications for State-based Legalization of Internet Gambling*, Occasional Paper Series, 29 LAS VEGAS: CTR. FOR GAMING RES. U. LIBR. (2014)).

<sup>67</sup> *Id.*; *see also* In re MasterCard Inter. Inc., 313 F.3d 257, 262 n.20 (5<sup>th</sup> Cir. 2002) (holding that “a plain reading of the statutory language [of the Wire Act] clearly requires that the object of the gambling be a sporting event or contest”).

Circuit's interpretation by stating that "interstate transmissions of wire communications that do not relate to a 'sporting event or contest . . . fall outside the reach of the Wire Act."<sup>68</sup>

*ii. The Interstate Horseracing Act*

The Interstate Horseracing Act of 1978 ("Horseracing Act")<sup>69</sup> created a legal carve out for gambling and betting activities related to horse racing. The Act allows for pari-mutuel betting<sup>70</sup> via telephone, internet, or electronic device so long as the wagering is legal in both the state where the bet is being placed and the state in which the bets are actually being placed.<sup>71</sup> The Act additionally legalized "off track betting" ("OTB") which allowed individuals in one state to place bets regarding the outcome of a horse race in another state, so long as it was legal in both jurisdictions.<sup>72</sup> In 2000, Congress amended the Horseracing Act to allow states to decide for themselves whether betting activity could be done via phone or internet,<sup>73</sup> while still expressly requiring both the bettor and receiver of such bet to be located in jurisdictions which permit such activity.<sup>74</sup> The Horseracing Act controls "relationships between OTB operators, licensed internet and television horse racing betting services, the tracks, horse owners and trainers, and the various state racing commissions concerning interstate wagers."<sup>75</sup>

*iii. The Professional and Amateur Sports Protection Act*

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<sup>68</sup> Remes, *supra* note 5, at 560 (quoting Memorandum Opinion from the Assistant Attorney Gen. Criminal Division, U.S. Department of Justice, *Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act* (Sept. 20, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/09/31/state-lotteries-opinion.pdf>).

<sup>69</sup> 15 U.S.C. § 3001 (2006).

<sup>70</sup> *See id.* § 3002 (defining pari-mutuel as "any system whereby wagers with respect to the outcome of a horserace are placed with, or in, a wagering pool conducted by a person licensed or otherwise permitted to do so under State law, and in which the participants are wagering with each other and not against the operator").

<sup>71</sup> *Id.* § 3001.

<sup>72</sup> Remes, *supra* note 5, at 561; *see also* 15 U.S.C. § 3002 (2006) (defining interstate off-track wager as "a legal wager placed or accepted in one State with respect to the outcome of a horserace taking place in another State").

<sup>73</sup> PUB. L. NO. 106-553, 114 Stat. 2762A-108 (2000) (amending 15 U.S.C. §3002).

<sup>74</sup> Remes, *supra* note 5, at 561 (citing Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 665 (2010)).

<sup>75</sup> *Id.* (citing Anthony Cabot, *The Absence of a Comprehensive Federal Policy Toward Internet and Sports Wagering and a Proposal for Change*, 17 VILL. SPORTS & ENT. L. J. 271, 280 (2010)).

In 1992, the Professional and Amateur Sports Protection Act (“PASPA”)<sup>76</sup> was passed by Congress to “stop the spread of State-sponsored sports gambling and to maintain the integrity of our national pastime.”<sup>77</sup> “Clinging to the notion that legalized sports gambling would lead to a parade of horrors,” professional sports leagues and the NCAA backed this legislation and lobbied for the bill’s passage.<sup>78</sup> Bill Bradley, a former professional basketball player for the New York Knicks and then U.S. Senator for New Jersey,<sup>79</sup> sponsored the act which attempted to prevent state’s from legalizing sports betting by making it unlawful to:

[S]ponsor, operate, advertise, promote, license, or authorize by law or compact . . . lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>80</sup>

PASPA became most notorious for being the first Congressional effort to regulate sports betting within each state.<sup>81</sup> Interestingly, however, PASPA allowed for the current “wagering schemes” already in practice in states—such as Nevada, Delaware, and Oregon—while prohibiting the spread of sports gambling in locations with an absence of such activity.<sup>82</sup> Nevada, however, was the only state “allowed to accept wagers on individual sporting events.”<sup>83</sup>

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<sup>76</sup> 28 U.S.C. §§ 3701–3704 (1992).

<sup>77</sup> *Id.* (quoting S. REP. NO. 102-248, at 4 (1991)).

<sup>78</sup> Hall, *supra* note 32, at 15.

<sup>79</sup> *Bill Bradley: United States Senator and Athlete*, ENCYC. BRITANNICA, <https://www.britannica.com/biography/Bill-Bradley> (last visited Jul. 24, 2019).

<sup>80</sup> 28 U.S.C. § 3702 (2006); *see also* Remes, *supra* note 5, at 561–62 n.84 (quoting Joseph F. Sullivan, *Gambling Debate Rages Anew Over Sports*, N.Y. TIMES (Nov. 20, 1991), <http://www.nytimes.com/1991/11/20/nyregion/gambling-debate-rages-anew-over-sports.html> (arguing that “the economic arguments advanced by proponents of legalization are outweighed by the potential for corruption and the destruction of the relationship between a sports franchise and its fans, who would become more interested in whether their team beat the gambling odds than whether it won the game”).

<sup>81</sup> Remes, *supra* note 5, at 562 (citing James C. W. Goodall, *Bringing Down the House: An Examination of the Law and Policy Underpinning the Professional and Amateur Sports Protection Act of 1992*, 67 RUTGERS L. REV. 1097, 1104 (2015)).

<sup>82</sup> *Id.*

<sup>83</sup> Hall, *supra* note 32, at 15 (citing 28 U.S.C. § 3704(a)(1)-(2)); *see also* Julian Morris & Guy Bentley, *A Good Bet Gone Bad: How the Professional and Amateur Sports Protection Act Harms Consumers, States and Sports*, 145 REASON FOUND., 15 (2017)).

Additionally, the Act listed many gambling exceptions including “lottery, sweepstakes, or other betting, gambling, or wagering scheme[s] . . . conducted exclusively in casinos located in a municipality” as well as horse racing.<sup>84</sup> PASPA created an additional exception allowing casinos that had “a betting, gambling, or wagering scheme” prior to October 2, 1992 to conduct a “legal sports-gambling regime *within one year of the enactment of PASPA*,”<sup>85</sup> which lead to major legal battles from states and casinos who failed to take advantage of this opportunity.<sup>86</sup>

For the next twenty-five years, “PASPA acted as the definitive barrier to sports gambling in all states outside of Nevada.”<sup>87</sup> Despite legislative efforts, attempts at closing the “loopholes” of PASPA failed, and the act stood “as is.”<sup>88</sup> Even so, by 2015, ninety-seven percent of sports betting that took place did so via “illegal bookies and offshore gambling sites.”<sup>89</sup> In fact, some speculate that PASPA itself encouraged and motivated the increase in sports betting—particularly illegal betting.<sup>90</sup>

#### *iv. The Unlawful Internet Gambling Enforcement Act*

With the increased popularity of the internet and the growth in usage for online sports betting, Congress made multiple attempts throughout the late 1990s and early 2000s to pass a bill regulating online gambling and sports betting.<sup>91</sup>

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<sup>84</sup> See 28 U.S.C. § 3704(a)(1) (1992) (creating a carve out for jurisdictions who had a “wagering scheme in operation between January 1, 1976 and August 31, 1990”).

<sup>85</sup> Remes, *supra* note 5, at 562; see 28 U.S.C. § 3704(a)(3)(A) (2016).

<sup>86</sup> Remes, *supra* note 5, at 562 (“Having failed to take advantage of this exemption within the required time, the State of New Jersey currently finds itself entangled in a dramatic battle with all four major professional leagues and the NCAA in challenging the constitutionality of PASPA in an attempt to legalize sports gambling at the State’s casinos and racetracks.”).

<sup>87</sup> Hall, *supra* note 32, at 15.

<sup>88</sup> See *e.g.*, S. REP. NO. 106-278, at 1 (“S. 2340 establishes a ban on gambling on Olympic, college and high school athletic events, or gambling on any competition in which college, or high school athlete is competing. This ban is a response to the specific recommendation of the National Gambling Impact Study Commission (NGISC), and closes a loophole in the Professional and Amateur Sports Act.”).

<sup>89</sup> Hall, *supra* note 32, at 15.

<sup>90</sup> *Id.* (“PASPA was fueling an underground, unregulated subculture of sports betting from which the states received no economic benefit.”).

<sup>91</sup> Remes, *supra* note 5, at 562–63 (citing Ryan Rodenberg, *The True Congressional Origin of Daily Fantasy Sports*, ESPN (Oct. 28, 2015), [http://espn.go.com/chalk/story/\\_id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress](http://espn.go.com/chalk/story/_id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress)) [hereinafter *The True Congressional Origin of Daily Fantasy Sports*]. See *e.g.*, *Amateur Sports Integrity Act and Gambling in Amateur Sports: Hearing on S. 2340 Before the S. Comm. on Commerce, Sci., and Transp.*, 106th Cong. 101–02 (2000) (Joint Prepared Statement

Finally, in 2006, Congress passed the Unlawful Internet Gambling Enforcement Act (“UIGEA”)<sup>92</sup> to cover the gaps in regulation of sports betting apparent with the expansion of internet opportunities.<sup>93</sup> In reaction to the National Gambling Impact Study Commission’s 1999 statement that highlights the negative impact of financial facilitators in online betting activity,<sup>94</sup> the UIGEA “prohibits gambling businesses from knowingly accepting payments in connection with the participation of another person in a bet or wager that involves the use of the Internet and that is unlawful under any federal or state law.”<sup>95</sup> The UIGEA, similar to PASPA, contains many exceptions including fantasy sports,<sup>96</sup> skill-games,<sup>97</sup> and legal intra-state and inter-tribal gaming,<sup>98</sup> such as casinos, and remains silent on state lotteries and horse racing.<sup>99</sup> Despite support,<sup>100</sup> many individuals expressed concern regarding the fact that Congress passed the bill quickly and it was “hastily tacked onto the end of unrelated regulation.”<sup>101</sup>

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by National Gambling Impact Study Commission Members Richard C. Leone, President, The Century Foundation and Leo T. McCarthy, President, The Daniel Group) (noting that the National Gambling Impact Study Commission, who were assigned “to analyze the social and economic impacts of legal gambling in America,” recommended that “betting on collegiate and amateur athletic events that [are] currently legal be banned altogether.”).

<sup>92</sup> 31 U.S.C. § 5361 (2016).

<sup>93</sup> Remes, *supra* note 5, at 563; *see also id.* at n.97 (“The original purpose of the IUGEA was to target internet gambling through its ‘primary lifeblood’ — the payment systems used to process such transactions.”); 31 U.S.C. § 5361(a)(1)-(4) (2016) (noting that “new mechanisms for enforcing gambling laws on the Internet are necessary...”).

<sup>94</sup> *See* NAT’L GAMBLING IMPACT STUDY COMM’N, FINAL REPORT, at 1-1 (1999), <http://govinfo.library.unt.edu/ngisc/index.html>.

<sup>95</sup> Remes, *supra* note 5, at 563 (quoting Unlawful Internet Gambling Enforcement Act of 2006 Overview, FDIC 1.1, <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>); *see also id.* at n.99 (“It is also interesting to note that the UIGEA does not prohibit knowingly transferring money for illegal gambling, only accepting them.”).

<sup>96</sup> Remes, *supra* note 5, at n.102 (quoting 31 U.S.C. § 5362(1)(E)(ix) (2016) (The definition of “[B]et or wager” does not include “[P]articipation in any fantasy or simulation sports game or education 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.”).

<sup>97</sup> 31 U.S.C. § 5362(1)(A).

<sup>98</sup> *Id.* § 5362(10)(B)-(C).

<sup>99</sup> Remes, *supra* note 5, at 563 (citing 31 U.S.C. § 5362(10)(B)).

<sup>100</sup> Remes, *supra* note 5, at 564.

<sup>101</sup> Benjamin Miller, *The Regulation of Internet Gambling in the United States: It’s Time for the Federal Government to Deal the Cards*, 34 J. NAT’L ASS’N ADMIN L. JUDICIARY 527, 537 (2014); *see also* Joe Falchetti,

Further, legislators questioned the creation and composition of the UIGEA.<sup>102</sup> For example, South Carolina Senator Tim Johnson stated, “I strongly support firm regulation and oversight of the gambling industry, but this legislation is unequal in its treatment of gambling activities creating specific carve outs...”<sup>103</sup> He continued his criticism by arguing “the effects of this legislation needed to be studied and analyzed by the full Senate before final passage . . . The inclusion of the Internet Gambling provision in a must pass bill at the last minute is irresponsible legislation.”<sup>104</sup> The UIGEA, however, did not prevent all types of online gambling.<sup>105</sup> Instead, it provided an explicit carve out for fantasy sports<sup>106</sup>

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*UIGEA, 6 Years Later*, CALVINAYRE.COM

(Oct. 15, 2012), <http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006>.

<sup>102</sup> Remes, *supra* note 5, at 564.

<sup>103</sup> *Id.*; see S. REP. NO. 109-125, at 10816 (2006) (Conf. Rep); see also *id.* at 10814 (statement by Connecticut Senator, Joseph Lieberman) (stating that “[T]his unilateral, partisan process also resulted in the eleventh hour insertion of a bill that purportedly outlaws Internet gambling but which may have unintended consequences. This issue clearly deserves more deliberation, and it is unfortunate that such a measure has been added to a critical bill designed to protect the Nation’s ports, legislation which this Congress must pass. I hope that the Senate will return to this issue and give it the attention it deserves, in the future.”).

<sup>104</sup> S. REP. NO. 109-125, at 10816 (2006) (Conf. Rep).

<sup>105</sup> Dana L. Hooper, *Outside the Lines: An Examination of the Legal Veracity of Fantasy Sports as an Exception to Traditional Gambling Regulation*, 1 ARIZ. ST. SPORTS & ENT. L.J. 115, 122 (2011).

<sup>106</sup> Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(E)(ix) (2006). Section 5362(E)(ix) of the UIGEA exempted:

Participation in any fantasy or simulation sports game ... 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 ... 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 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

as Congress was focused mostly on regulating online poker websites.<sup>107</sup> Therefore, most existing fantasy sports games met these requirements and were legal under the UIGEA.<sup>108</sup> Thus, as time went on, regulation began to relax in respect to gambling and betting activities.

## 2. Early Legal Challenges

Constitutional challenges have been brought in response to these federal statutes and the increasing public interest in sports betting.<sup>109</sup> In 2008, a trade organization for online gaming—Interactive Media Entertainment & Gaming Association (“iMEGA”)—brought a judicial challenge against the UIGEA<sup>110</sup> arguing that the statute is void due to vagueness and that it “violated a constitutional right of individuals to engage in gambling-related activity in the privacy of their homes.”<sup>111</sup> Nonetheless, the UIGEA was upheld.<sup>112</sup> Despite a lack of success against the UIGEA in the Third Circuit, iMEGA challenged PASPA two years later,<sup>113</sup> where the case was dismissed on procedural grounds.<sup>114</sup>

In 2011, a state constitutional amendment in New Jersey allowing the state to regulate sports betting<sup>115</sup> was challenged by four professional sports leagues

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performance of an individual athlete in any single real-world sporting or other event.

<sup>107</sup> Hooper, *supra* note 105, at 122; *see generally* UIGEA, H.R. 4411, 109th Cong. (2d Sess. 2006).

<sup>108</sup> Hooper, *supra* note 105, at 124.

<sup>109</sup> Remes, *supra* note 5, at 563; *see* Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of the U.S., 580 F.3d 113 (3d Cir. 2009); *see generally* Interactive Media Ent. & Gaming Ass’n v. Gonzales, No. 07-2625 (MLC), 2008 U.S. Dist. LEXIS 16903 (D.N.J. Mar. 4, 2008).

<sup>110</sup> *See* Interactive Media Ent. & Gaming Ass’n, 2008 U.S. Dist. LEXIS 16903, at \*1–3.

