

Rejecting the Zero-Sum Game in Daily Fantasy Sports – A Proposal for Arizona

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The daily fantasy sports (“DFS”) industry has been on a meteoric rise since its introduction in 2007. Led by market leaders DraftKings and FanDuel, DFS is a multibillion-dollar industry that has taken advantage of the advent of the internet and the public’s desire for more immediate results. Commercials and advertisements promoting huge payouts in exchange for small entry fees quickly garnered the attention of not only sports fans, but also many top state officials. DFS operators rely on the Unlawful Internet Gambling Enforcement Act (“UIGEA”) to argue they are operating legally. Although UIGEA created an exemption for fantasy sports from traditional internet gambling, there is no evidence the drafters contemplated DFS. The questionable legality of DFS eventually caught up with the aggressive business models of DraftKings and FanDuel. Now, the DFS industry is backing state-by-state lobbying efforts to resolve the legal uncertainty.

Arizona’s Tribal-State Gaming Compact (“Compact”) further complicates the inquiry into whether DFS is illegal gambling. Historically, Arizona has considered DFS a game of chance and therefore illegal gambling. In 1998, the Arizona Attorney General, Grant Woods, opined that fantasy sports were illegal gambling. Several recent legislative attempts in Arizona to legalize and regulate DFS have been unsuccessful. The Compact contains a “poison pill” provision that eliminates limits on what the Native American tribes in Arizona can do if the state expands gaming allowed off reservation. Additionally, triggering the poison pill significantly reduces the tribes’ obligation to share revenue with the state.

This Note recommends Arizona resolve the uncertain legal status of daily fantasy sports by passing legislation that would legalize and regulate DFS in Arizona, while satisfying the countervailing interests of the Arizona tribes. DraftKings received \$48,742 from Arizona players in 2014 despite the ban on DFS. Arizona consumers need protection and the failure to legalize DFS is depriving Arizona’s economy from revenue. Part I of this Note will provide background on the history of fantasy sports. In addition, Part I will explain how daily fantasy is played and analyze whether it is a game of skill or a game of chance. Part II of this Note will discuss New York’s turbulent path to passing successful DFS legislation. Part III will take Colorado and Mississippi as examples of states with successful DFS legislation, and describe how the similarities between the two states and Arizona can help craft a successful bill in Arizona. Part IV will analyze past unsuccessful attempts at DFS legislation in Arizona, as well as the historical legal stance on DFS in Arizona. Finally, Part V of this Note will propose a solution to resolve the uncertain legal status of DFS in Arizona. The solution proposed incorporates the ideal definition of DFS, appropriate consumer protections, DFS operator licensing fees and taxes, regulatory oversight, and compliance with the Compact.

Table of Contents

Introduction.....	2
I. Daily Fantasy Sports Background.....	6
A. Advent and Growth of Daily Fantasy Sports.....	6
B. The Rules of the Game	8
C. Legal Issues Surrounding Daily Fantasy Sports	9
II. History of Daily Fantasy Sports in New York.....	11
III. Daily Fantasy Sports Regulation Nationwide.....	14
A. Colorado	15
B. Mississippi	17
IV. Arizona’s Attempts at Regulation	18
V. Resolution of the Status of Daily Fantasy Sports in Arizona	22
A. Arizona Tribal-State Compact	23
B. Proposal for Daily Fantasy Sports Legislation in Arizona.....	26
Conclusion	30

Introduction

Arizona is one of five states that has historically banned daily fantasy sports (“DFS”) as a game of chance and therefore illegal gambling.¹ Recent attempts to make DFS legal in the state have come up short. For example, Senate Bill 1515 was introduced in early 2016, but ultimately failed in the Senate Rules Committee.² The Bill sought to exclude fantasy sports league competitions from the laws that have banned DFS as a form of illegal gambling.³ Much of the

¹ Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, last visited Feb. 21, 2017, http://www.espn.com/chalk/story/_id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states (showing Iowa, Louisiana, Montana, and Washington as the other four states that have historically banned DFS).

² Ariz. State Legislature, *Bill Status Inquiry*, <https://apps.azleg.gov/BillStatus/BillOverview?SessionID=115> (last visited Nov. 10, 2016); *see also infra* Part IV.

³ The Associated Press, *State Legislatures See Flurry of Daily Fantasy Sports Bills*, ARIZ. CAPITOL TIMES, Mar. 7, 2016, <http://azcapitoltimes.com/news/2016/03/07/state-legislatures-see-flurry-of-daily-fantasy-sports-bills>.

reason for the failed legislation stems from issues created by gaming compacts that Arizona has with the Native American tribes located in the state.⁴