<sup>111</sup> Interactive Media Ent. & Gaming Ass’n, 580 F.3d at 115,117.

<sup>112</sup> *Id.* at 117, 119.

<sup>113</sup> Remes, *supra* note 5, at 565 (citing Interactive Media Ent. & Gaming Ass’n v. Holder, No. 09-1301 (GEB), 2011 WL 802106 (D.N.J. Mar. 7, 2011) (arguing that PASPA violated the First, Fifth, Tenth, Eleventh, and Fourteenth Amendments, and the Commerce Clause)).

<sup>114</sup> *Id.*

<sup>115</sup> N.J. CONST. art. IV, § 7 (amended 2013).

and the NCAA as a violation of PASPA.<sup>116</sup> Upon district<sup>117</sup> and appellate<sup>118</sup> decisions in favor of the leagues—upholding the constitutionality of PASPA—New Jersey passed a law in 2014 partially repealing their complete ban on sports betting as to comply with PASPA.<sup>119</sup> Nevertheless, upon another challenge by the leagues, the District Court<sup>120</sup> and Third Circuit<sup>121</sup> found again in their favor. Two months later, however, the judgment was vacated and an *en banc* hearing was granted.<sup>122</sup>

### 3. The Fall of PASPA

In a historic decision in 2018, the United States Supreme Court declared the federal ban on state-sponsored sports betting unconstitutional.<sup>123</sup> Raymond Lesniak, retired New Jersey state senator, stated—with reference to *Sports Business Journal's* announcement of the Sports Gambler as the most influential person in sports—that “The American Sports Gambler has been the most influential person in sports biz for decades . . . It just took the United States Supreme Court decision to recognize it.”<sup>124</sup>

Federal deference to the states began with individual jurisdictions’ own efforts toward autonomy. PASPA, for instance, was faced with significant opposition from states like New Jersey that sought to allow sports betting at

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<sup>116</sup> See *NCAA v. Christie*, 926 F. Supp. 2d 551, 554 (D.N.J. 2013); see also Remes, *supra* note 5, at 565 (“In response [to the constitutional amendment], the four major professional leagues (NFL, NBA, NHL, and the Office of the Commissioner of Baseball) and the NCAA filed a complaint arguing that the New Jersey law would violate PASPA.”).

<sup>117</sup> See *Christie*, 926 F. Supp. 2d at 554.

<sup>118</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208, 214, 240 (3d Cir. 2013); see also Remes, *supra* note 5, at 565 (noting that “The Third Circuit affirmed the District Court’s ruling later that year in a 2-1 decision”).

<sup>119</sup> Remes, *supra* note 5, at 565 (citing Brent Johnson, *Christie Signs Law Allowing Sports Betting in N.J.*, NJ.COM (Oct. 17, 2014, 4:53 PM), [http://www.nj.com/politics/index.ssf/2014/10/chris\\_christie\\_signs\\_law\\_allowing\\_for\\_sports\\_betting\\_in\\_nj.html](http://www.nj.com/politics/index.ssf/2014/10/chris_christie_signs_law_allowing_for_sports_betting_in_nj.html)).

<sup>120</sup> *NCAA v. Christie*, 61 F. Supp. 3d 488, 508 (D.N.J. 2014).

<sup>121</sup> *NCAA v. Governor of N.J.*, 799 F.3d 259, 261 (3d Cir. 2015).

<sup>122</sup> Remes, *supra* note 5, at 565; see also David Pardum, *Federal Appeals Court Grants New Jersey Rehearing in Sports Betting Case*, ESPN (Oct. 14, 2015), [http://espn.go.com/chalk/story/\\_id/13884984/federal-appeals-court-grants-new-jersey-rehearing-sports-betting-case](http://espn.go.com/chalk/story/_id/13884984/federal-appeals-court-grants-new-jersey-rehearing-sports-betting-case).

<sup>123</sup> Hall, *supra* note 32, at 14 (“[T]he United States Supreme Court struck down the federal prohibition on state-sanctioned sports betting, signifi[ying] the colossal rise of sports betting in America. Of course, the word ‘rise’ is somewhat misleading, as sports betting has been a predominant part of American culture for decades.”).

<sup>124</sup> Pardum, *supra* note 32.

casinos and race tracks within their jurisdiction.<sup>125</sup> In 2012, when New Jersey passed a law legalizing sports betting in Atlantic City,<sup>126</sup> the National Collegiate Athletic Association (NCAA), National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL), and MLB sued the state claiming that the law violated PASPA.<sup>127</sup> Despite the district and Third Circuit courts agreeing with the leagues, and the Supreme Court's denial of New Jersey's petition for a writ of certiorari,<sup>128</sup> the state persisted by appealing their own criminal statute against sports betting<sup>129</sup>—effectively legalizing the activity. Nevertheless, the leagues once again challenged the action as a violation of PASPA<sup>130</sup> and both the district court and Third Circuit agreed with the leagues.<sup>131</sup> This time, however, the United States Supreme Court granted New Jersey's petition for writ of certiorari to review the decision of the appellate court.<sup>132</sup>

On May 14, 2018, the Supreme Court, in *Murphy v. NCAA*,<sup>133</sup> declared PASPA unconstitutional and “commenc[ed] a new era of sports gambling in America.”<sup>134</sup> In fact, some have declared *Murphy* as “the most important sports betting case in United States history.”<sup>135</sup> In a 7-2 decision, the court found PASPA violated the state's regulatory powers as recognized under the Tenth Amendment.<sup>136</sup> Thus, states should be allowed to decide for themselves whether or not legalizing sports gambling is in the best interest of their state and the public. At oral argument, Justice Kennedy noted that PASPA lacked a clear

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<sup>125</sup> Hall, *supra* note 32, at 15 (“New Jersey's efforts to legalize sports betting are encompassed primarily by three cases: *Interactive Media Entm't and Gaming Ass'n Inc. v. Attorney Gen. of the United States*, D.C. No. 3-07-cv-02625 (2009); *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013) (‘Christie I’); and *NCAA v. Gov. of N.J.*, 799 F.3d 259 (3d Cir. 2015) (‘Christie II’).”).

<sup>126</sup> Sarah Coffey, *N.J. Moves Towards Legal Sports Betting This Fall, in Time for NFL Season*, 2 NAT'L L. REV. 146 (May 25, 2012), <https://www.natlawreview.com/article/nj-moves-towards-legal-sports-betting-fall-time-nfl-season>.

<sup>127</sup> Christie, 926 F. Supp. 2d at 551.

<sup>128</sup> *NCAA v. Governor of N.J.*, 730 F.3d 208 (3d Cir. 2013), *cert. denied*, 134 S.Ct. 2866 (2014).

<sup>129</sup> Coffey, *supra* note 126.

<sup>130</sup> Christie, 61 F. Supp. 3d at 488.

<sup>131</sup> *NCAA v. Governor of N.J.*, 832 F.3d 389, 392 (3d Cir. 2016), *rev'd sub nom. Murphy v. NCAA*, 138 S. Ct. 1461 (2018).

<sup>132</sup> *Id.*; *cert. granted sub nom. Christie v. NCAA*, 137 S. Ct. 2327–28 (2017); *see also* Hall, *supra* note 32, at 15 (“If history repeated itself, New Jersey would be out of options. This time, however, history was written, not repeated.”).

<sup>133</sup> *Murphy*, 138 S. Ct. at 1485 (2018).

<sup>134</sup> Hall, *supra* note 32, at 15.

<sup>135</sup> *Id.* (quoting Ryan Rodenberg, *Handicapping When SCOTUS Will Rule on NJ Betting Case*, ESPN (Feb. 7, 2018), [http://www.espn.com/chalk/story/\\_/id/22355958/sports-betting-ranking-potential-dates-supreme-court-rule-new-jersey-sports-betting-case](http://www.espn.com/chalk/story/_/id/22355958/sports-betting-ranking-potential-dates-supreme-court-rule-new-jersey-sports-betting-case)).

<sup>136</sup> *Murphy*, 138 S. Ct. at 1468, 1485.

federal policy and “blur[red] political accountability.”<sup>137</sup> In a similar vein, Justice Breyer expressed concern in regard to PASPA because it “tell[s] states what to do, and therefore, it falls within commandeering.”<sup>138</sup> As Justice Samuel A. Alito Jr., the author of the opinion, simply put it, “[a] more direct affront to state sovereignty is not easy to imagine.”<sup>139</sup>

#### 4. The Trend Toward Legalization at the State Level

Notwithstanding federal efforts, state law remains prevalent in prohibiting<sup>140</sup> or permitting<sup>141</sup> gambling or betting activities. Encouraged by New Jersey’s efforts in fighting PASPA from the outset, the fight toward state autonomy has remained consistent.<sup>142</sup> As Hall stated, “the Supreme Court’s invalidation of PASPA was the equivalent of a red-carpet induction.”<sup>143</sup> Thus, states now enjoy the ability to legalize sports betting within their own jurisdiction.<sup>144</sup>

Ironically, the autonomy provided to states to regulate sports betting within their jurisdictions “opened doors to a massive[ly] regulated sports betting market in the United States.”<sup>145</sup> By April 28, 2019, thirty-eight state legislatures had 152 sports betting bills before them.<sup>146</sup> As of 2019, approximately twenty-five states

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<sup>137</sup> Transcript of Oral Argument at 35–36, *Murphy*, 138 S. Ct. 1461 (2018) (Nos. 16-476, 16-477).

<sup>138</sup> *Id.* at 40.

<sup>139</sup> *Murphy*, 138 S. Ct. at 1478.

<sup>140</sup> Remes, *supra* note 5, at 559; *see, e.g.*, CAL. CONST. art. IV, § 19 (creating the California State Lottery system and permitting “slot machines, lottery games, and banking and percentage card games . . .”); *see also* MISS. CODE ANN. § 87-1-5 (excluding “betting, gaming or wagering on cruise vessels” if the owner or controller possesses a gaming license).

<sup>141</sup> Remes, *supra* note 5, at 559; *see, e.g.*, N.Y. PENAL LAW § 225.10 (McKinney 2019) (specifying the promotion of gambling as a Class E felony); *see also* KY. REV. STAT. ANN. § 372.010 (West 2020) (“Every contract . . . of money, property or other thing won, lost or bet in any game, sport, pastime or wager . . . is void.”); 720 ILL. COMP. STAT. 5/28-7 (2019) (held “Gambling contracts void”).

<sup>142</sup> *See supra* Section II (B)(2).

<sup>143</sup> Hall, *supra* note 32, at 15.

<sup>144</sup> *See id.* (footnote omitted) (“States are now free to regulate sports gambling on their own terms, a freedom that is consistent with national law and policy.”); *see also* *Chun v. State*, 807 F. Supp. 288, 292 (S.D.N.Y. 1992) (finding that gambling is primarily a matter of state concern); Illegal Gambling Businesses Act, 18 U.S.C. § 1955 (b)(1)(i) (2018) (applicable only where activity is illegal under state law); 15 U.S.C. § 3001 (a)(1) (2018) (finding that “the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders”).

<sup>145</sup> Hall, *supra* note 32, at 15.

<sup>146</sup> *Id.* (citing Eric Ramsey, *Sports Betting Legislative Lasso: Who's Next After Montana?*, LEGAL SPORTS REP.

were expected to legalize sports betting by the end of 2020<sup>147</sup> following the lead of eight states who acted quickly.<sup>148</sup> Shortly after *Murphy* was decided, Nevada was joined by Delaware, New Jersey, Mississippi, Rhode Island, Pennsylvania, New Mexico, and West Virginia in allowing sports betting and gambling within their states.<sup>149</sup> In just those states, between August and December 2018, almost \$4 billion was recorded in sports bets and over \$300 million was received in proceeds from the gambling activities.<sup>150</sup>

Some areas of the country, particularly the South, were not as quick to act.<sup>151</sup> Although Mississippi was one of the first states to legalize sports betting in the wake of *Murphy*,<sup>152</sup> no other Southern state followed that year. Since then, however, legalization has been gradual. Starting in Arkansas, a constitutional amendment was approved to allow sports betting in the state,<sup>153</sup> and by 2019 Kentucky, Louisiana, Alabama, Georgia, Virginia, North Carolina, and Tennessee followed with sports betting bills circulating through the legislature.<sup>154</sup>

Tennessee's sports betting bill, in particular, was of great significance. House Bill 1, the "Tennessee Sports Gaming Act," was introduced to the General Assembly on November 7, 2018 "in an effort to capture dollars being wagered through illegal channels or at casinos in neighboring states."<sup>155</sup> Thus, similar to the original intent of legalized gambling in the United States to raise funds for

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(May 7, 2019), <https://www.legalsportsreport.com/32125/sports-betting-bills-may-6>).

<sup>147</sup> John T. Holden, *Prohibitive Failure: The Demise of the Ban on Sports Betting*, 35 GA. ST. U. L. REV. 329, 371 (2019); John Wertheim, *Will Legalized Sports Betting Curtail Corruption or Encourage It?*, CBS NEWS (Mar. 24, 2019), <https://www.cbsnews.com/news/ncaa-march-madness-betting-will-legalized-sports-betting-curtail-corruption-or-encourage-it-60-minutes/>.

<sup>148</sup> Hall, *supra* note 32, at 15.

<sup>149</sup> *Id.* at 15–16.

<sup>150</sup> *Id.* at 16 (citing US *Sports Betting Revenue 2020*, LINES (last visited Sept. 23, 2020), <https://www.thelines.com/betting/revenue>).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (citing Ryan Rodenberg, *State-by-State Sports Betting Bill Tracker*, ESPN (March 12, 2019), <http://www.espn.com/chalk/story//id/19740480/gambling-sports-betting-bill-tracker-all-50-states>); *Legislative Tracker: Sports Betting*, LEGAL SPORTS REP. (last visited Sept. 23, 2020), <https://www.legalsportsreport.com/sportsbetting-bill-tracker>).

<sup>153</sup> Dustin Gouker, *The First Arkansas Sportsbook is 'Coming Soon' to West Memphis*, LEGAL SPORTS REP. (Mar. 12, 2019), <https://www.legalsportsreport.com/30154/first-arkansas-sportsbook-betlucky>.

<sup>154</sup> Hall, *supra* note 32, at 16.

<sup>155</sup> *Id.* (citing H.B. 1, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019), <http://www.capitol.tn.gov/Bills/111/Bill/HB0001.pdf>).

the public good, Tennessee sought to benefit from this opportunity.<sup>156</sup> Tennessee, however, was unique in its efforts to legalize due to “practical and political obstacles” and the fact that the state did not have any casinos or racetracks.<sup>157</sup> Additionally, opponents of the effort relied on the state constitution in which lotteries were prohibited and a governor who was “openly opposed to state-sanctioned gambling.”<sup>158</sup> Nevertheless, the governor declared that his opposition to state-sponsored gambling was not a “dealbreaker”<sup>159</sup> and a spokesperson on his behalf noted that he was willing to “work with lawmakers to improve a bill that impacts the state’s economic and social health, even if it’s not something we plan to support.”<sup>160</sup>

Despite such challenges and opposition, the bill nevertheless gained bipartisan support.<sup>161</sup> Writing in support of the bill, Tennessee Attorney General Herbert Slatery authored an opinion in which he distinguished sports gambling from chance-based activities which are prohibited by the state constitution.<sup>162</sup> With the governors support, the bill underwent significant amendments, including requiring all legalized sports betting activity to be conducted in an online format<sup>163</sup> and providing oversight authority to the Tennessee Education Lottery Corporation Board.<sup>164</sup> The bill also mandated that the sports betting sites utilize only official league data in an effort to protect the integrity of the game.<sup>165</sup> Additionally, “[t]o maximize the state’s cut of gaming revenues,” the annual license fee was increased from \$7,500 to \$750,000 and the ten percent proposed tax was doubled.<sup>166</sup> With the support of both the Senate and the House of

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<sup>156</sup> See *supra* Section I (B).

<sup>157</sup> Hall, *supra* note 32, at 16 (citing Brett Smiley, *The Power 15: Ranking States in Order of Their Odds of Legalizing in 2019*, SPORTS HANDLE (Dec. 18, 2018), <https://sportshandle.com/sports-betting-legalization-2019-power-rankings/> (ranking 11 other states more likely to pass sports betting legislation than Tennessee)).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> Chris Bundgaard, *TN Sports Betting Bill Getting Makeover with Touches from the Top*, WKRN (last updated Mar. 12, 2019, 10:49 PM), <https://www.wkrn.com/news/tn-sports-betting-bill-getting-makeover-with-touches-from-the-top/1843684453>.

<sup>161</sup> Hall, *supra* note 32, at 16.

<sup>162</sup> Legality of Sports Betting in Tenn, 48 Op. Tenn. Att’y Gen. 1–4 (2018).

<sup>163</sup> Tennessee Sports Gaming Act, TENN. CODE § 4-51-317 (d) (2019).

<sup>164</sup> *Id.* § 4-51-306.

<sup>165</sup> Tennessee Sports Gaming Act, TENN. CODE ANN. § 4-51-316 (2019);

see Matt Bonesteel, *Sports Gambling ‘Integrity Fee’ Supporters Are Not Doing Themselves Any Favors*, WASH. POST (May 22, 2018), [https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/?utm\\_term=.6d9653d3dfbf](https://www.washingtonpost.com/news/early-lead/wp/2018/05/22/sports-gambling-integrity-fee-supporters-are-not-doing-themselves-any-favors/?utm_term=.6d9653d3dfbf).

<sup>166</sup> Hall, *supra* note 32, at 16 (citing Amend. No. 1 to H.B. 1, H. State Comm. 1, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019),

Representatives in the state, the bill became law without the governor's signature on May 24, 2019.<sup>167</sup> Thus, even in a state with opposition and significant obstacles to legalization, the benefits of legalized sports betting were recognized and the activity became legal.

Tennessee also helped to show the importance and profitability of online sportsbooks. Not only were they able to profit off of the licensing fee and tax benefits, but the preclusion of local business from including sports betting in their retail operations allowed the state to better regulate the operations.<sup>168</sup> Additionally, states like New Jersey showed that even when states had both online and physical sports betting operations, more business was being done via mobile device or computer than in-person.<sup>169</sup> Popular online gaming sites, such as MGM, FanDuel, DraftKings and William Hill, use geo-fencing technology which ensures people are placing sports bets within a jurisdiction which allows such activities and verifies that the individual bettor is at least twenty-one years old.<sup>170</sup>

### C. Connecticut's Path Toward the Legalization of Sports Betting

Connecticut is on a path to legalizing sports betting. Since the fight for state autonomy in decisions regarding sports betting, Connecticut representatives have remained vocal. Among the controversy over UIGEA, for example, Connecticut Senator Joseph Lieberman expressed his concern regarding the quick and inconsiderable passage of the act.<sup>171</sup> Additionally, unlike Tennessee who had no casinos or racetracks,<sup>172</sup> Connecticut is home to two of the world's largest casinos.<sup>173</sup> Thus, the infrastructure is already in place to oversee the activity and

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<http://www.capitol.tn.gov/Bills/111/Amend/HA0319.pdf>; Amend. No. 2 to H.B. 1, H. Fin., Ways, and Means Comm. 1, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019), <http://www.capitol.tn.gov/Bills/111/Amend/HA0436.pdf>).

<sup>167</sup> Hall, *supra* note 32, at 17.

<sup>168</sup> *See id.*

<sup>169</sup> *Id.* at 1617 (citing Brett Smiley, *Iowa, Indiana, Tennessee Move Closer to Legal Sports Betting*, SPORTS HANDLE (Apr. 23, 2019), <https://sportshandle.com/iowa-indiana-tennessee-legal-sports-betting/> ("In March, bettors in Mississippi wagered \$35 million in retail sportsbooks. In that same month, bettors in New Jersey wagered more than 10 times that amount (\$372 million) on sports, and nearly 80 percent of those wagers were placed on a mobile device or computer.")); CONN. PUB. SAFETY AND SEC. COMM. J. FAVORABLE REP., H.B. 7331, at 2 (2019) (Senior Manager for Government Affairs at DraftKings Inc., Christopher Cipolla, noted that "In January 2019, New Jersey generated \$385 million from sports wagering, 80% of that from mobile devices.").

<sup>170</sup> Hall, *supra* note 32, at 17.

<sup>171</sup> 152 CONG. REC. S10814 (daily ed. Sept. 29, 2006).

<sup>172</sup> *See supra* § II (B) (4).

<sup>173</sup> *Connecticut Casinos*, WORLD CASINO DIRECTORY (last visited Sept. 23, 2020), <https://www.worldcasinodirectory.com/connecticut>.

implement sports betting seamlessly in both a brick-and-mortar and online format.

The Connecticut legislature has attempted multiple times to pass laws regarding sports betting and online sports wagering.<sup>174</sup> The 2019 proposed bill, for example, would allow the state's casinos to host in-person sports betting and conduct their own internet or online gambling activities.<sup>175</sup> The government has been careful, however, to protect the business of the state's casinos and their tribal owners.<sup>176</sup> Legislators, such as State Senator Formica, also see sports

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<sup>174</sup> See e.g., S.B. 17, OFF. OF LEGIS. RSCH., GEN. ASSEMB., OLR B. ANALYSIS (Conn. 2019); H.B. 7055, PUB. SAFETY & SEC. COMM., GEN. ASSEMB., J. FAVORABLE REP. at 2 (Conn. 2019) (noting that “[I]f additional gaming were to be legalized more safeguards would be needed such as; funds dedicated to treating addiction, proper training for sports betting operators, establishing a regulatory agency, and age restrictions.”); H.B. 7331, PUB. SAFETY & SEC. COMM., GEN. ASSEMB., J. FAVORABLE REP. (Conn. 2019); S.B. 540, OFF. OF LEGIS. RSCH., GEN. ASSEMB., OLR B. ANALYSIS (Conn. 2018); H.B. 5306, OFF. OF LEGIS. RSCH., GEN. ASSEMB., OLR B. ANALYSIS (Conn. 2018); S.B. 540, FIN., REVENUE & BONDING COMM., J. FAVORABLE REP. (Conn. 2018); H.B. 5307, PUB. SAFETY & SEC. COMM., GEN. ASSEMB., J. FAVORABLE REP., (Conn. 2018); *Exec. & Legis. Nominations 11 A.M. Comm. Pub. Hearing*, GEN. ASSEMB., at 9 (Conn. 2018) (statement of Donald Defronz, chairperson of the Bd. of Dir. of Conn. Lottery Corp.) (“[T]he two big initiatives that are going to be confronting the legislature this year will be I-gaming and if the Supreme Court rules favorably on sports betting, a potential expansion into sports betting”); see also FIN., REVENUE & BONDING COMM., GEN. ASSEMB., COMM. TRANSCRIPT, at 83-97 (Conn. 2002) (showing an early interest in legalizing sports betting in the state).

<sup>175</sup> GEN. ASSEMB., PUB. SAFETY & SEC. COMM., J.F. REP., H.B. 7331, at 2 (Conn. 2019).

<sup>176</sup> See GEN. ASSEMB., PUB. SAFETY & SEC. COMM., OLR B. ANALYSIS, S.B. 17 (“This bill authorizes sports wagering and online casino gaming pursuant to amendments to existing agreements with the Mashantucket Pequot and Mohegan tribes and after certain conditions are met.”); GEN. ASSEMB. PUB. SAFETY & SEC. COMM., J.F. REP., H.B. 7331, at 1 (Conn. 4/4/2019) (“This bill authorizes the governor to enter into a new compact with the tribes to allow them to offer in-person or online sports wagering, provided that such authorization does not relieve the tribes of their slot payment obligations or terminate the slot moratorium.”); GEN. ASSEMB., PUB. SAFETY & SEC. COMM., COMM. TRANSCRIPT, at 54 (Conn. 2/26/2019) (“[I]f we want to start sports betting here in the state of Connecticut whether it’s online [or] in person...we need to allow the tribes to get it off the ground.”); GEN. ASSEMB., H. TRANSCRIPT (Conn. 5/4/2018) (“I am gravely concerned that this discussion is one that’s compiled upon the Native American tribes and the casinos they operate having a reduced amount of business and a reduced amount of money that’s coming into the Pequot Fund”); GEN. ASSEMB., H. TRANSCRIPT, at 197, 201, 219 (Conn. 2017).

betting as a necessary and inevitable action for regulation.<sup>177</sup> Most recently, in the 2020 legislative session, the House noted their interest in legalizing sports betting.<sup>178</sup> In February 2020, Connecticut Governor Ned Lamont stated, “I want to work with you to ensure that together we stand up a responsible sports betting platform. A betting platform that promotes economic growth for our State and is fair to our tribal partners.”<sup>179</sup>

Legislators have particularly recognized the economic benefit that sports betting could bring to the state.<sup>180</sup> The Vice President of Interactive Gaming of Mohegan Gaming and Entertainment, Aviram Alroy, testified that the casino has “been operating online gaming in New Jersey since 2019” and notes that “the market in Connecticut is expected to generate more than \$100 million in revenue.”<sup>181</sup> Additionally, Greg Smith, the president of the Connecticut Lottery Corporation, noted when testifying before the Connecticut Public Safety Committee in reference to House Bill 7331 that the Committee’s “estimates show that [sport betting revenue] will return about four to five times as much money per dollar wager as any other operator.”<sup>182</sup> Senator Formica put it simply, that legalizing sports wagering and internet gambling in Connecticut “is an

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<sup>177</sup>GEN. ASSEMB., PUB. SAFETY & SEC. COMM. TRANSCRIPT, at 18 (Conn. 2019) (“Sports wagering and internet gambling is occurring around us.”); *see also* Senator Somers, *id.* at 51 (“We all know that sports betting occurs.”); GEN. ASSEMB., OFFI. OF LEGIS. RES., OLR B. ANALYSIS, S.B. 540 (Conn. 2018) (“The attorney general opinion concluded that if the federal ban on sports betting is found to be unconstitutional, the tribes would not have the exclusive right to provide sports betting in Connecticut (AG Opinion 2018-01). Further, if Connecticut were to legalize sports betting, amendments to the gaming agreements would be needed to allow the tribes to offer sports betting.”)

<sup>178</sup> GEN. ASSEMB., H.R. J. CONV. REP., at 34 (Conn. 2020).

<sup>179</sup> *Id.*

<sup>180</sup> GEN. ASSEMB., S. J. (Conn. 2/20/2019); GEN. ASSEMB., H. J., at 530 (Conn. 2/20/2019) (“Beyond the two-year budget, we must enact new sources of revenues, such as sports betting and internet wagering.”); GEN. ASSEMB., FIN., REV. & BONDING. COMM., J.F. REP., S.B. 540, at 1 (Conn. 4/30/2018) (“The proposal seeks to establish a regulatory framework for sports wagering and online lottery draw games in order to generate additional tax revenue for the state.”).

<sup>181</sup> GEN. ASSEMB., PUB. SAFETY & SEC. COMM., J.F. REP., H.B. 7331, at 2 (Conn. 2019); *see also id.* (quoting Scott Bowen, Senior Vice President of Business Development at NeoPollard Interactive, who testified that “sports wagering is a rising trend, and that it is generally included in Lottery operations, because it maximizes revenue to the state by eliminating a need for an arbitrary tax.”).

<sup>182</sup> HEARING FOR THE PUB. SAFETY & SEC. COMM., at 5 (Conn. 2019) (statement of Greg Smith, President of the Conn. Lottery Corp.) (noting further that “[t]his is because just like for the lottery games we would give the state all of the profits the lottery generates from sports betting as opposed to a roughly 10 percent tax on profits from the casinos or other commercial operators would pay under this bill”).

opportunity for us to...create Connecticut jobs [and] generate Connecticut revenue in an opportunity that already exists.”<sup>183</sup>

Another important interest of Connecticut’s effort toward legalizing sports betting is eliminating black market gambling activities.<sup>184</sup> In essence, if the government is able to regulate and license gambling and sports betting activities in the state, they can ensure that it is running in accordance with the respective laws.<sup>185</sup> Smith noted, echoed by Rich Pingel, Chief Legal Officer for Sportech PLC, “[i]f sports betting is not convenient to people, meaning geographically throughout the state and online or on mobile, bettors will continue with the local bookies or their current illegal offshore websites that they currently use, and the state will not derive significant economic benefit from the legalization.”<sup>186</sup> Thus, the particular concern that individuals under the age of twenty-one will gamble in underground wagers will also be protected by online filters and in person licensed gambling locations.<sup>187</sup> In fact, a representative on behalf of the NBA testified in support of Connecticut’s sports betting regulations “emphasizing their approval of its development of a regulatory framework for sports betting in Connecticut and the inclusion of consumer protection measures and governing body safeguards.”<sup>188</sup>

Connecticut, however, has also seen its share of opposition to sports betting. University of Connecticut Athletic Director, David Benedict, for instance, offered written testimony to the Connecticut Joint Favorable Committee that UConn opposes the legalization of collegiate sports betting and points to the NCAA’s stated opposition to sports wagering.<sup>189</sup> Benedict offered an amendment to the 2019 sports betting bill to specifically add: “any collegiate sporting event that takes place in Connecticut, or a sport or athletic event in which any Connecticut college team participates regardless of where the event takes place.”<sup>190</sup> Additionally, entities and individuals, such as Michele Mudrick, Legislative Advocate of the Coalition Against Casino Expansion in Connecticut,

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<sup>183</sup> GEN. ASSEMB., *supra* note 176, at 18.

<sup>184</sup> GEN. ASSEMB., *supra* note 182, at 6.

<sup>185</sup> *See e.g.*, GEN. ASSEMB., FIN., REV. & BONDING COMM., J.F. REP., S.B. 540, at 1 (Conn. 2018) (Steve Wagner, Director of Information Technology at Connecticut Lottery Corporation testified in support of S.B. 540 (“[T]he federal prohibition of sports betting has not stopped it from taking place and the Connecticut Lottery is ready to operate sports betting in a way that is, ‘regulated in a safe and secure environment utilizing responsible gambling best practices, and would provide a convenient option that all players across Connecticut can enjoy.’”).

<sup>186</sup> GEN. ASSEMB., *supra* note 182, at 6.

<sup>187</sup> GEN. ASSEMB., *supra* note 176, at 215.

<sup>188</sup> GEN. ASSEMB., FIN., REV. & BONDING COMM., J.F. REP., S.B. 540, at 2 (Conn. 2018).

<sup>189</sup> *An Act Concerning Sports Wagering in the State, Hearing on H.B. 7331 Before the Pub. Safety & Sec. Comm.* (Conn. 2019) (statement of David Benedict, Athletic Dir., UCONN.).

<sup>190</sup> *Id.* at 2.

testified that “sports betting is extremely dangerous for children, that it makes gambling a normal activity for them.”<sup>191</sup>

In light of the COVID-19 pandemic, the 2020 Connecticut legislature has convened early as a safety precaution.<sup>192</sup> Therefore, a decision on sports betting and fantasy sports will not be made in this legislative cycle. The popularity of sports betting—and particularly the increase in eSports betting—may further the necessity of this legislative action.

#### IV. SUMMARY OF THE BENEFITS AND DISADVANTAGES OF SPORTS BETTING

##### A. Arguments Against Sports Betting

Despite potential benefits and public interest, many legislators and individuals still view sports betting as contributing to a “moral erosion” of society.<sup>193</sup> Specifically, many legislators note their concern for compulsive and pathological gambling, particularly among young people.<sup>194</sup> The House of Representatives noted, in particular, that problem gambling can contribute to “personal and family hardships, such as lost savings, excessive debt, bankruptcy, foreclosed mortgages, and divorce.”<sup>195</sup> High suicide rates have also been correlated with compulsive gambling as compared to other forms of addiction.<sup>196</sup> Although these are compelling concerns, there is little evidence that the statutory scheme regulating gambling is preventing these “evils” considering the many loopholes created to allow certain types of gambling to occur.<sup>197</sup>

Some legislators also cite the “house advantage”<sup>198</sup>—the fact that “you bet on the performance of a participant in a sporting event and the house takes a cut.”<sup>199</sup> Legalized gambling proponents note that pari-mutuel betting “is a non-

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<sup>191</sup> GEN. ASSEMB., PUB. SAFETY COMM., J.F. REP., H.B. 7331, at 5 (Conn. 2019).