In 2002, Arizona voters passed the Arizona Tribal-State Gaming Compact (“Compact”) giving Native American tribes the exclusive right to operate certain kinds of gambling within state boundaries.⁵ The Compact specifically “establishes technical standards for the gaming machines, authorizes the state to inspect casinos, requires background investigations and licensing of casino employees and vendor companies, and requires tribes to contribute 1 to 8% of their gaming revenue to state and local governments.”⁶ The contribution is determined on a sliding scale based on the amount of each tribe’s gaming revenue.⁷ The Compact further provides that if Arizona expands the kinds of gaming allowed off reservation, it triggers a “poison pill” that eliminates any limits on what the tribes can do.⁸ The Compact requires tribes to have minimum theoretical percentage payouts, law enforcement plans to address criminal activity at the casinos, and an online electronic monitoring system for slot machine data.⁹ Additionally, triggering the poison pill would absolve the tribes of any obligation to share revenues with the state.¹⁰ The poison pill, if triggered, would cost Arizona over \$100 million per year in shared revenues from tribal gaming.¹¹ There are 16

⁴ See, e.g., Michelle Ye Hee Lee, *Bill Legalizing Fantasy Sports in Arizona Fails*, THE REPUBLIC, Mar. 31, 2014, <http://www.azcentral.com/story/news/politics/2014/03/30/fantasy-sports-supporters-hope-see-game-legalized/7076827/>.

⁵ Ariz. Rev. Stat. Ann. § 5-601.02 (2012) (allowing gaming devices, keno, off-track pari-mutuel wagering, pari-mutuel wagering on horse racing, pari-mutuel wagering on dog racing, blackjack, poker (including jackpot poker), and lottery as permissible forms of regulated gambling by an Indian tribe); The Associated Press, *supra* note 3; see *infra* Part V.A.

⁶ Arizona Department of Gaming, *Tribal-State Compacts*, gaming.az.gov/law-compacts/tribal-state-compacts (last visited Jan. 20, 2017) [hereinafter *Tribal-State Compacts*].

⁷ *Id.* Each Tribe contributes 1% for its first \$25 million; 3% of the next \$50 million; 6% of the next \$25 million; and 8% of the Class III Net Win in excess of \$100 million. Class III Net Win is the difference between gaming wins and losses before deducting casino operating costs. *Id.*

⁸ The Associated Press, *supra* note 3; see *infra* Part V.A.

⁹ *Tribal-State Compacts*, *supra* note 6. Among other things, the Compact also limits the maximum number of casinos, slot machines, and blackjack and poker tables allowed in Arizona. *Id.*

¹⁰ The Associated Press, *supra* note 3.

¹¹ Arizona Indian Gaming Association, *Protect Our Compacts: Keep Gaming Limited in Arizona*, protectourcompacts.org (last visited Jan. 20, 2017) [hereinafter *Protect Our Compacts*].

tribes in Arizona operating 23 Class III casinos in the state.¹² Another five tribes do not have casinos but have slot machine rights that they may lease to tribes with casinos.¹³ The Arizona Indian Gaming Association (“AIGA”), which is committed to protecting tribal interests, has opposed DFS legislation in the past, and is still opposed to current attempts to legalize DFS within the state.¹⁴ AIGA even has a website dedicated to opposing DFS legislation in Arizona.¹⁵ The website claims that, because of the poison pill provision, the Compact would be null and void if legislation is passed.¹⁶ If the Compact becomes null and void, the tribes would be allowed to operate Class III gaming and table games without limitations.¹⁷ In addition, if the Compact becomes null and void, the tribes can reduce their contribution to the state.¹⁸ The tribes would only be obligated to make quarterly payments to the state equal to 0.75% of the tribe’s Class III Net Win.¹⁹

To conduct Class III gaming under the federal Indian Gaming and Regulatory Act (“IGRA”), a tribe must enter into a tribal-state compact, which generally requires that the tribe submit to state regulation of certain gaming activities in exchange for the right to conduct those

¹² *Tribal-State Compacts*, *supra* note 6. Class III casinos may offer “Las Vegas style” gaming activities (e.g. slot machines, house-banked poker, and blackjack) and are regulated by both the Arizona Department of Gaming and the Tribal Gaming Authority of the tribe that owns the casino. Alternatively, Class II casinos are “regulated solely by the tribe that operates the facility with oversight from federal authorities,” and can offer bingo and non-house banked card games. Arizona Department of Gaming, *Class II and Class III FAQ*, gaming.az.gov/class-ii-and-class-iii-faq (last visited Oct. 5, 2016).

¹³ *Tribal-State Compacts*, *supra* note 6.

¹⁴ Dustin Gouker, *Tribal Gaming Interests Waking up on Fantasy Sports: Oklahoma Coalition Quashes Bill*, LEGAL SPORTS REPORT, Mar. 21, 2016, <http://www.legalsportsreport.com/9116/tribes-and-fantasy-sports> [hereinafter *Tribal Gaming Interests Waking up on Fantasy Sports*]; *See also* Lee, *supra* note 4 (discussing how S.B. 1468, which attempted to make fantasy competitions legal in Arizona, was killed in the Senate by opposition from Native American gaming proponents).

¹⁵ *Protect Our Compacts*, *supra* note 11.

¹⁶ *Id.*

¹⁷ Arizona Tribal/State Compact § 3(h)(1)(a)-(b) (2003), https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf (explaining that the poison pill provision being triggered eliminates the limits on number of devices, facilities, and maximum devices per facility each tribe is allowed without the need to amend the Compact).

¹⁸ *Id.* § 3(h)(1)(c); *see also infra* Part V.A.

¹⁹ Arizona Tribal/State Compact § 3(h)(1)(c) (2003). Class III Net Win is the tribe’s gross gaming revenue, or the difference between gaming wins and losses before deducting costs and expenses. *Id.* § 2(qq).

activities.²⁰ Shared revenues with the state in exchange for exclusivity is a common practice.²¹ The National Indian Gaming Commission has not opined whether DFS would be considered Class III gaming, but it would seem more likely than not that if DFS is considered gaming, it would be Class III gaming.²² The classification of DFS as Class III gaming would impact the exclusivity of Arizona's Compact.

A number of states, including Oklahoma, California, Florida, Connecticut and Wisconsin, have experienced tribal opposition to DFS legislation.²³ States that have successfully passed legislation concerning DFS have done so with consumer protection in mind.²⁴ Arizona should resolve the uncertain legal status of daily fantasy sports by passing legislation that would legalize and regulate DFS operations in the state, while satisfying the countervailing interests of the Arizona Indian Gaming Association.

Part I of this Note will explain the creation of fantasy sports, and how the subset of daily fantasy sports became a multibillion-dollar industry. The market leaders, DraftKings and FanDuel, have taken advantage of the growth of the internet and the public's desire for more immediate results. In addition, Part I will explain how daily fantasy is played and analyze whether it is a game of skill or a game of chance. Part II of this Note will discuss New York's turbulent path to passing successful DFS legislation. Part III will take Colorado and Mississippi as examples of states with

²⁰ Charles W. Galbraith & Julian SpearChief-Morris, *What the Growth of Daily Fantasy Sports Means for Tribes*, LAW360, July 5, 2016, <http://www.law360.com/articles/813931/what-the-growth-of-daily-fantasy-sports-means-for-tribes>.

²¹ *Id.*

²² *Id.* Under the Indian Gaming and Regulatory Act, Class III gaming is defined as all forms of gambling that is not Class I or Class II, and Class I and Class II gaming are limited categories. *Id.* Class I gaming means "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6) (2012). "[E]lectronic or electromechanical facsimiles of any game of chance" are specifically excluded from the definition of Class II gaming. *Id.* § 2703(7)(B)(ii).

²³ *Tribal Gaming Interests Waking up on Fantasy Sports*, *supra* note 14; Don Van Natta Jr., *Welcome to the Big Time*, Outside the Lines & ESPN the Magazine, Aug. 24, 2016, http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel.

²⁴ See *infra* Part II (New York) and Part III (Colorado and Mississippi).

successful DFS legislation, and describe how the similarities between the two states and Arizona can help craft a successful bill in Arizona. Part IV will analyze past unsuccessful attempts at DFS legislation in Arizona, as well as the historical legal stance on DFS in Arizona. Finally, Part V of this Note will propose a solution to resolve the uncertain legal status of DFS in Arizona. The solution proposed will be informed by past attempts in Arizona, other states' successful DFS legislation, and the Arizona Tribal-State Gaming Compact. This Note suggests to legalize and regulate DFS in Arizona, while complying with the terms of the Compact.

I. Daily Fantasy Sports Background

A. Advent and Growth of Daily Fantasy Sports

Daily fantasy sports has grown into a multibillion-dollar industry, with millions of participants playing each week.²⁵ The two market leaders are DraftKings and FanDuel, which together control 95% of the DFS market in the United States.²⁶ In only three years, DraftKings went from an idea hatched by three friends in Boston to the multi-billion dollar company it is today.²⁷ The advent of the internet allowed fantasy sports to go from friendly competition amongst friends to large-scale competition against strangers from all around the world.²⁸ Traditional, season-long fantasy sports have been around since the 1960s, while the first DFS companies just began operating around 2007.²⁹ DraftKings and FanDuel have been able to secure massive

²⁵ Zachary Shapiro, Note, *Regulation, Prohibition, and Fantasy: The Case of Fanduel, DraftKings, and Daily Fantasy Sports in New York and Massachusetts*, 7 HARV. J. SPORTS & ENT. L. 289, 289-90 (2016).

²⁶ *Id.* at 290.

²⁷ Van Natta Jr., *supra* note 23.

²⁸ Marc Edelman, Article, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. ILL. L. REV. 117, 121 (2016) (describing how statistically-oriented sports fans originally played fantasy sports amongst friends until the advent of the internet in 1994 transformed fantasy sports from an in-home, social activity into a highly publicized, commercial pursuit).