<sup>192</sup> Russell Blair, *Coronavirus Forces Early Adjournment of Connecticut’s Legislative Session*, HARTFORD COURANT (Apr. 21, 2020), <https://www.courant.com/coronavirus/hc-news-coronavirus-general-assembly-20200421-mwsuufkmpgrihpdnrsuajvugq-story.html>.

<sup>193</sup> S. REP. NO. 102-248, at 6 (1991).

<sup>194</sup> Remes, *supra* note 6, at 573.

<sup>195</sup> H.R. REP. NO. 109-412, pt. 1, at 13 (2006).

<sup>196</sup> Remes, *supra* note 5, at 573 (citing *Suicide Risk is High Among Compulsive Gamblers*, 12 NORTHSTAR PROB. GAMBLING ALL. 1 (2014)).

<sup>197</sup> *Id.* at 573–74; see generally Jason M. Breslow, *How Fantasy Sports Got Around Online Gambling Laws*, PBS (Oct. 15, 2015), <http://www.pbs.org/wgbh/frontline/film/fantasy-sports-gamble/> (discussing the loopholes that exist in sports gambling and the internet).

<sup>198</sup> Remes, *supra* note 5, at 573.

<sup>199</sup> *Id.* at 572–73 (citing Texas’ Attorney General, Ken Paxton from Joe Drape, *Texas Attorney General Deems Daily Fantasy Sports Illegal*, N.Y. TIMES (Jan. 19, 2016), <http://www.nytimes.com/2016/01/20/sports/texas->

banked game, meaning that the house, the operator of the game, is a disinterested party, and the only cut taken is for taxes and administrative purposes.”<sup>200</sup>

In addition, many sports teams and leagues have expressed their support for anti-gambling legislation and movements.<sup>201</sup> Since the 1919 “Black Sox” scandal, where members of the Chicago White Sox were accused of fixing the World Series in exchange for gambling proceeds,<sup>202</sup> “betting on sports was generally viewed by professional sports leagues as public enemy number one.”<sup>203</sup> Upon passage of the UIGEA, for example, the NFL, NBA, NCAA, NHL, and MLB submitted a joint letter to Congress stating the “[p]assage of this bill is long overdue.”<sup>204</sup> Similar to the goals of PASPA, “maintaining the integrity of competition” is a main argument against legalization.<sup>205</sup> In fact, NFL Commissioner Roger Goodell stated in a 2012 deposition that out of all the threats surrounding professional football, “gambling would be number one on my list.”<sup>206</sup>

### B. Arguments in Favor of Sports Betting

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attorney-general-deems-daily-fantasy-sports-illegal.html (noting, in 2016, the reason for Texas’ ban on daily fantasy sports games).

<sup>200</sup> *Id.* at 573 (“In Montana’s pari-mutuel fantasy system 74% of the total amount wagered is distributed to the players’ prize pool, with the remaining 26% divided up between administrators and operators, as dictated by statute. However, not more than 10% of the 26% may be used for administrative purposes; instead, “[T]he remaining portion collected ... must be deposited in a state special revenue account” to be used “for other purposes that the board considers appropriate for the good for the existing horseracing.”) (Internal citations omitted).

<sup>201</sup> *Id.* at 563–64.

<sup>202</sup> Remes, *supra* note 6, at 552.

<sup>203</sup> Hall, *supra* note 33, at 15; see also Brett Smiley, *A History of Sports Betting in the United States: Gambling Laws and Outlaws*, SPORTSHANDLE, <https://sportshandle.com/gambling-laws-legislation-united-states-history/> (hereinafter “A History of Sports Betting in the United States”).

<sup>204</sup> Ryan Rodenberg, *The True Congressional Origin of Daily Fantasy Sports*, ESPN (Oct. 28, 2015), [http://espn.go.com/chalk/story/\\_id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress](http://espn.go.com/chalk/story/_id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress) (hereinafter *The True Congressional Origin of Daily Fantasy Sports*”).

<sup>205</sup> Remes, *supra* note 6, at 573; see also 146 CONG. REC. E67-01, 146 CONG. REC. E67-01, E67, 2000 WL 126038 (noting that the 2000 proposed “Student Athlete Protection Act” “has the strong support of the NCAA, coaches, athletes, and a broad spectrum of the education community” and is “intended to help protect the integrity and purity of amateur athletics from the growing and increasingly negative influence of legal sports betting”).

<sup>206</sup> Hall, *supra* note 33, at 15 (citing David Purdum & Ryan Rodenberg, *NFL's Evolving Stance on Sports Betting and Las Vegas*, ESPN (May 14, 2018), [http://www.espn.com/chalk/story/\\_id/19015998/nfl-oral-history-nfl-changing-stance-gambling-las-vegas](http://www.espn.com/chalk/story/_id/19015998/nfl-oral-history-nfl-changing-stance-gambling-las-vegas)).

Many proponents argue for the legalization of sports betting because it is an activity enjoyed by so many Americans.<sup>207</sup> According to a 2012 nationwide poll from Fairleigh Dickinson University, fifty-one percent of Americans favor sports gambling.<sup>208</sup> Additionally, an American Gaming Association survey released prior to Super Bowl 50 in 2016, showed eighty percent of Americans supported changing current gambling laws and sixty-six percent favored state autonomy in legalization.<sup>209</sup>

The popularity has even led some to claim that gambling is “inevitable.”<sup>210</sup> Even individuals who do not necessarily condone gambling activity recognize its popularity and acceptance. For example, while serving as the NBA Commissioner, the late David Stern said in 2009: “It may be a little immoral, because it really is a tax on the poor, like lotteries.”<sup>211</sup> “But having said that, it’s now a matter of national policy: Gambling is good.”<sup>212</sup> Lacking strong opposition<sup>213</sup> and an increase in betting activity,<sup>214</sup> sports betting and gambling

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<sup>207</sup> *More Than Half of Americans in Favor of Making Sports Betting Legal: Three-Quarters Against Legalizing Internet Gambling: Poll*, N.Y. POST (Dec. 21, 2012, 1:56 PM), <http://nypost.com/2012/12/21/more-than-half-of-americans-in-favor-of-making-sports-betting-legal-three-quarters-against-legalizing-internet-gambling-poll/>.

<sup>208</sup> *Id.*

<sup>209</sup> See Super Bowl National Survey, MELLMAN GROUP, INC. (Jan. 29, 2016), <https://www.americangaming.org/sites/default/files/16fre129-f%20Super%20Bowl%20release%5B3%5D%5B1%5D.pdf>; see also *80% of Super Bowl Viewers Say: Change Sports Betting Law*, AM. GAMING ASS’N (Jan. 3, 2016), <https://www.americangaming.org/new/80-of-super-bowl-viewers-say-change-sports-betting-law/> (quoting pollster Mark Mellman: “[T]his first-of-its-kind poll shows clear support among Super Bowl viewers for a state-by-state regulatory approach to sports betting,” and “[I]f the public had its way, public policy would change.”).

<sup>210</sup> Remes, *supra* note 6, at 566–67 (quoting GAMBLING IN AMERICA: FINAL REPORT OF THE COMMISSION ON THE REVIEW OF THE NATIONAL POLICY TOWARD GAMBLING (1976), [https://archive.org/stream/gamblinginameric00unit/gamblinginameric00unit\\_djvu.txt](https://archive.org/stream/gamblinginameric00unit/gamblinginameric00unit_djvu.txt) (“In 1976, the Commission of the Review of the National Policy Toward Gambling concluded three years of research by stating bluntly: ‘Gambling is inevitable. No matter what is said or done by advocates or opponents of gambling in all its various forms, it is an activity that is practiced, or tacitly endorsed, by a substantial majority of Americans.’”).

<sup>211</sup> Ian Thompson, *Weekly Countdown: Stern Open to Legalized Betting, Rule Changes*, SPORTS ILLUSTRATED (Dec. 11, 2009), <http://www.si.com/more-sports/2009/12/11/weekly-countdown>.

<sup>212</sup> *Id.*

<sup>213</sup> Remes, *supra* note 6, at 567 (“Although referred to as ‘the vice of the savage,’ gambling has ‘failed to rally [religious] concern in the same ways as other contemporary social issues.’”) (Footnotes omitted.).

<sup>214</sup> See Jason Logan, *Sports Betting Hits Record High in 2015*

in the United States may be unstoppable.<sup>215</sup> Former President Barack Obama has even participated in March Madness activities by making his own bracket predictions.<sup>216</sup> In fact, studies suggest that even after the Wire Act, PASPA, and the UIGEA were instituted, sports betting has not decreased.<sup>217</sup> The legal status of sports betting, in it of itself, has only “exacerbated” the negative effects of public health and moral erosion that is sought to be protected by maintaining a ban.<sup>218</sup> As NBA Commissioner Adam Silver stated in a 2014 New York Times op-ed, “[s]ports betting should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.”<sup>219</sup>

Despite the negative attitudes of some within the professional sports fields, some leagues and teams have also utilized this opportunity to profit themselves. In fact, after PASPA was struck down, the MLB, NHL, NBA, and NFL entered into agreements with casinos and individual sports teams created their own partnerships with gaming associations.<sup>220</sup> For example, the New Jersey Devils partnered with bookmaker William Hill and created a “sports betting lounge” at the Prudential Center.<sup>221</sup> NFL teams, such as the Las Vegas Raiders, New York Jets, Baltimore Ravens, and Dallas Cowboys, entered into deals with casinos which included marketing opportunities, such as “predictive gaming and fan engagement.”<sup>222</sup> A balance has been struck, however, as laws, such as the

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*with Over \$4 Billion Bet at Nevada Sportsbooks*, COVERS

(Jan. 26, 2016), <https://www.covers.com/editorial/article/73d59e21-b51e-e711-80cb-44a8423171c1/sports-betting-hits-record-high-in-2015-with-over-4-billion-bet-at-nevada-sportsbooks/amp>.

<sup>215</sup> Remes, *supra* note 5, at 568 (“Sports gambling has become such an accepted part of American culture.”); *see also* Stephanie Kuzydym, *Why Your NCAA Bracket Pool Is Against the Law*, HOUS. CHRON. (Mar. 24, 2015, 10:11 AM) <http://www.houstonchronicle.com/sports/article/NCAA-pool-bet-a-crime-you-can-get-away-with-6136757.php>.

<sup>216</sup> *See* Kuzdym, *supra* note 216; Chris Good, *NCAA March Madness 2015: The Evolution of Obama’s Bracket Pickets*, ABC NEWS (Mar. 18, 2015, 10:26 AM), <http://abcnews.go.com/Politics/march-madness-evolution-obamas-ncaa-picks/story?id=29723157>.

<sup>217</sup> Remes, *supra* note 5, at 574 (noting that the acts, “[H]ave simply driven [sports betting] underground.”).

<sup>218</sup> *Id.*; *see also* NEIL ISAACS, *YOU BET YOUR LIFE: THE BURDENS OF GAMBLING* 8 (2001).

<sup>219</sup> Adam Silver, *Legalize and Regulate Sports Betting*, N.Y. TIMES (Nov. 13, 2014), [http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?\\_r=0](http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0).

<sup>220</sup> *U.S. Sportsbook and Casino Team Sponsorship Tracker*, LEGAL SPORTS REPORT <https://www.legalsportsreport.com/sports-betting-deals/> (last visited Sept. 20, 2020).

<sup>221</sup> Hall, *supra* note 32, at 17 (citing “*U.S. Sportsbook and Casino Team Sponsorship Trackers*, *supra* note 220).

<sup>222</sup> *Id.*

Tennessee Sports Gaming Act, have worked to protect college athletes against gambling interference.<sup>223</sup>

The legalization of sports betting could also provide a great economic benefit to states.<sup>224</sup> “Sports betting is the new frontier for gambling . . . a figurative gold rush rivaling the bygone days of westward expansion in the U.S.” stated journalist, Eric Ramsey.<sup>225</sup> In a 2017 study by Eilers & Krejcik Gaming, it was estimated that within the following three years, an estimated \$12 billion in revenue would be generated by the United States sports betting industry.<sup>226</sup> In fact, market analysts predict that in the sports betting market, “more than \$300 billion [would be] wagered annually and legally in the United States” which would make the sports betting market “the 15<sup>th</sup>-largest industry in the country” and “roughly 2 percent of the country’s gross domestic product.”<sup>227</sup>

Finally, as Silver notes, “times have changed since PASPA was enacted.”<sup>228</sup> Societal attitudes toward sports betting have changed and the government is unable to regulate the sports gambling industry in its current format.<sup>229</sup> In Europe, where sports betting is legal, the government is able to monitor and track the transactions similar to that of the New York Stock Exchange.<sup>230</sup> Silver recommends that a legalized gambling legislative schema in America could include, for example, “[m]andatory monitoring and reporting of unusual betting-line movements; a licensing protocol to ensure betting operators are legitimate; minimum-age verification measures; [and] geo-blocking technology to ensure betting is available only where it is legal.”<sup>231</sup>

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<sup>223</sup> *Id.*; House State Committee 1, Amendment No. 1 to HB0001, p. 13, <http://www.capitol.tn.gov/Bills/111/Amend/HA0319.pdf> (prohibiting placing bets on “Individual actions, events, statistics, occurrences, or nonoccurrences to be determined during a collegiate sporting event”).

<sup>224</sup> Remes, *supra* note 5, at 574; Andrew Vacca, *Sports Betting: Why the United States Should Go All In*, 2 WILLAMETTE SPORTS L. J. 1, 10 (2014) (analogizing Colorado's ability to make profits from the legalization of marijuana beneficial to the local community).

<sup>225</sup> Eric Ramsey, *Sports Betting Legislative Lasso: Louisiana, Oregon on the Trail to Legalization*, LEGAL SPORTS REPORT (last updated May 11, 2020), <https://www.legalsportsreport.com/30818/sports-betting-bills-april-1/>.

<sup>226</sup> Hall, *supra* note 32, at 15 (citing Darren Heitner, *How Legalized Sports Betting Could Bring in \$6.03 Billion Annually by 2023*, FORBES (Sep. 27, 2017, 7:30 AM), <https://www.forbes.com/sites/darrenheitner/2017/09/27/how-legalized-sports-betting-could-bring-in-6-03-billion-annually-by-2023/#5f251b079ecb>).

<sup>227</sup> Hall, *supra* note 32, at 15 (quoting Holden, *supra* note 147, at 384).

<sup>228</sup> Silver, *supra* note 219.

<sup>229</sup> Remes, *supra* note 5, at 574.

<sup>230</sup> *Id.* at 575; see also James Herbert, *Silver: Gambling Good for Business, I Don't Want to Hide From That*, CBS SPORTS (Apr. 20, 2015, 10:58 AM), <http://www.cbssports.com/nba/eye-on-basketball/25155791/adam-silver-on-gambling-its-good-for-business-i-dont-want-to-hide-from-that>.

<sup>231</sup> Silver, *supra* note 219.

## V. WHAT ARE FANTASY SPORTS?

A. *Explanation and Creation of Fantasy Sports*

The foundations of fantasy sports were actually born in the 1950s by Wilfred “Bill” Winkenbach with a fantasy golf game.<sup>232</sup> With the help of Scotty Stirling and George Ross—two writers from the *Oakland Tribune*—Winkenbach developed the original foundations of fantasy football.<sup>233</sup> However, the closest version to modern day Fantasy Sports began in the 1960s by Bill Gamson, a psychology professor with appointments at Harvard University and the University of Michigan.<sup>234</sup> Gamson created a “forward-looking baseball simulation,” where individuals could draft players from different baseball teams to create their own teams and compete against one another.<sup>235</sup> Throughout the Major League Baseball season, individuals would compete with their “team” against other “teams” and try to earn the most points in pre-determined sets of statistical categories.<sup>236</sup> After discovering Gamson’s game, Daniel Okrent and Robert Sklyar utilized this format to create the original “Rotisserie League”<sup>237</sup>—the first official fantasy baseball league.<sup>238</sup>

Upon the technological prosperity of the 1990s and greater usage of the internet, fantasy sports were implemented in an online format, which allowed for easier data collection, analyzation, and access to one another, both nationally and

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<sup>232</sup> Dib, *supra* note 48, at 363; Corinne Green, ‘Wink’: Wilfred ‘Bill’ Winkenbach Invented Fantasy Football Way Back in 1962 with GOPPPL in *Oakland*, NEWSNET5 (Sept. 11, 2014, 10:29 AM), <https://web.archive.org/web/20150929163914/http://www.newsnet5.com/sports/wink-wilfred-bill-winkenbach-invented-fantasy-football-way-back-in-1962-with-gopppl-in-oakland>.