²⁹ *Id.* at 120, 124. Fantasy Day Sports Corp. was the first company to delve into "daily fantasy sports." *Id.* at 124. The company was viewed with some perception of illegality, but many others began to offer similar contests after Fantasy Day Sports Corp. was not prosecuted. *Id.* at 125.

amounts of equity funding from private investors, and they have both entered endorsement deals with some of the major sports leagues.³⁰

Both DraftKings and FanDuel have established a reputation for being aggressive.³¹ The two companies focused on building a consumer base first, and resolving the DFS industry's uncertain legal status later.³² This aggressive model of business brought several issues to the forefront. Allegations of insider trading and concern over participants with the deepest pockets always winning DFS contests led some to question the systems DraftKings and FanDuel had built.³³ A study showed that a tiny percentage of daily fantasy players win consistently, with only 1.3% participating in baseball contests consistently winning.³⁴ Further, DraftKings employees won an estimated \$6 million playing in DFS contests on FanDuel.³⁵ The employees have access to proprietary information like the percentage of ownership of various players by contestants that is unavailable to the public.³⁶ The use of this information can be considered "insider trading."³⁷ FanDuel warned its employees in a 2012 internal memo to be careful about raising suspicions by winning too often when playing on DraftKings.³⁸ These issues ultimately led New York Attorney General Eric Schneiderman to file cease-and-desist letters against DraftKings and FanDuel in November 2015.³⁹

³⁰ *Id.* at 126-27; *See also* Van Natta Jr., *supra* note 23.

³¹ *See* Ben Fischer, *FanDuel vs. DraftKings: Are we seeing the Future of Sports Wagering?*, N.Y. BUS. J., Nov. 18, 2014, <http://www.bizjournals.com/newyork/blog/techflash/2014/11/fanduel-vs-draftkings-are-we-seeing-the-future-of.html> (describing the expensive battle for market supremacy between FanDuel and DraftKings).

³² Van Natta Jr., *supra* note 23.

³³ *Id.*

³⁴ *Id.* In the study conducted by McKinsey and Company, the group of players paying the lowest entry fees had a -51% return on their investments, while the players paying the largest entry fees saw a +7% return. Drew Harwell, *All the Reasons You (Probably) Won't Win Money Playing Daily Fantasy Sports*, WASH. POST, Oct. 12, 2015, https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/?utm_term=.0cbc48346ddb.

³⁵ Van Natta Jr., *supra* note 23.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*; *see infra* Part II.

B. The Rules of the Game

Individuals participate in DFS by creating an account, depositing money into the account, and using the money to buy entry tickets to a variety of DFS contests.⁴⁰ Participants select athletes to fill their rosters, with each user allocated a fixed maximum budget to spend on athletes for their team.⁴¹ Each athlete has his own cost, with elite athletes having the highest price.⁴² Teams gain points depending on the performance of the chosen athlete in real-life games, which is similar to traditional season-long fantasy sports.⁴³ However, daily fantasy occurs on a daily or weekly basis, while season-long fantasy occurs over the course of the entire season.⁴⁴ There are a variety of different game formats including head-to-head matchups, guaranteed prize pool contests, and “50-50” games where if the participant finishes in the top 50%, they win double the entry fee amount.⁴⁵ Head-to-head matchups pit one individual player against another single opponent, with the player amassing the most team points winning the prize.⁴⁶ Guaranteed prize pool contests have tiered payouts based on the percentile the player finishes within the pool.⁴⁷

Beginner DFS users could fill out a roster in minutes and hope for a good outcome.⁴⁸ Experienced DFS users spend hours creating projections, tweaking models, watching film, and constructing rosters.⁴⁹ The long hours of research are more lucrative depending on how familiar

⁴⁰ Shapiro, *supra* note 25, at 291. DFS operators also run promotions to encourage players to deposit more money into their account with the promise the DFS operator will match their funds. *Id.* at 291 n.4.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Other differences between daily fantasy and season-long fantasy include how players are selected and how the contests are structured. Nathaniel J. Ehrman, *Out of Bounds?: A legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 *SPORTS LAW. J.* 79, 86 (2015).

⁴⁵ Shapiro, *supra* note 25, at 291.

⁴⁶ *Id.*

⁴⁷ *Id.* at 291-92.

⁴⁸ Jonathan Bales, *Here’s What It Takes to Make a Living Playing Fantasy Sports*, *BUS. INSIDER*, Nov. 6, 2013, <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11>.

⁴⁹ *Id.*

the average user is with the specific sport.⁵⁰ For example, the typical sports fan might know more about football than other sports, so experienced users will focus their research efforts in the other sports, like baseball and basketball.⁵¹ The user looks to find value where players' prices are too low relative to their expected production.⁵² Experienced users analogize their DFS play to investments jobs.⁵³

C. Legal Issues Surrounding Daily Fantasy Sports

While DFS initially flew under the radar, as the industry has grown, the sites offering daily fantasy games have continued to operate in a space of questionable legality.⁵⁴ The Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) appeared to exempt DFS activities from traditional regulation of internet gambling since the Act provides a carve-out for fantasy sports that meet particular requirements as well as skill-based games and legal intrastate and inter-tribal gaming.⁵⁵ 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.”⁵⁶ While DFS sites have pointed to this statute to argue they are operating legally, there is no evidence that consumers were playing DFS at the time of the statute’s drafting, and therefore the drafters of UIGEA could not have contemplated DFS.⁵⁷ It is only clear that the statute meant to exempt season-long fantasy sports.⁵⁸

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Shapiro, *supra* note 25, at 295.

⁵⁵ *Id.* at 295-96.

⁵⁶ *Id.* (quoting Unlawful Internet Gambling Enforcement Act of 2006 Overview at 1, *available at* <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>). UIGEA was added as Title VIII to the SAFE Port Act, which otherwise regulates harbor and port security. *Id.* at 295.

⁵⁷ *Id.* at 296; *see supra* Part I.A.

⁵⁸ *Id.* at 297.

The distinction between games of skill and chance is often the key feature determining whether or not a particular activity should be considered illegal gambling or legal activity.⁵⁹ Among the early skeptics of the meteoric rise of DFS and the legality of the industry were Major League Baseball (“MLB”) executives, who conducted a two-year study of the legality of daily fantasy sports.⁶⁰ But a law firm hired by the MLB concluded that DraftKings “overwhelmingly” offered games of skill, not chance.⁶¹ This determination is crucial, as many states, including Arizona, allow people to pay money to participate in games of skill but forbid them from paying to enter games of chance.⁶² Opponents of DFS have argued that because athlete performance varies daily or weekly, DFS contests involve little more than wagering on the performance of individual athletes during a given game, which would be illegal under the laws of most states.⁶³ Alternatively, proponents of DFS argue that preparing a DFS lineup requires skill, as creating a successful team requires extensive knowledge.⁶⁴

DraftKings also wanted to know whether DFS would survive a legal challenge, so they hired a Las Vegas lawyer to analyze this issue.⁶⁵ The lawyer concluded that the company's “pay-to-play fantasy sports service” was legal in 45 states as long as each contest's outcome was “within the control of the users.”⁶⁶ Exact determinations of whether DFS is a game of skill or chance will ultimately rest on state law interpretations of these terms.⁶⁷ Since the determination of skill or

⁵⁹ Shapiro, *supra* note 25, at 297. State laws apply differing standards to determine whether a game is a game of skill or chance. *Id.* (noting most states base their determination on whether the chance-based elements are predominant and on whether chance has more than an incidental impact on the outcome of the game).

⁶⁰ Van Natta Jr., *supra* note 23.

⁶¹ *Id.*

⁶² Shapiro, *supra* note 25, at 298 (noting that most games have elements of both skill and chance, so the determination will often depend on a subjective determination of which element is the dominant factor in the outcome).

⁶³ *Id.*

⁶⁴ *Id.* Traditional hallmarks of skill include learned or developed ability, identifiable strategy or tactics that result in positive outcomes, and technical expertise. *Id.* (listing gin rummy, pool, darts, and season-long fantasy sports as the most common examples of games of skill).

⁶⁵ Van Natta Jr., *supra* note 23.

⁶⁶ *Id.*

⁶⁷ Shapiro, *supra* note 25, at 299.

chance is a highly subjective analysis, DFS continues to operate in a legal “grey area,” lacking any clear legislative guidance.⁶⁸

Federal gambling laws only facilitate the enforcement of state gambling laws; therefore, the ultimate determination of legality of DFS rests with individual states.⁶⁹ Currently, the state-by-state approach to legalization of DFS has varied across the country. Twelve states have explicitly allowed DFS, five states have historically banned DFS, thirteen states have legislation currently pending, ten states have recently contested the issue, and ten states do not have any current legislation on the issue.⁷⁰ Currently, DFS is still being played in all but ten states.⁷¹ The ten states include the five that ban DFS, and five more where FanDuel and DraftKings have decided not to take users because of the legal uncertainty.⁷² A state-by-state lobbying effort, led by DraftKings and FanDuel, is underway in more than 30 states to clarify the legal status of DFS.⁷³ The same companies that ignored resolving the legal status of the DFS industry are now embracing limited regulation, so long as it is not subjected to the same exacting standards as traditional gambling operations.⁷⁴

II. History of Daily Fantasy Sports in New York

New York is one of the most noticeable states at the forefront of efforts to legalize and regulate DFS. Initially, New York looked primed to deal a major blow to DraftKings and FanDuel,

⁶⁸ *Id.* at 301.

⁶⁹ *Id.* at 295-96 (quoting Geoffrey T. Hancock, Note, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317, 319 (2009)). Under the Interstate Horseracing Act, for example, Congress found that states should have the primary responsibility for determining what forms of gambling may legally take place within their borders. 15 U.S.C.A. § 3001(a)(1).

⁷⁰ Rodenberg, *supra* note 1.

⁷¹ Chris Grove, *What are the States Where You Can Play Daily Fantasy Sports*, LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> (last visited Jan. 19, 2017) [hereinafter *What are the States Where you Can Play DFS*].