<sup>233</sup> Dib, *supra* note 48, at 363–64; Green, *supra* note 234; Bob Harris & Emil Kadlec, *A Nod (and a Wink) to the Founders of Fantasy Football*, FANTASY SPORTS PUBS (last visited Apr. 19, 2011), [www.footballdiehards.com/Articles/wink/wink.cfm](http://www.footballdiehards.com/Articles/wink/wink.cfm).

<sup>234</sup> Edelman, *supra* note 31, at 5–11.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Examples of pre-determined statistical categories include home runs, batting averages, and runs batted in (RBIs).

<sup>237</sup> David L. Pratt II, *Fantasy Sports and the Right of Publicity: A Case for Viewing Dissemination Player Statistics as Fair Use News*, 13 TEX. WESLEYAN L. REV. 215, 220 (2006) (“The first fantasy baseball draft of the ‘rotisserie’ league—so named for Manhattan’s La Rotisserie Francais restaurant where the members of the league first met—took place, not at the computer terminals familiar to modern fantasy sports aficionados, but at a dining room table in a simple New York apartment.”) (Internal citations omitted).

<sup>238</sup> Edelman, *supra* note 31, at 5–11.

internationally.<sup>239</sup> Fantasy sports games gained national attention from CBS following the release of the first online fantasy sports website in 1997.<sup>240</sup> By 1995, ESPN launched a complete and official online fantasy baseball league, which expanded to create football, basketball, hockey, NASCAR, soccer, golf, and fly fishing leagues by 2000.<sup>241</sup> Fantasy sports encompass many different sporting activities, seasons, and betting styles. But the most popular sport is football, which as of 2012, saw the largest revenue out of all other fantasy sports combined.<sup>242</sup> Today, fantasy eSports games are even available, allowing participants to select a roster of eSports players and score fantasy points according to their players scores.<sup>243</sup>

### B. How do they Work?

Once a prospective fantasy sports participant<sup>244</sup> chooses a host site<sup>245</sup> and a fantasy sports game—such as football, baseball, or NASCAR—they must join a league. Leagues are often made up of people the participant knows in their real life, but can also be joined randomly, or by specialty play interest (e.g., high stakes competitions). Most fantasy sports leagues are made up of eight to twelve participants.<sup>246</sup> The competition season starts with a “draft” where players virtually select individual athletes across all the teams in the professional league based on position to make up a complete “team.”<sup>247</sup> After teams are drafted, participants compete on a weekly basis against another participant’s team in their league. Within each team, participants are scored by the real-world statistics of their players based on a variety of factors<sup>248</sup> while weekly winners are decided

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<sup>239</sup> *Id.*

<sup>240</sup> Dib, *supra* note 48, at 364; Green, *supra* note 232.

<sup>241</sup> Edelman, *supra* note 31, at 10–11.

<sup>242</sup> *Id.* at 12.

<sup>243</sup> *Esports Betting – Overview of the Esports Gambling Vertical*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/esports-betting/> (last visited Sept. 12, 2020) (“Fantasy eSports sites offer some variant of the ‘salary cap’ model, in which users select a roster of players for their fantasy team under the restrictions of a salary cap set by the site. After picking a team, the eSports competitors score fantasy points for users based on their performances in competition. The users that end a contest with the most fantasy points win cash prizes.”).

<sup>244</sup> For the purposes of this note, the term “participant” is used to describe the individual who is playing and participating in the fantasy sports game.

<sup>245</sup> *See infra* Section V(D).

<sup>246</sup> Dib, *supra* note 48, at 364; *see generally* Jim McCormick, *So You Want to Play Fantasy Football?*, ESPN (July 8, 2010),

<http://www.espn.com/fantasy/football/ffl/story?page=nfldk2k10howtoplay> (explaining the general rules of fantasy football).

<sup>247</sup> Dib, *supra* note 48, at 364; *see generally* McCormick, *supra* note 246.

<sup>248</sup> In fantasy football, for example, players receive or lose points based on a variety of factors such as passing yards, passing touchdowns, interceptions, fumble lost,

based on which participant has the most points across the league.<sup>249</sup> By the end of the season, the player who wins the most amount of weeks is the winner. Ties are decided by the total amount of points or other factors determined by the Commissioner.

### C. *Are They Legal?*

The legality of fantasy sports is largely dependent upon the state laws under which it acts.<sup>250</sup> Federally, however, UIGEA and PASPA specifically exempt fantasy sports activities,<sup>251</sup> so it is up to the states to regulate themselves. In many states that now allow for sports betting or have other carve outs for fantasy sports activities, the activity is legal.<sup>252</sup> In states that do not allow for sports betting or have other anti-gambling laws, the state or other individual could make a prima facie claim of illegal gambling by establishing that a particular game or activity

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rushing yards, and receptions. See Brad Perniciaro, *The Ultimate Fantasy Football Scoring & Points System Guide*, CHEATSHEET WAR ROOM (Feb. 10, 2020), <https://www.cheatsheetwarroom.com/blog/fantasy-football/leagues/scoring-systems>.

<sup>249</sup> See *Rules - Standard Scoring System*, ESPN (June 19, 2005),

<http://www.espn.com/fantasy/football/ffl/story?page=fflrulesstandardscoring>.

<sup>250</sup> Edelman, *supra* note 31, at 26; see also Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form Mainstream Wagering United States*, 40 J. MARSHALL L. REV. 1195, 1202 (2007) (“A more natural approach to accessing the legality of fantasy sports is to begin with an analysis of state laws for two reasons. First, most federal gambling laws were enacted to help states enforce their own gambling laws. Second, given the complementary [sic] or supplemental nature of federal gambling laws to state gambling laws, those that first look to the federal laws can sometimes miss the larger theoretical framework underlying these federal laws.”).

<sup>251</sup> Jeffrey Standen, *The Special Exemption for Fantasy Sports*, 42 N. KY. L. REV. 427, 433 (2015).

<sup>252</sup> See, e.g., N.H. REV. STAT. § 287-H:3.

involve the three elements: (1) “consideration,”<sup>253</sup> (2) “reward,”<sup>254</sup> and (3) “chance.”<sup>255, 256</sup>

Most states that have laws against illegal gambling take a liberal view on what is considered “consideration” and apply the “predominant purpose test.”<sup>257</sup> In doing so, a fact specific analysis is conducted regarding the particular fantasy game’s rules and structure.<sup>258</sup> For example, if the particular fantasy game’s host site does not require league entry fees, most states would find that the game is

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<sup>253</sup> Edelman, *supra* note 31, at 27 (“The element of ‘consideration’ is described as a ‘*quid pro quo*,’ or something in exchange for something else. Most courts have construed the term ‘consideration’ narrowly in the context of gambling, limiting its definition to instances in which a participant provided money or a valuable item of property in exchange for the chance of greater winnings. However, a minority of courts have adopted the true contract-law meaning of the word ‘consideration,’ and found that ‘consideration’ involves any detriment, even nonmonetary in value, in exchange for the chance to win a prize.”) (Internal citations omitted.).

<sup>254</sup> *Id.* at 28 (“[T]he element of ‘reward’ is the prize that one gets for winning a bet. Courts have held that a reward must be tangible in form. However, something tangible, even of small value, is sufficient to constitute a reward.”) (Internal citations omitted).

<sup>255</sup> *Id.* at 26–29 (“[T]he element of ‘chance’ is defined as ‘something that happens unpredictably without discernible intention or observable cause.’ In other words, courts have found that the element of chance requires that a game’s result be driven *not* by ‘judgment, practice, skill or adroitness,’ *but rather* by factors entirely outside of the participant’s control. To determine whether a particular activity satisfies the gambling element of chance, courts will traditionally apply one of three tests: the ‘predominant purpose test,’ the ‘any chance test,’ or the ‘gambling instinct test.’ The ‘predominant purpose test,’ which is applied by most states, deems an activity to be one of chance where ‘greater than 50 percent’ of the result is derived from chance. By contrast, the ‘any chance test’ finds that an activity is based on chance if ‘a particular game contains any chance that influences the outcome of the game,’ and the ‘gambling instinct test ... looks to the nature of an activity to determine if it appeals to one’s gambling instinct.”) (Internal citations omitted).

<sup>256</sup> See *Geis v. Cont’l Oil Co.*, 511 P.2d 725, 727 (1973) (noting that under Utah law “the statutory elements of a lottery are: (1) prize; (2) chance; and (3) any valuable consideration.”); *McKee v. Foster*, 347 P.2d 585, 590 (1959); *Valentin v. El Diario Prensa*, 427 N.Y.S.2d 185, 186 (N.Y. Civ. Ct. 1980) (noting that in New York, three elements are required for an illegal lottery: (1) consideration, (2) chance, and (3) a prize); *People v. Hunt*, 162 Misc. 2d 70, 71 (N.Y. Crim. Ct. 1994) (“Gambling occurs when a person stakes or risks something of value upon the out-come of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”) (Internal citations omitted; quotations marks omitted).

<sup>257</sup> *Id.* at 29.

<sup>258</sup> *Id.*; see *Cabot & Csoka*, *supra* note 250, at 1207 (arguing that whether a fantasy sports game is illegal under state gambling law “varies based on the method of play of the fantasy game at issue”).

not in violation of anti-gambling laws because it fails to meet the definition of “consideration” that is required to find the game to be illegal.<sup>259</sup> In the same vein, host sites that do not award prizes to the winners of the fantasy leagues are typically found to not be in violation of anti-gambling laws because they do not satisfy the element of “reward.”<sup>260</sup>

Some states have stricter interpretations of these principles. As of 2012, for example, Delaware, Kansas, Michigan, Ohio, Wisconsin, Washington, and Vermont adopt a strict contract-law meaning of “consideration” and hold fantasy sports host sites to a higher level of liability.<sup>261</sup> On the other hand, states like New York specifically hold that fantasy sports are not considered gambling.<sup>262</sup> Further, New York passed the Interactive Fantasy Sports law after determining “that interactive fantasy sports are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill and knowledge of the participants” rather than relying “on the current membership of an actual team that is a member of an amateur or professional sports organization.”<sup>263</sup> Similarly, some Connecticut legislators recognize fantasy sports betting as “a game of skill” and thus not simply left up to chance.<sup>264</sup> Some states more specifically regulate the actual participation, management, and business of fantasy sports.<sup>265</sup>

#### D. Host Sites

Host sites are the websites and locations in which fantasy sports participants can choose to host their leagues. The host sites are platforms in which the league

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<sup>259</sup> Edelman, *supra* note 31, at 29 (“By contrast, other forms of pay-to-play fantasy sports games present greater legal risk. For example, ‘modified auction,’ ‘draft,’ and ‘autopick’ leagues are more likely to be categorized as games of chance because fantasy participants in these leagues are denied the strategic opportunity to bid up the price of certain players based on their presumptions about competitor preference.”) (Internal citations omitted); *see, e.g.*, *Humphrey v. Viacom, Inc.*, No. 06–2768, 2007 WL 1797648 at \*10 (D. N.J. June 20, 2007) (noting that an entry fee paid by a fantasy participant was not consideration for gambling purposes but rather consideration merely for the day-to-day statistical services provided by the website).

<sup>260</sup> Edelman, *supra* note 31, at 29.

<sup>261</sup> *Id.* at 30–31 (internal citations omitted).

<sup>262</sup> 62 N.Y. JUR. 2D *Gambling* § 128; *see also* 14 IND. L. ENCYC. GAMING AND LOTTERIES § 10 (“A paid fantasy sports game operating pursuant to statute does not constitute gambling for any purpose.”); *see also* Ind. Code Ann. § 4-33-24-1.

<sup>263</sup> 62 N.Y. JUR. 2D *Gambling* § 128. *But see* *White v. Cuomo*, 87 N.Y.S.3d 805 (Sup. 2018) (noting that sports betting is not legal under New York’s state constitution).

<sup>264</sup> *Public Safety and Sec. Comm. Pub. Hearing*, 2019 Leg. Sess. (Conn. 2019) (Statement of Rep. Fishbein).

<sup>265</sup> *See, e.g.*, Mo. Rev. Stat. Ann. § 313.905 (2019); 62 N.Y. JUR. 2D *Gambling* § 130 citing Rac. Pari-Mut. Wag. & Breed Law § 1404(1).

data is stored and displayed and allows fantasy participants to maintain their team rosters.<sup>266</sup> Not only do these sites provide individuals with player statistics, data, and tracking analytics, they also help leagues “collect league entry fees, distribute prize money, manage message boards, and provide expert analysis.”<sup>267</sup>

The three main host sites in the fantasy sports industry include, “ESPN, Yahoo!, and CBS Sports,”<sup>268</sup> which each offer different types of hosting and services to users.<sup>269</sup> In most jurisdictions, these host sites must register with the gaming commission of their respective state.<sup>270</sup>

#### E. *Why does America Love Them?*

America’s interest in fantasy sports is rooted in the common belief among spectators that they would do a better job coaching than the coach. As the President of the Fantasy Sports Trade Association, Greg Ambrosius, stated:

“It’s the old armchair quarterback theory . . . Somebody feels they’re a better coach than the guy on the sideline, a better [general manager] than the guy up in the press box and a better

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<sup>266</sup> Edelman, *supra* note 31, at 19; *see* *Humphrey v. Viacom, Inc.*, No. 06-2768, 2007 WL 1797648, at \*1 (D.N.J. June 20, 2007); Aaron Feld, *Gambling on Sports Data: Protecting Leagues’ High-Level Data from Sportsbooks*, 2020 U. ILL. L. REV. 341, 352 (2020) (“Data is the lifeblood of sports betting and is ‘perhaps the most crucial and valuable element of the entire industry.’”).

<sup>267</sup> Edelman, *supra* note 31, at 19 (citations omitted).

<sup>268</sup> *Id.*; *cf. id. n.3* (citing Gene Wang, *Fantasy Football Gets Benched*, WASH. POST (May 29, 2011) (“Yahoo is the most visited fantasy football site, according to recent data compiled by Experian Hitwise, a leading Internet analytics service provider. Yahoo, which offers free team scoring but charges for its enhanced game tracker function, claimed nearly 46 percent of all fantasy football visits in September 2010, with ESPN next at 34 percent.”)).

<sup>269</sup> Edelman, *supra* note 31, at 19–20 (“Both the ESPN and Yahoo! Sites offer only one type of hosting: a basic, free service available to all users. By contrast, CBS Sports offers three types of hosting: Free, Commissioner, and Premium.”); *see also id.* (referencing *ESPN Fantasy Baseball 2011: Rules*, ESPN, <http://games.espn.go.com/flb/content?page=flbrulesindex2011>). Note, however, that both ESPN and Yahoo! offer additional add-ons for an additional fee. Yahoo!, for example, offers a league counting report; a trade review service; a fantasy sports guide; and team-management and recommendation software. *See Yahoo Fantasy Baseball Premium Add-Ons*, YAHOO! SPORTS, <http://baseball.fantasysports.yahoo.com/b1/premiumaddons>.