⁷² *Id.*

⁷³ Rodenberg, *supra* note 1. The lobbying effort includes upwards of 75 lobbyists. *Id.*

⁷⁴ The Associated Press, *supra* note 3; *See also* Van Natta Jr., *supra* note 23.

but the state's efforts turned into an encouraging step forward in the industry's search for legal clarification. New York has taken a more proactive approach to DFS regulation than other states, which is good for the DFS industry, as New York is the second most lucrative market for DraftKings and FanDuel.⁷⁵ New York's actions prompted heightened attention from the two market leaders because of the potential loss of major revenue from a ban of DFS operations in the state.

On November 10, 2015, New York Attorney General Eric Schneiderman issued a cease-and-desist order to DraftKings and FanDuel.⁷⁶ Schneiderman argued that DFS players were risking something of value on contests where they have no control or influence over the outcome.⁷⁷ DraftKings and FanDuel responded with lawsuits against the state, alleging that DFS contests were games of skill and that Schneiderman was denying them due process.⁷⁸ Schneiderman asked for, and was granted, a temporary injunction to force DraftKings and FanDuel to halt services to players in the state.⁷⁹ The same court later granted a temporary stay of the injunction.⁸⁰

In March 2016, Schneiderman declared victory, as a settlement was reached where DraftKings and FanDuel would no longer operate in the state.⁸¹ Under the settlement, the DFS market leaders "stop[ped] accepting wagers from New York residents for their less active NBA, NHL[,] and MLB contests in exchange for clearing a major hurdle with state legislators to get a DFS bill passed."⁸² DraftKings and FanDuel felt that winning the battle in New York was essential

⁷⁵ Van Natta Jr., *supra* note 23 (showing that New York is "where each company had the highest number of customers, who spent a total of \$268.3 million in fees in 2015, second only to California").

⁷⁶ *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at *1 (N.Y. Sup. Ct. Dec. 11, 2015); Shapiro, *supra* note 25, at 306; Van Natta Jr., *supra* note 23.

⁷⁷ *Fanduel*, 2015 WL 8490461, at *1; Shapiro, *supra* note 25, at 306.

⁷⁸ *Fanduel*, 2015 WL 8490461, at *2; Shapiro, *supra* note 25, at 306.

⁷⁹ *Fanduel*, 2015 WL 8490461, at *9.

⁸⁰ Shapiro, *supra* note 25, at 307.

⁸¹ Van Natta Jr., *supra* note 23.

⁸² *Id.*

to getting other state legislatures to go along as well.⁸³ The New York Gaming Association (“NYGA”) presented opposition to New York DFS legislation, citing concerns about the bill and how it handled DFS.⁸⁴

Ultimately, the tribal opposition in New York did not stop the legislation from passing. New York has tribal-state gaming compacts with three tribes within the state.⁸⁵ The New York gaming compacts differ from the Arizona Compact. New York’s compacts grant the tribes exclusivity for Class III gaming within a defined geographic area, while Arizona’s Compact does not limit the “poison pill” provision to a specific geographic area.⁸⁶ Defining a specific geographic area where the tribe can operate Class III gaming does not limit New York’s ability to allow other kinds of gaming within the state, but it must be located outside of that defined geographic area.

The DFS bill passed and the governor signed it into legislation on August 3, 2016.⁸⁷ The New York legislation creates a regulatory framework for the New York State Gaming Commission’s oversight of DFS, and implements important consumer protections and safeguards against fraud and abuse.⁸⁸ The specific protections and safeguards include prohibiting minors from participation, eliminating inaccurate or misleading advertising about the chances of winning, identifying all highly experienced players, listing information concerning assistance for

⁸³ The settlement between Schneiderman and the DFS operators ultimately proved a win-win for both parties. Schneiderman forced DraftKings and FanDuel to stop accepting wagers for most sports while appropriate legislation was drafted, and DraftKings and FanDuel were still able to accept wagers for football contests while the legislation provided legitimacy to the DFS industry. *See id.*

⁸⁴ Dustin Gouker, *New York Fantasy Sports Bill Clears First Hurdle, But Opposition on Display*, LEGAL SPORTS REPORT, June 1, 2016, <http://www.legalsportsreport.com/10261/new-york-dfs-bill-clears-vote>.

⁸⁵ New York State Gaming Commission, *Native Americans and Gambling in New York State*, https://gaming.ny.gov/gaming/indian_dig1.php#compacts (last visited Nov. 11, 2016).

⁸⁶ *Compare* Nation-State Gaming Compact Between the Seneca Nation of Indians and the State of New York § 12(a)(1), Aug. 29, 2002, <http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038394.pdf> (describing the boundaries the Seneca Nation of Indians shall have exclusivity to install and operate gaming devices), *with* Arizona Tribal/State Compact § 3(h), 2003, https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf (describing the Native American tribe’s exclusivity to operate Class III gaming without a geographic boundary).

⁸⁷ Van Natta Jr., *supra* note 23.

⁸⁸ N.Y. Rac. Pari-Mut. Wag. & Breed. §§ 1400-1412 (McKinney 2016); New York State Gaming Commission, *Interactive Fantasy Sports*, gaming.ny.gov/ifs (last visited Oct. 1, 2016) [hereinafter *Interactive Fantasy Sports*].

compulsive play on the website, protecting players' funds upon deposit, and offering introductory procedures to new players.⁸⁹ The law requires DFS operators to register with the state, and allows for temporary permits for companies that were already operating in the state to continue operating while pending application for registration.⁹⁰ Registrants are taxed 15% of their DFS gross revenue generated within New York, and an additional 0.50% annually.⁹¹ The tax money collected goes in the New York Lottery fund to provide aid to New York's public schools.⁹²

The aggressiveness of the New York Attorney General prompted DraftKings and FanDuel to go on the offensive in pursuing DFS legislation that would regulate and tax the DFS industry in any state where there was legal uncertainty.⁹³ This would allow DraftKings and FanDuel to continue operating without the possibility of the state shutting it down. The New York action also opened the eyes of many other states' top officials.⁹⁴

III. Daily Fantasy Sports Regulation Nationwide

Tribal-state gaming compacts present a unique roadblock to DFS regulation. DFS regulation has seen tremendous movement around the country, but only 12 states currently approve of DFS.⁹⁵ DraftKings and FanDuel are operational in 40 states regardless of where the state is in the legalization efforts.⁹⁶ Along with Arizona, only four other states explicitly ban DFS. Other states with strong Native American tribe opposition to DFS regulation have not been successful in

⁸⁹ N.Y. Rac. Pari-Mut. Wag. & Breed. § 1404 (McKinney 2016); *Interactive Fantasy Sports*, *supra* note 88. Notably left out of the protections is anything prohibiting a company's employee with proprietary information from playing and winning on a different site. *See* Wag. & Breed. § 1404.

⁹⁰ N.Y. Rac. Pari-Mut. Wag. & Breed. § 1402 (McKinney 2016).

⁹¹ *Id.* § 1407.

⁹² *Interactive Fantasy Sports*, *supra* note 88.

⁹³ *See* Van Natta Jr., *supra* note 23.

⁹⁴ *Id.*

⁹⁵ Rodenberg, *supra* note 1.

⁹⁶ *What are the States Where You Can Play DFS*, *supra* note 71 (showing that DraftKings or FanDuel can be played in every state except Arizona, Alabama, Hawaii, Idaho, Iowa, Louisiana, Montana, Nevada, Delaware, and Washington State).

passing legislation. States that do not have gaming compacts do not have the added concern of how DFS legislation will affect tribal gaming interests.

The Mississippi Attorney General issued an opinion in early 2016 expressly stating DFS is considered illegal gambling in the state.⁹⁷ The Mississippi legislature promptly acted to legalize and regulate DFS. Arizona is in a similar position, as Arizona’s Attorney General has expressed his concerns that DFS is illegal in the state.⁹⁸ Although Colorado has a tribal-state gaming compact like Arizona, the state successfully passed DFS legislation.⁹⁹ The legislation passed by Colorado and Mississippi took different approaches to DFS regulation. Analyzing the approaches taken by Colorado and Mississippi will help shed some light on how Arizona should proceed.

A. Colorado

Colorado was the fifth state in 2016 to pass DFS legislation.¹⁰⁰ Colorado’s bill is unique in that it specifically covers smaller DFS operators.¹⁰¹ DFS sites with less than 7,500 in-state users must register with the state, but do not have to be licensed or go through an annual audit.¹⁰² Other important provisions in the bill include: (1) The Division of Professions and Occupations (“DPO”) in the Department of Regulatory Agencies will oversee DFS operators; (2) DPO sets the licensing and renewal fees since those numbers are not in the bill; (3) operators with 7,500 users

⁹⁷ Miss. Att’y Gen. Op. No. 2015-00445 (Jan. 29, 2016), 2016 WL 695680.

⁹⁸ Dan Adams & Curt Woodward, *Lawsuit Accuses DraftKings of Flouting Bans in 5 States*, BOSTON GLOBE, Nov. 22, 2015, <https://www.bostonglobe.com/business/2015/11/22/regulators-probe-draftkings-business-banned-states/0xD1UDp3rNPATDZ6kLvohN/story.html>; *See also* Howard Fischer, *Bill to Exclude Fantasy Sports from Gambling Law Draws Derision*, ARIZ. CAPITOL TIMES, Feb. 18, 2016, <http://azcapitoltimes.com/news/2016/02/18/bill-to-exclude-fantasy-sports-from-gambling-law-draws-derision>.

⁹⁹ Dustin Gouker, *Rocky Mountain High for Daily Fantasy Sports: Colorado Bill Heads to Governor*, LEGAL SPORTS REPORT, May 9, 2016, <http://www.legalsportsreport.com/9952/colorado-legislature-passes-dfs-bill> [hereinafter *Rocky Mountain High for Daily Fantasy Sports*].

¹⁰⁰ Colo. Rev. Stat. Ann. §§ 12-15.5-102 to -112 (West 2016); *Rocky Mountain High for Daily Fantasy Sports*, *supra* note 99.