<sup>270</sup> *See, e.g.*, 62 N.Y. JUR. 2D *Gambling* § 129 (noting that “pursuant to the Interactive Fantasy Sports Act no interactive fantasy sports operator may administer, manage, or otherwise make available an interactive fantasy sports platform to persons located in New York State unless registered with the New York State Gaming Commission”) (internal citations omitted); *see also* Ind. Code Ann. § 4-33-24-16(1) (2016).

owner than the guy up in the owner's suite. That's what it's really all about."<sup>271</sup>

Individuals participate in fantasy sports by running their own teams and competing against others in their league.<sup>272</sup> As of 2012, more than 30 million Americans were reported to have been participating in fantasy sports games.<sup>273</sup> It is estimated that "today's sports fans spend as much time predicting the performance of professional athletes as Wall Street investors spend predicting stocks and bonds."<sup>274</sup> Some have even contended that today fantasy sports and the sports betting market generally have "officially generated more money than the sports leagues that drive them."<sup>275</sup> According to recent studies, the average participant in fantasy sports is "a male, in his middle to late 30s, with a bachelor's degree, and a household income of between \$75,000 and \$80,000"<sup>276</sup> who "lives in the suburbs, spends between \$450 and \$500 per year playing fantasy sports, and competes mainly against friends he knows from real life."<sup>277</sup>

Fantasy sports have given sports fans and fanatics the way to become more involved in the professional sports world. One scholar noted that "participation is no longer limited to simply spending the occasional Sunday afternoon with the family going to the ballpark to see the home team play."<sup>278</sup> As the way Americans enjoy sporting events continues to evolve, "[c]heap seats, hot dogs, and peanuts have been joined by the pervasive force that continues to shape the contours of modern American citizenry: technology. Although these traditions are still central to the fascination that is sport, technology has completely changed the face of how we now view the game."<sup>279</sup>

<sup>271</sup> John Niyo, *Fantasy Baseball's Reality*, DETROIT NEWS, Apr. 17, 2005, at 01C.

<sup>272</sup> Edelman, *supra* note 31, at 16.

<sup>273</sup> *See id.* (citing Gene Wang, *Fantasy Football Gets Benched*, WASH. POST, May 29, 2011, at D3, estimating that there are approximately 30 million fantasy sports participants); Tom Van Riper, *A Guy's Fantasy*, FORBES (Feb. 28, 2011), <https://www.forbes.com/forbes/2011/0228/focus-sports-mlb-rotisserie-stratomatic-guys-fantasy.html#5f7216e86585> (estimating that the fantasy sports market has 30 million participants).

<sup>274</sup> Edelman, *supra* note 31, at n.3 (citing *Fantasy Football Website Aims to Choose the Best Athletes Using a Formula Derived from Wall Street. Its Creators are Most Definitely Bullish on Fantasy Sports*, FLA. SUN-SENTINEL, Aug. 26, 2009, at 1D (comparing fantasy sports management and investing)).

<sup>275</sup> *Rotosurance: Sports Betting and Fantasy Sports Betting Insurance*, ROTOSURANCE LLC, <https://www.rotosurance.com/> [hereinafter *Rotosurance*].

<sup>276</sup> Edelman, *supra* note 31, at 17; *see also id.* at 17 (citing Jeremy Fowler & Chris Silva, *Living in a Fantasy World: 'General Managers' Take Their Sports Leagues Seriously*, FLA. TODAY, June 29, 2003 at 1, available at 2003 WLNR 18145423 as recognizing that the average fantasy sports participant is educated with a stable income).

<sup>277</sup> Edelman, *supra* note 31, at 17.

<sup>278</sup> Pratt, *supra* note 237, at 216.

<sup>279</sup> *Id.*

Some Americans are invested in fantasy sports because of the variety of games, information, and prizes offered. Bloomberg Sports, for example, offers participants “analytical tools” and “expert advice,” to help evaluate risk and succeed in fantasy games.<sup>280</sup> On a larger scale, fantasy sports contests, such as the Fantasy Football World Championship, offer a chance at large cash prizes with entry fees of thousands of dollars.<sup>281</sup> As early as 2012, the insurance industry has also utilized this opportunity by offering participants “policies” to protect fantasy players in the case of a real-life injury.<sup>282</sup> Important “sub-segments” or other populations who participate in fantasy sports within their own demographics include “high-stakes participants”,<sup>283</sup> female participants,<sup>284</sup> and those competing in leagues just for fun.<sup>285</sup> Fantasy sports have become a game for all demographics, populations, and generations.<sup>286</sup> Within each league,

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<sup>280</sup> Edelman, *supra* note 31, at 3.

<sup>281</sup> See *id.* (citing Chris Dempsey, *Fantasy Revolution Online Craze is Intoxicating to Americans, and Expanding Outside the Sports World*, DENV. POST, Sept. 9, 2007, at B3.; Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, LOY. L.A. ENT. L. REV. 53, 64 (2008) (describing “the rise of hyper-competitive fantasy leagues offering cash prizes as high as \$100,000”); Childs Walker, *Dream Teams: Tired of Second Guessing How Your Favorite Sports Clubs Are Managed? Fantasy Leagues Let You Take Charge of the Action*, THE BALT. SUN (March 6, 2006) (“You can find high-stakes national games with top prizes in the hundreds of thousands of dollars.”)).

<sup>282</sup> Edelman, *supra* note 31, at 3.

<sup>283</sup> *Id.* at 17 (“One of these sub-segments includes the ‘high-stakes participants,’ who play in several fantasy sports leagues per season, play in leagues with entry fees that exceed \$1,000 per season, and dedicate 10 or more hours per week to their fantasy team rosters. High-stakes fantasy participants come from a wide range of different backgrounds.”) (internal citations omitted.).

<sup>284</sup> *Id.* at 18 (“According to a recent survey by the Fantasy Sports Trade Association, female participants are the fastest growing sub-segment of fantasy sports participants. While once representing just two percent of all fantasy sports participants, females now compose between 15 and 20 percent of the overall fantasy marketplace.”) (Internal citations omitted.).

<sup>285</sup> *Id.* at 19 (“A final sub-segment of the fantasy sports participants are those who compete in ‘family friends’ or educational leagues. Participants in family friendly leagues seek to participate within ‘an online environment where grownups and kids can enjoy fun and interactive features that are educational. In stark contrast to the high-stakes participants, family gamers are generally unconcerned with league entry fees and prize money. Rather, they care primarily about the interactive experiences their games provide.”) (Internal citations omitted.).

<sup>286</sup> Dib, *supra* note 48, at 364 (“From the office to the fraternity house and everywhere in between, sports fans from all walks of life put their knowledge of sports to the test by competing against each other in fantasy sports.”).

individuals may also take the self or group appointed roles of commissioner<sup>287</sup> or treasurer<sup>288</sup> as a way to maintain order and rules within the particular leagues.

The creation of Daily Fantasy Sports (“DFS”) expanded this interest.<sup>289</sup> DFS was created in 2007 by professional poker player Chris Fargis<sup>290</sup> to allow participants to “draft players on a daily basis and pay money to enter contests in which the winners are determined at the end of the day (or weekend for football).”<sup>291</sup> Although opponents argue that the single-game and quick turnaround wagers “push[] DFS away from being a game of skill into one of chance,”<sup>292</sup> DFS has increased the quantity and opportunity for individuals to participate in sports betting. Al Zeidenfeld, for example, earned over seven-figures from a twenty-dollar league fee by competing in a DFS game against 270,000 competitors on DraftKings host site.<sup>293</sup> Although some states equate DFS with illegal gambling,<sup>294</sup> many states and large host sites—such as

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<sup>287</sup> Edelman, *supra* note 31, at 21–22 (“In addition to selecting an appropriate hosting service, every fantasy sports league also needs to select a commissioner. ‘Commissioners’ are those who manage fantasy sports leagues by establishing league rules and resolving disputes over rule interpretations. In many high-stakes commercial leagues . . . the competition provides a league commissioner. In most private fantasy leagues, one of the league’s participants is nominated to serve in that role.”) (Internal citations omitted.).

<sup>288</sup> *Id.* at 22–23 (“Fantasy sports leagues with entry fees and prize money also must select a treasurer to collect money at the beginning of the season, and to distribute it to the winners at the season’s end. In high-stakes commercial leagues, an employee of the host site serves in this role. In private leagues, this job is often performed by one of the participants.”) (internal citations omitted.).

<sup>289</sup> Remes, *supra* note 5, at 555.

<sup>290</sup> See Jay Caspian Kang, *How the Daily Fantasy Sports Industry Turns Fans into Suckers*, N.Y. TIMES (Jan. 6, 2016), [https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?\\_r=0](https://www.nytimes.com/2016/01/06/magazine/how-the-daily-fantasy-sports-industry-turns-fans-into-suckers.html?_r=0).

<sup>291</sup> Dib, *supra* note 48, at 364 (internal citation omitted.).

<sup>292</sup> See Remes, *supra* note 5, at 555 (citing Bradley Steffen, *Should the Kentucky Legislature Follow Montana’s Lead in Regulating Fantasy Sports?*, 42 N. KY. L. REV. 511, 512 (2012) (noting that the “constant debate as to whether fantasy sports are an activity of skill or chance”).

<sup>293</sup> Dib, *supra* note 48, at 362; see Neil Greenberg, *How the Winner of DraftKings Millionaire Maker Built His Winning Roster*, WASH. POST (Sept. 21, 2016, 12:53 PM PDT), [https://www.washingtonpost.com/news/fancy-stats/wp/2016/09/21/how-the-winner-of-draftkings-millionaire-maker-built-his-winning-roster/?utm\\_term=.bae4b0db2744](https://www.washingtonpost.com/news/fancy-stats/wp/2016/09/21/how-the-winner-of-draftkings-millionaire-maker-built-his-winning-roster/?utm_term=.bae4b0db2744).

<sup>294</sup> Dustin Gouker, *Attorney General Opinions on Daily Fantasy Sports*, LEGAL SPORTS REP., <https://www.legalsportsreport.com/state-legality-of-dfs/> (last updated Dec. 1, 2018); Dib, *supra* note 48, at 362 (“Currently, there are six states, including Texas, whose attorney general has declared [DFS] as games as chance that equate to illegal gambling.”).

DraftKings and FanDuel<sup>295</sup>—note that the competitions are based on skill and are not illegal.<sup>296</sup> Today, even sports leagues, such as the NFL, have requested that all stadiums display fantasy sports statistics on their scoreboards during games and ESPN has included their own news ticker with fantasy statistics during their game broadcasts.<sup>297</sup>

## VI. SPORTS BETTING INSURANCE<sup>298</sup>

### A. *What is it?*

Sports betting insurance originated in light of high-stakes fantasy sports to protect participants from great monetary loss in case of a real-world injury to a star player on participant's fantasy team.<sup>299</sup> Today, the average fantasy sports participant spends approximately \$653 playing games.<sup>300</sup> As players are tactically drafted onto teams and large amounts of money are spent, the “entire investment can be diminished with a serious injury to one of your top players.”<sup>301</sup> If a bettor was to take out a “policy” on a particular player, and they were to get injured over the designated policy period, they may be able to retrieve some of their money back, such as an amount equal to their fantasy entry fee or a specified amount in the particular policy. In fact, Henry Olszewski, one of the original starters of a fantasy sports insurance company, noted that he came up with the

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<sup>295</sup> § 147:49.50. Daily fantasy sports, 14 BUS. & COM. LITIG. FED. CTS. § 147:49.50 (4th ed.) (“DraftKings, based in Boston, and FanDuel, based in New York, are key players in the DFS space.”).

<sup>296</sup> Dib, *supra* note 48, at 362.

<sup>297</sup> Leighton Hunley, *Real Insurance for Fantasy Football: Insurance Policies Would Cover Claims for Fantasy Football Owners Whose Players Suffer Major Injuries During the Season*, RISK & INS.: PROFITABLE NICHEs (July 28, 2014), <https://riskandinsurance.com/real-insurance-fantasy-football/> (noting that “at the most recent FSTA conference, representatives from the San Francisco 49ers and the Minnesota Vikings spoke about ‘how their new stadiums are being built with the fantasy sports player in mind.’”).

<sup>298</sup> For the purpose of this note, two sports betting insurance policies will be analyzed and compared: (1) FantasyPlayerProtect and (2) Rotosurance. These policies were chosen because of the popularity of the companies, the similarity in policies for comparison, and the ease of access to relevant information. These are not meant to be an exhaustive list of companies or organizations offering similar “insurance policies.”

<sup>299</sup> Edelman, *supra* note 31, at 25.

<sup>300</sup> *Rotosurance Polices Explained*, ROTOSURANCE LLC: HOW IT WORKS, <https://www.rotosurance.com/how-it-works> (last visited September 28, 2020) [hereinafter *Rotosurance: How it Works*].

<sup>301</sup> *Id.*

original idea for the policy after New England Patriots former quarterback Tom Brady was injured in the first game of the 2008 football season.<sup>302</sup>

*B. What kinds of companies and organizations offer these policies?*

Fantasy Sports Insurance (“FSI”), located in Long, Island, New York, offered the first sports betting insurance policy,<sup>303</sup> which was underwritten by Lloyd’s of London.<sup>304</sup> The FSI policy worked by:

Insur[ing] fantasy participants for up to \$1,900 in losses of league entry fees, league transaction fees, and fantasy magazine subscriptions, if the purchaser of the policy has a player on his fantasy team that misses more than a certain number of games in a season due to injury.<sup>305</sup>

*C. What are the underwriting risks?*

In analyzing sports betting insurance policies, two major companies—Fantrax and Rotosurance—and policies are considered regarding their terms and underwriting characteristics. These policies were chosen based on their policy and terms and conditions availability, usage, notoriety, and comparability. These two analyzed policies are representative of the main types of policies offered.

### 1. Fantasy Player Protect

Fantasy Player Protect (FPP) is a form of fantasy sports insurance by the company Fantrax, which claims to “protect your fantasy sports team against injury to your top fantasy players.”<sup>306</sup> According to the Fantrax website, the highlights of these policies include the ability to “[r]ecover your fantasy team ownership costs if key players are injured,” “[e]ase the devastation of injuries to

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<sup>302</sup> *Fantasy Football Players Can Now Buy Insurance to Protect Their ‘Investment,’* FOX NEWS (last updated Sept. 13, 2015), <https://www.foxnews.com/sports/fantasy-football-players-can-now-buy-insurance-to-protect-their-investment>.

<sup>303</sup> Edelman, *supra* note 31, at 25; *see also* Alex Prewitt, *This NFL Insurance Policy is No Fantasy*, USA TODAY, Aug. 25, 2009, <http://www.usatoday.com/sports/football/fantasy/2009-08-24-insuranceN.htm?csp=34>.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*; *see Fantasy Baseball*, FANTASYSPORTSINSURANCE.COM, <http://www.fantasysportsinsurance.com/fantasy-baseball.aspx> (last visited Oct. 5, 2020) (noting that Fantasy Sports Insurance offers insurance policies to protect against injury to a single player, two players, or three players).

<sup>306</sup> Fantasy Player Protect: Fantasy Sports. Real Insurance., FANTRAX, <https://www.fantrax.com/newui/showPage.go?page=fantasyPlayerProtect> (last visited Oct. 5, 2020) [hereinafter *Fantasy Player Protect*].

your fantasy team,” and “[c]over multiple players in any of your leagues.”<sup>307</sup> Although the current policy is unavailable on the website,<sup>308</sup> analysis on the policy provides that it is offered through MiniCo Insurance Agency of Phoenix and underwritten by the Hudson Insurance Company, a member of Odyssey Holdings Corp.<sup>309</sup>

The specific policy was created to reimburse fantasy participants whose players—often star players which they rely upon—“experience season-ruining injuries.”<sup>310</sup> The policy defines the specific reimbursement amounts based upon on the number of games missed per season.<sup>311</sup> For example, in a fourteen or fifteen week season, a player who misses more than eight games triggers the policy; in a sixteen or seventeen week season, missing more than nine games triggers the policy.<sup>312</sup> The reimbursement or coverage amount was priced to cover the entry fee for the league and other “research expenses” including magazine or other online subscriptions.<sup>313</sup>

Each fantasy participant can take out a policy for up to five players per team based on a pre-designated list of about one hundred players for whom FPP determines that coverage is available.<sup>314</sup> The amount of premium that is due per insured player is determined based upon the health of the player.<sup>315</sup> A premium for a “historically healthy player,” for instance, may cost about 9 percent of the coverage amount, while an “injury prone player” may cost thirteen percent of the coverage amount, plus taxes and fees.<sup>316</sup> One article notes that the cost differential of FPP’s insurance product between insuring high risk players versus those that are low risk are “relatively small.”<sup>317</sup>

Although the actuarial considerations are not publicly available at this time, articles that have analyzed the policies note that most of the underwriting principles are drawn from historical data.<sup>318</sup> This data, for example, considers the

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<sup>307</sup> *Id.*

<sup>308</sup> As of the time of publishing, the link to the current policy is inaccessible.

<sup>309</sup> Hunley, *supra* note 297 (noting that Hudson Insurance group is “an insurance carrier rated ‘A’ by A.M. Best”).

<sup>310</sup> *Id.* (“FPP promises to ‘settle valid claims within 30 days of the end of the regular sports season’”).

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* (noting that as of 2014, “FPP’s coverage maximum [was] \$1,000, including up to \$250 for ancillary research expenses”).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* (“[C]onsider an owner who pays an entry fee of \$100 plus \$50 on subscriptions and decides to insure his or her star player for \$150. If the star is a low-risk player, the 9 percent premium comes to \$13.50 compared to a premium of \$19.50 at the injury-prone 13 percent rate.”).

<sup>318</sup> *Id.*

risks and specifics of a player's position,<sup>319</sup> health, and fitness.<sup>320</sup> It then frames these factors with reference to the league's rule amendments and trends that may affect the occurrences and treatment of player injuries.<sup>321</sup> Additionally, the individual player policies also consider how teams uniquely react to player injuries or health conditions.<sup>322</sup>

## 2. Rotosurance

Rotosurance offers a variety of insurance policies to (1) cover player injuries in fantasy football, baseball, basketball, and hockey; (2) to cover individual wagers in daily fantasy sports; and (3) insure individual bets.<sup>323</sup> In exchange for a "small one-time premium" payment, Rotosurance states that they will "protect your entire entry fee investment."<sup>324</sup>

The fantasy football insurance policy allows the participant to take out a policy on their "top players." If one of them were to get injured and sit out for the minimum number of games, the participant will "receive most or all of your entry fee back depending on what coverage you purchased after you file a claim."<sup>325</sup> In the fantasy football policy, if a player misses 9 or more games due to injury, the policy will be triggered.<sup>326</sup> Similar to most insurance policies, the

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<sup>319</sup> *Id.* (noting that "[f]rom an actuarial perspective, the player risk assessment needs to begin with historical injury data on the player's position: How often do tight ends touch the ball? What is a quarterback's exposure to injury on a game-by-game basis or a season-by-season basis?").

<sup>320</sup> *Id.* (describing that the policy premiums and coverage would depend on "the player's specific condition: How old is he? How long has he been in the league? Are there indications that his body is wearing down? If he's a quarterback, you'd look at how often he gets sacked. If he runs with the ball, does he know how to slide or run out of bounds to safety? Or does he take the big hits—to show everyone how tough he is?").

<sup>321</sup> *Id.* (noting that the underwriting additionally considers "rule changes and trends in the league affecting how injured players are treated." For instance, "the overall NFL environment is now more cognizant of injuries, specifically head injuries, and rules are in place to make sure that there's sign-off from the team doctor before players are permitted to come back in the game. Presumably, that rule would cut down on season-ending injuries.").

<sup>322</sup> *Id.* (commenting that "teams with more proactive approaches to protecting players might keep them out of more games, which could end up triggering more claims for the insurer to pay (note that FPP provides an email to policyholders containing a certificate of insurance, which provides details on how a claim will be triggered.").

<sup>323</sup> Rotosurance: How it Works, *supra* note 300.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*; Rotosurance: Insurance Policy, ROTOSURANCE LLC, <https://842d6528-e967-4d0b->

Rotosurance Example NFL Full Coverage Policy defines both what it covers and excludes.<sup>327</sup> The policy only covers, “[p]layers injured during team coordinated activities.”<sup>328</sup> On the other hand, the policy does not cover “[p]layers suspended, players already injured, benched players, paternity leave, or any other non-team related reason.”<sup>329</sup> Additionally, the policy defines specific terms, such as the “Person Insured,”<sup>330</sup> “Coverage,”<sup>331</sup> and “Season.”<sup>332</sup> Thus, the fantasy football participant must first establish that they fit these criteria before filing a claim under the policy.

Rotosurance’s Terms of Service note that they offer “State Farm’s securities products” which are “not FDIC Insured, are not Bank Products, and may lose value.”<sup>333</sup> Similar to FPP, State Farm is a reputable insurer and thus the underwriting is being done from a professional and established carrier. Although the Rotosurance policy does not explain the underwriting risks or considerations, they likely price coverage based on factors similar to that of the FPP policy.

#### D. What are the solvency risks?

Solvency is an essential element of the insurance industry. In light of the financial crisis of 2008, solvency became a major focus of insurance regulators and quasi-regulators—such as the NAIC.<sup>334</sup> Solvency involves the ability of

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acb6219c9842ed8c.filesusr.com/ugd/7776e3\_ff7800e3f9384c8ab1f999b388bb250f.pdf (last visited Oct. 5, 2020) [hereinafter *Rotosurance: Sample Policy*] (“For your insurance coverage to kick in your player must miss 9 or more games (out of 16). You will receive 100% of your entry fee and total fantasy investments back with this coverage.”).

<sup>327</sup> Rotosurance: Sample Policy, *supra* note 326.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> Rotosurance: Fantasy Sports Insurance, ROTOSURANCE LLC: TERMS OF SERVICE, <https://www.rotosurance.com/terms-of-service> (last visited Oct. 5, 2020) [hereinafter *Rotosurance: Terms of Service*] (“By ‘Person Insured’, we mean the User who has entered into an individual Insurance Contract as per the regulations stated under this Heading and further specified in the individual Listings made available on our Website. Eligibility requirements are to be stated in these Terms of Service under the ‘Insurance Term’ Heading, as well as specific requirements in the Listings available on the Service’s Website.”).

<sup>331</sup> *Id.* (“By ‘Coverage’, we mean the execution of the content of the individual Insurance Agreement that is to be executed by the Service towards the Person insured, namely upon fulfilling the Insurance Event (unless stated otherwise in these Terms of Service or the specific Listing made available on the Service’s Website).”).

<sup>332</sup> *Id.* (“By ‘Season’, we mean the regular sports season (period of time) in which the Insurance Policy Term is related to.”).

<sup>333</sup> *Id.*

<sup>334</sup> Cassandra Cole & Kathleen McCullough, *Journal of Insurance Regulation: A Comparison of the Risk Management and Own Risk and Solvency Assessment Model*

insurance companies to cover all debts and provide for all obligations in the case of a policy trigger.<sup>335</sup> Not only is this essential for protecting policyholders in the case of a covered loss, but it is also necessary for the public's trust.<sup>336</sup> If policyholders or the public generally cannot trust that insurance companies will pay the claims, there is little incentive to do business with the carriers. Thus, states and regulators conduct significant surveys and research<sup>337</sup> and establish guarantee funds<sup>338</sup> in an effort to protect this interest.

Sports betting insurance poses issues of solvency which could negatively impact policyholders and the insurance industry as a whole. Because the terms of service do not indicate what the solvency of these companies are, there is no guarantee that they have the resources to financially cover the long-term expenses of insureds under the policies. From the public's standpoint, the average person may not appreciate the fact that fantasy sports insurance is not under the purview of state insurance laws and thus unable to access guaranty funds in the case of an insurer's insolvency. Thus, society's trust in insurance may be negatively affected.

*E. How have these policies been used?*

There is little current data on how many people currently take advantage of the fantasy sports insurance policies offered or their respective responses. As of 2014, however, a "back-of-the-envelope estimate of market potential" for what a fantasy sports insurance market may look like, theorized that "if 10 percent of the 33 million players are willing to pay a \$20 annual premium to insure a single player, that's a \$66 million insurance product each season."<sup>339</sup> While this premium level may pale in comparison to that of other property and casualty products currently on the market,<sup>340</sup> the size of such an industry in a niche field, such as this, would be significant.

VII. DOES SPORTS BETTING INSURANCE MEET THE DEFINITION OF

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*Act and Insurer Ratings*, 36 NAT'L ASSOC. INS. COMM'RS (2017); *see also* § 222:47. Effect of Particular Statutory Provisions—On Insolvent Insurers, 16 COUCH ON INS. § 222:47 (describing, as an example, the solvency provisions of the Louisiana Insurance Guaranty Association).

<sup>335</sup> *See* § 5:6. Assessing insurer's financial condition, 1 COUCH ON INS. § 5:6.

<sup>336</sup> *Id.*, n.1 (citing *Eakin v. Am. Underwriters Group, Inc.*, 552 N.E.2d 50 (Ind. Ct. App. 1990) as noting that the Indiana Insurance Commissioner "met his burden of proving . . . that [the] continuation of [an insurer's] business was financially hazardous to its policyholders, creditors, [and] the public").

<sup>337</sup> Cole & McCullough, *supra* note 336.

<sup>338</sup> *How Guaranty Funds Work*, PROP. CAS. INSUR. ASS'N AMERICA., [http://www.pciaa.net/docs/default-source/default-document-library/Guaranty\\_Funds\\_Primer.pdf?sfvrsn=2](http://www.pciaa.net/docs/default-source/default-document-library/Guaranty_Funds_Primer.pdf?sfvrsn=2) (last updated 2009).

<sup>339</sup> Hunley, *supra* note 297.

<sup>340</sup> *Id.*

“INSURANCE”?

*A. Modern Definition of Insurance*

In most states, a bona fide insurance contract requires two common-law elements: the “doctrine of insurable interest” and the “principle of indemnity.”<sup>341</sup> The “doctrine of insurable interest” requires that, when entering into a contract of insurance, one must have some sort of a special relationship to the person, object, or thing they are insuring.<sup>342</sup> Therefore, if a court does not find that the insured has a special relationship to the person, place, activity, or thing that they are insuring, the insurance contract will be found to be void.<sup>343</sup> In addition, the common law principle of indemnity requires that in the event of a loss, the insurance contract—and therefore, the insurer—only pays the insured the amount economically equal to the measure of the loss.<sup>344</sup> In other words, the insured should not receive a profit or excess funds in the case of a policy loss. Because fantasy sports betting insurance satisfies the common law doctrines of insurable interest and indemnity, it does meet the modern definition of “insurance.”

In Connecticut, insurance is defined as: “any agreement to pay a sum of money, provide services or any other thing of value on the happening of a particular event or contingency or to provide indemnity for loss in respect to a specified subject by specified perils in return for a consideration.”<sup>345</sup> The statute further specifies that the “insured shall have an interest which is subject to a risk of loss...which risk is assumed by the insurer,” mandating the requirement for

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<sup>341</sup> *A Short Treatise on Fantasy Sports*, *supra* note 32, at 51.

<sup>342</sup> § 246:93. Insurable Interest, 17 COUCH ON INS. § 246:93 (“In order to prevent the procurement of insurance for speculative purposes and to discourage fraud, insurance policies generally require that the insured have an ‘insurable interest’ in the subject matter of the insurance.”); *see also A Short Treatise on Fantasy Sports*, *supra* note 32, at 51 (defining the “doctrine of insurable interest” as the “require[ment] that any insurance contract involve ‘some significant relationship between the insured and the person, the object, or the activity that is the subject of the insurance transaction.’”) (Internal citations omitted); *see also* § 7:5. Insurable interest purpose—Prevent gambling, TEX. PRAC. GUIDE INS. LITIG. § 7:5 (“Without an insurable interest, an insurance contract is a gambling contract, and gambling contracts cannot legally be enforced.”).

<sup>343</sup> *A Short Treatise on Fantasy Sports*, *supra* note 32, at 51 (“[I]n applying the ‘doctrine of insurable interest,’ a court will void an insurance contract ‘where an insurance policy is obtained by a party who has no interest in the subject of the insurance.’”); *Ruse v. Mutual Ben. Life Ins. Co.*, 26 Barb. 556, 561 (N.Y. 1861) (voiding an insurance policy when the policyholder does not have an interest in the life or well-being of the insured).

<sup>344</sup> *A Short Treatise on Fantasy Sports*, *supra* note 32, at 51.

<sup>345</sup> Conn. Gen. Stat. § 38a-1(11).

an insurable interest.<sup>346</sup> Further, the doctrine of indemnity is specified in defining “Insurance” as “any agreement to pay a sum of money, provide services or any other thing of value on the happening of a particular event or contingency or to provide indemnity for loss in respect to a specified subject by specified perils in return for a consideration.”<sup>347</sup>

### B. *The Legal Status of Fantasy Sports Insurance*

The term “insurance” does not necessarily mean a policy, organization, or system is subject to the laws or regulations of a state insurance. To be considered insurance, in the sense of being regulated under the specific insurance regulations of a particular jurisdiction, one must find that it fits the definition. A policyholder must have both an insurable interest in the contract and must only be equally indemnified for the loss.

Whether sports betting insurance is considered “insurance” depends on two factors: (1) that the sports betting activity is not an illegal gambling activity and (2) that the insurance contract meets the elements of an insurance product. Assuming, for the sake of argument, that Connecticut will legalize sports betting, the true issue depends on whether the insurance contract meets its respective elements—the elements of insurable interest and indemnity—to be considered legally effective. Notice, however, that under current Connecticut law, gambling is illegal.<sup>348</sup> Thus, insuring gambling is also illegal.

#### i. **Insurable Interest**

Some scholars have contended that under the doctrine of insurable risk, “[f]antasy sports insurance presents a close call.”<sup>349</sup> Under such line of reasoning, one may note that although fantasy sports participants “have no direct relationships to the lives or health of the players on their fantasy sports teams,” they, on the other hand, “seem to have a real financial stake in a property right pertaining to the statistical output of these athletes.”<sup>350</sup> This type of insurance—

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<sup>346</sup> *Id.*

<sup>347</sup> Conn. Gen. Stat. § 38a-1(12).

<sup>348</sup> Conn. Gen. Stat. Ann. § 53-278b states:

(a) Any person who engages in gambling, or solicits or induces another to engage in gambling, or is present when another person or persons are engaged in gambling, shall be guilty of a class B misdemeanor; provided natural persons shall be exempt from prosecution and punishment under this subsection for any game, wager or transaction which is incidental to a bona fide social relationship, is participated in by natural persons only and in which no person is participating, directly or indirectly, in professional gambling.

<sup>349</sup> Edelman, *supra* note 31, at 51.

<sup>350</sup> *Id.* at 51–52.

in which individuals take a stake in the lives of those they do not have a personal relationship in—was directly the type that the British Parliament sought to prevent with the Gambling Act of 1774.<sup>351</sup> At such time, individuals were taking out life insurance policies on the lives of Royalty or those who were seriously ill in an effort to receive a profit from their death.<sup>352</sup> Thus, the doctrine of insurable interest developed to ensure that insureds had a bona fide relationship interest being insured in the policy.<sup>353</sup> With fantasy sports insurance, the relationship that the policyholder has to the thing being insured—the fantasy team or the injured professional athlete—is what must be analyzed in deciding whether an insurable interest exists.

Many contend, however, that fantasy sports insurance is illegal. Joseph Balice, senior associate of Ezra Bruzkus Gubner LLP stated, for example, that although:

“[i]t is undeniable that a fantasy football owner’s sole monetary interest in their players is based on the bet they made when paying the league entry fee...The whole purpose of the insurable interest is to prevent using insurance policies as a form of gambling—fantasy football insurance is a wager on a wager. It would make little sense that this could be an insurable interest.”<sup>354</sup>

A wager is not considered to be insurance. Therefore, a wager on a wager is similarly not considered to be an insurance product.

Balice further noted that there was no way for a fantasy sports insurer to verify that a participant insuring a player actually had that individual on their team in their respective fantasy leagues.<sup>355</sup> Thus, even if one was convinced that a participant had an insurable interest based on their connection to the player via their fantasy team, that link is broken when there is no guarantee they even drafted that player on their fantasy team. Other opponents also note that there is no mechanism of the insurance policy which tracks whether or not a player who a policy is taken out on is dropped or traded.<sup>356</sup> If a participant, for instance, dropped or traded a player before the eight or nine missed games that would typically trigger the policy, they would not be legally entitled to the coverage. Nonetheless, there is no way for insurers to track such activity.

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<sup>351</sup> Timothy Alborn, *A License to Bet: Life Insurance and the Gambling Act in the British Courts*, 14 CONN. INS. L.J. 1, 2 (2007).

<sup>352</sup> *Id.* at 1–2.

<sup>353</sup> *Id.* at 2–4.

<sup>354</sup> *Fantasy Football Insurance: Busted Coverage*, LAW360 (Sep. 19, 2013, 6:27 PM), <https://www.law360.com/articles/473366/fantasy-football-insurance-busted-coverage>.

<sup>355</sup> *Id.*

<sup>356</sup> Hunley, *supra* note 297.

Sports betting insurance policies, such as Rotosurance's fantasy football player policy, try to contract around this by defining what is considered an "insurable interest" within the policy itself.<sup>357</sup> In the Rotosurance Terms of Service, "insurable interest" is defined as "the derivation of a benefit from the health condition of the insured Player."<sup>358</sup> Thus, these policies try to satisfy this element and bring itself within the realm of insurance by creating a legal interest of the fantasy sports participant. The contract of insurance, however, cannot create the insurable interest: the insurable interest must be established by the policyholder "in the subject matter of the insurance."<sup>359</sup> Thus, the policy language will not have the legal effect in satisfying this requirement.

Additionally, some jurisdictions recognize fantasy sports as a game of skill—as opposed to a game of chance—thus creating an insurable interest for participants. For example, New York recognizes that factors such as "the duration of the game," "the ability to make trades or other roster moves," "no random/chance tiebreakers," and pre-set prizes not determined by the number of players or entry fees paid" make fantasy sports games a test of skill.<sup>360</sup>

## ii. Doctrine of Indemnity

Some scholars contend that it is unclear whether the principle requirements under the doctrine of indemnity are met.<sup>361</sup> Indemnity is an essential requirement of an insurance policy which ensures policyholders are not compensated in excess.<sup>362</sup> This ensures that the risks can be accurately assessed, premiums set, and interests protected.<sup>363</sup> Indemnity also ensures that the interest of risk aversion, a fundamental principle of insurance, is protected by paying out policyholders the equitable amount based upon their respective premium payment.<sup>364</sup> To satisfy this requirement, host sites of fantasy sports games would have to ensure that the fantasy sports participant's winnings "never exceed[] the difference between the expected winnings of a given fantasy sports owner if a particular player remains healthy throughout the season, and the expected winnings of that same fantasy sports owner given the occurrence of the insurable event."<sup>365</sup>

## iii. Fantasy Sports Insurance is "Insurance"

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<sup>357</sup> Rotosurance: Terms of Service, *supra* note 332.

<sup>358</sup> *Id.*

<sup>359</sup> 17 STEVEN PLITT ET AL., COUCH ON INS. § 246:93 (3d ed. 1995).

<sup>360</sup> GAMING, GAMBLING & FANTASY SPORTS, 20160513A NYC BAR § 218.

<sup>361</sup> Edelman, *supra* note 32, at 51 (Internal citations omitted.).

<sup>362</sup> *See generally* 15 STEVEN PLITT ET AL., COUCH ON INS. § 216:17 (3d ed. 1995).

<sup>363</sup> *Id.*

<sup>364</sup> *See* Kenneth S. Abraham, *Risk Aversion, Insurance, and the Limits of Regulation*, 5 UC IRVINE L. REV. 513, 513–536 (2015).

<sup>365</sup> Edelman, *supra* note 31, at 52.

Considering the fact that fantasy sports are legal and that fantasy sports insurance satisfies the elements of insurance—insurable interest and indemnity—it should be considered insurance under Connecticut law. Although fantasy sports participants may not have an insurable interest in the individual players they may be insuring, they do have a significant interest in their respective fantasy teams. As the manager of the fictional team of players, fantasy participants have a financial, reputational, and potentially emotional connection to the success of their teams, which is largely dependent on the players. As compared to the illegal actions of British individuals taking out policies on the lives of royalty, of whom they do not know, fantasy participants do have a tangible insurable interest in the teams they manage.

A fantasy sports participant can legally insure a participant on their respective fantasy team in the same way a film producer can take out a policy on an actor in the case of injury or illness.<sup>366</sup> Although the producer does not have an insurable interest in the actual life of the actor, they do have a personal interest in ensuring that they are able to act and film. If a star actor was to get sick, for example, the producer may lose profits or incur additional expenses in finding replacement cast members. Similarly, a fantasy sports participant has an insurable interest in ensuring their fantasy players, in real-life, do not incur injuries and are able to provide valuable playing time and points to the team's roster.

Similarly, so long as the policy pays out an amount not to overly indemnify the policyholder, it is sufficient. In a policy, for example, that reimburses an insured the fantasy league entry fee upon the sufficient absence of an insured player, this may not overly compensate the participant. On the other hand, however, a pro rata reimbursement of league fees may be a more accurate way of handling this issue. In many standard insurance policies, the language will specify that they will not cover more than the financial interest in the policy. However, if a star player was to get injured in real life there is still a chance that the rest of the fantasy team's players will still perform well and have a successful or winning season. In such a circumstance, a participant would be overly indemnified if the participant's league entry fee was reimbursed due to one player's injury while the team does not lose money—or even ranks highly or wins—the participant would be overly indemnified. Thus, for the policies to be considered insurance products they should reimburse on a pro rate basis for the actual loss that player contributed to the team, whether it be a complete demise of a season or a lower ranking within a league.

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<sup>366</sup> See Caitlin Kenney, *How do Movie Producers Insure Lindsay Lohan and Other Troubled Stars*, NPR: PLANET MONEY (Jan. 14, 2013 2:30 PM), <https://www.npr.org/sections/money/2013/01/14/169367312/how-do-movie-producers-insure-lindsay-lohan-and-other-troubled-stars> (“Insurance on stars like Lohan is called cast insurance, and it protects against the risk that stars will not be able to film due to sickness, injury or death. Producers insure their stars because having an actor unable to film can cost them hundreds of thousands of dollars a day.”).

## VIII. WHAT ARE THE IMPLICATIONS IN CONNECTICUT?

*A. What does this mean for the Connecticut Department of Insurance?*

The actions and involvement of the Connecticut Department of Insurance depend on whether sports betting insurance is considered “insurance” under state law. Because fantasy sports insurance meets Connecticut’s definition of insurance, it should be regulated accordingly under the discretion of the Commissioner.<sup>367</sup> Fantasy sports insurers should be held to the same standards as other insurers in the state.<sup>368</sup> Moreover, the producers should be required to apply for insurance licenses<sup>369</sup> and abide by necessary state requirements. Solvency, for example, could be ensured through examination of the company’s financial conditions,<sup>370</sup> mandates on financial reserves,<sup>371</sup> and access to guaranty funds.<sup>372</sup> However, if the companies fail to comply, they could be subject to fines<sup>373</sup> and other penalties.<sup>374</sup> Additionally, the failure to comply with state insurance laws makes the contracts unenforceable to either party.<sup>375</sup>

The oversight of the Connecticut Department of Insurance is essential for the protection of Connecticut’s sports bettors and residents. If residents are hedging their bets by taking out insurance policies on their fantasy sports players (and particularly if they are being encouraged to wage larger bets in light of such protection) they may suffer from being taken advantage of. Insurance is a contract: although bettors could seek to enforce such contract in court if the insurer fails to comply, the protections of the department of insurance to have fair contractual terms, ensure enforcement, and provide redress in the case of a breach of duty are essential to protect Connecticut residents. Although some terms may be enforced despite their lack of approval by the department,<sup>376</sup> this overview is nevertheless important and may be taken into consideration by the

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<sup>367</sup> Conn. Gen. Stat. § 38a-8 (2019).

<sup>368</sup> Conn. Gen. Stat. § 38a-782 (2019) (specifying the standards for insurance producers in the state); Conn. Gen. Stat. § 38a-782a (2019) (requiring insurance producers to take part in continuing education programs); Conn. Gen. Stat. § 38a-784 (2019) (requiring renewal of licenses).

<sup>369</sup> Conn. Gen. Stat. § 38a-263 (2019); Conn. Gen. Stat. § 38a-769 (2019).

<sup>370</sup> Conn. Gen. Stat. § 38a-14a (2019).

<sup>371</sup> Conn. Gen. Stat. § 38a-76 (2019); Conn. Gen. Stat. § 38a-77 (2019).

<sup>372</sup> Conn. Gen. Stat. § 38a-92 (2019); Conn. Gen. Stat. § 38a-836 (2019); Conn. Gen. Stat. § 38a-839 (2019).

<sup>373</sup> Conn. Gen. Stat. § 38a-2 (2019) (General penalty).

<sup>374</sup> Conn. Gen. Stat. § 38a-16 (2019); Conn. Gen. Stat. § 38a-817 (2019); Conn. Gen. Stat. § 38a-818 (2019); Conn. Gen. Stat. § 38a-830 (2019).

<sup>375</sup> Conn. Gen. Stat. § 38a-275 (2019).

<sup>376</sup> *See* *Cage v. Litchfield Mut. Ins. Co.*, 713 A.2d 281 (Conn. Super. 1997) (holding that exclusions in an insurance policy not filed with the department of insurance may still be enforceable).

courts. As with any typical insurance policy, such as property insurance, automobile insurance, or health insurance, it is within the government and state's interest to ensure that their residents receive such coverage. Despite the arguable lack of "necessity" with fantasy sports insurance, as compared to the requirement for auto insurance, upholding contracts and protecting consumers is an important interest, especially for the "insurance capital of the world."<sup>377</sup>

*B. What should the Connecticut legislature consider?*

Regardless of whether the Connecticut Department of Insurance deems sports betting insurance to be "insurance" as to bring it under the purview of state regulation, the Connecticut legislature should still take the existence of such policies into consideration in the legalization of sports betting and gambling in the state.

Connecticut has taken a particularly strong stance to prevent irresponsible gambling behaviors and compulsive gambling. The Connecticut Council on Problem Gambling (CCPG) is "a non-profit organization focused on preventing problem gambling and helping those who may be struggling from disordered gambling as well as persons affected."<sup>378</sup> Although the CCPG claims that it "does not advocate for or against gambling," but encourages responsible gambling behaviors.<sup>379</sup> The organization offers a 24-hour helpline for problem gambling, prevention and education programs, and other resources to those struggling with gambling addition or other problems.<sup>380</sup> Additionally, Connecticut law bans unauthorized gambling activities.<sup>381</sup>

The existence of sports betting insurance in Connecticut may not further the goals of the state government. It is undeniable that a large majority of Americans enjoy participating in fantasy sports—and sports gambling generally—and spend a great sum of money annually. Thus, insurance helps to protect many in their investments. Additionally, fantasy sports encourage families, friends, and strangers to participate and play amongst one another and encourage viewership in sporting events, stimulating the economy and community.

Additionally, sports betting insurance may encourage irresponsible gambling behaviors. Today's gamblers, who currently spend about \$653 on fantasy sports per year,<sup>382</sup> may change their gambling habits based upon the

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<sup>377</sup> Patrick J. Mahoney, *Aetna Helps Make Hartford 'The Insurance Capital of the World,'* CONNECTICUTHISTORY.ORG (Mar. 27, 2015), <https://connecticuthistory.org/aetna-helps-make-hartford-the-insurance-capital-of-the-world/#:~:text=During%20the%2019th%20century%2C%20a,fabric%20of%20the%20capital%20city>.

<sup>378</sup> CONN. COUNS. ON PROBLEM GAMBLING, <http://www.ccp.org/about-ccpg/> [hereinafter *CCPG*].

<sup>379</sup> *Id.*

<sup>380</sup> *Id.*

<sup>381</sup> See Conn. Gen. Stat. § 53-278b (2019); see also Conn. Agencies Regs. § 53-278c-6 (2001); Conn. Agencies Regs. § 53-278c-1 (2001).

<sup>382</sup> *Rotosurance: How it Works*, *supra* note 300.

existence of insurance. For example, knowing that they could recoup 100% of their league fees if an insured player was to get injured under a policy, a participant may decide to spend more money on their leagues or join more leagues. However, insuring a few players on a participant's team does not guarantee success. Connecticut legislators have particularly recognized studies by the Stop Predatory Gambling Organization, which noted, "[t]he increase for sport wagering and online gaming . . . is 18.7 percent instead of 2.5 percent of gambling addicts, so there's much more higher rate of gambling addiction with the sports wagering, internet gambling."<sup>383</sup> Additionally, to trigger a policy, the participant must meet very narrow criteria including: a player who was injured during play and is out for the designated number of weeks out of the season.

Sports betting insurance providers, like Rotosurance, also provides policies for individual sports bets.<sup>384</sup> Thus, one may place a wager on a series of bets, such as win bets, moneyline bets, over/under bets, point spread and handicap bets, parlays, and teasers.<sup>385</sup> If one was to place a bet that the final score of a football game would be over 42 points,<sup>386</sup> they could place a certain amount of money down to win a sum based upon the "Vegas odds"<sup>387</sup> of that occurring. By allowing individuals to insure these individual bets, some may be encouraged to place more money on these and make riskier wagers (e.g., multi-team parlays or low risk chances) if they are able to get some or all of their money back. Thus, they may be more likely to participate in irresponsible gambling behaviors.

Nevertheless, considering the popularity of wagering games, such as fantasy sports, and the positive implications of such on the state's economy, it is beneficial for the state to employ legalized gambling with the proper precautions. Routing a portion of the sports betting revenue to government and non-profit organizations tasked with providing resources for preventing and treating irresponsible gambling behaviors and addictions should be considered.

### C. *The Responsibility of Other State Governments*

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<sup>383</sup> *Public Safety and Security Committee Public Hearing* (Feb. 26, 2019) (transcript).

<sup>384</sup> *Rotosurance: How it Works*, *supra* note 300.

<sup>385</sup> *Different Types of Bets Explained*, GAMBLINGSITES.ORG, <https://www.gambling-sites.org/sports-betting/beginners-guide/types-of-bets/>.

<sup>386</sup> *Id.* at 365 (this would be considered betting on the "over" of the game, and this would take into consideration the total of the scores of both teams).

<sup>387</sup> *Sports Betting Odds*, VEGASINSIDER.COM, <https://www.vegasinsider.com/odds/Las-Vegas-Odds>, SCORESANDODDS.COM, <https://www.scoresandodds.com/las-vegas-odds>; *FAQ: What are Las Vegas Odds?*, UCLA INST. FOR DIGITAL RESEARCH & EDUC. STAT. CONSULTING, <https://stats.idre.ucla.edu/other/mult-pkg/faq/general/faq-what-are-las-vegas-odds/> ("When statistical types use the word odds they mean the probability that an event will occur divided by the probability that an event will not occur, that is, odds =  $p/1(1-p)$ . However, in everyday conversation, people can use the word odds with a slightly different but related meaning. In ordinary conversation people often mean Law Vegas or gambling odds.").

Both Fantasy Player Protect and Rotosurance do not specify which states their policies are effective in. Because most states have a carve out for fantasy sports despite their gambling laws, residents of many states may purchase fantasy sports insurance to protect their wagers. However, it is unclear and unlikely, however, that any state Department of Insurance or legislature has regulated or recognized fantasy sports insurance. Thus, Connecticut must play a leading role in protecting their residents and ensuring a profitable and safe legalized gambling environment.

#### IX. CONCLUSION

Fantasy sports and sports betting generally are inevitable. These activities, though controversial, must be regulated to ensure investments are protected. Therefore, the Connecticut legislature and Department of Insurance should take an active role in protecting fantasy sports players and sports bettors in Connecticut. “Hedging your bets” has taken on a new meaning in the fantasy sports betting market: how states react and protect their residents will determine how the game will be played.