¹⁰¹ *Rocky Mountain High for Daily Fantasy Sports*, *supra* note 99.

¹⁰² *Id.*

or more must arrange an annual third-party audit; (4) amateur sports, including college sports, are prohibited; (5) basic consumer protections; and (6) a minimum age of 18 to play.¹⁰³

Colorado has gaming compacts with two Native American tribes that allows the tribes to conduct casino-style gaming on their reservations.¹⁰⁴ The two tribes are not subject to taxation and are not required to report their revenues to the state.¹⁰⁵ In the five years after the compacts were entered into (1995-1999), an annual average economic impact of between \$29 million and \$33 million circulated in the Colorado economy.¹⁰⁶ Unlike in Arizona, the Colorado compacts do not provide for revenue to be shared with the state.¹⁰⁷ Also, the Colorado compacts do not contain a “poison pill” provision.¹⁰⁸ One Colorado compact states “in the event the State authorizes Class III gaming activities in addition to those described in Section 3 of this Compact, such authorization shall extend to the Tribe without amendment of this Compact.”¹⁰⁹ DFS is included in the Class III gaming category.¹¹⁰ The other Colorado compact is silent on what happens in the event Colorado authorizes additional gaming activities.¹¹¹ Voluntary termination, either by both parties or by just the tribe, of the compact is contemplated in both compacts.¹¹² Although Colorado successfully

¹⁰³ *Id.*

¹⁰⁴ Colorado Department of Revenue, *Tribal Casinos in Colorado*, <https://www.colorado.gov/pacific/enforcement/tribal-casinos-colorado> (last visited Jan. 20, 2017) [hereinafter *Tribal Casinos in Colorado*]. The two tribes are the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe. *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ The Ute Mountain Ute Tribe and State of Colorado Gaming Compact, Oct. 27, 1995, <http://www.bia.gov/cs/groups/xeig/documents/text/idc-038256.pdf> [hereinafter Ute Mountain Ute Tribe Compact]; The Southern Ute Indian Tribe – State of Colorado Gaming Compact, June 15, 1995, <http://www.bia.gov/cs/groups/xeig/documents/text/idc1-026015.pdf> [hereinafter Southern Ute Indian Tribe Compact].

¹⁰⁸ Ute Mountain Ute Tribe Compact, *supra* note 107; Southern Ute Indian Tribe Compact, *supra* note 107.

¹⁰⁹ Ute Mountain Ute Tribe Compact, *supra* note 107, at § 12(D).

¹¹⁰ See 25 U.S.C. § 2703(8) (2012). Class I gaming primarily includes social games solely for minimal prizes, and Class II gaming consists of bingo and most card games. See *id.* § 2703(6)-(7).

¹¹¹ Southern Ute Indian Tribe Compact, *supra* note 107.

¹¹² Ute Mountain Ute Tribe Compact, *supra* note 107, at § 12(B).; Southern Ute Indian Tribe Compact, *supra* note 107, at § 15(b).

passed DFS legislation with tribal-state gaming compacts present, Colorado's compacts are much less restrictive on the state than the Arizona Compact.

B. Mississippi

In January 2016, the Mississippi Attorney General stated that fantasy sports gambling was illegal under then current Mississippi law.¹¹³ He mentioned that any change to the law would be a matter within the purview of the state's legislature.¹¹⁴ He also noted, that even though fantasy sports is considered illegal, daily and season long fantasy sports games were being offered to the state's citizens online without regulation.¹¹⁵

Mississippi Governor, Phil Bryant, signed Senate Bill 2541 into law in May 2016.¹¹⁶ The Bill legalized and regulated DFS, but on a provisional basis.¹¹⁷ The Bill created and tasked the Fantasy Contest Task Force to review the DFS industry and suggest more comprehensive regulations.¹¹⁸ The Bill includes basic consumer protections and requires fantasy sports operators to register with the state for no charge.¹¹⁹ The Bill is automatically repealed in July 2017, by which time Mississippi may enact permanent legislation that includes the Fantasy Contest Task Force's recommendations on regulations and fees.¹²⁰ The Bill, as it is now, does not include any fees or taxes to be paid by DFS operators to be able to conduct business in the state.¹²¹

¹¹³ Miss. Att'y Gen. Op. No. 2015-00445 (Jan. 29, 2016), 2016 WL 695680.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Miss. Code Ann. §§ 97-33-301 to -317 (West 2016); Steve Wilson, *Bet on It: Mississippi Legalizes Daily Fantasy Sports*, WATCHDOG.ORG, May 17, 2016, <http://watchdog.org/265477/daily-fantasy-sports>.

¹¹⁷ Wilson, *supra* note 116.

¹¹⁸ David Gouker, *Mississippi Becomes Latest State to Enact Fantasy Sports Law*, LEGAL SPORTS REPORT, May 13, 2016, <http://www.legalsportsreport.com/10012/mississippi-governor-signs-dfs-bill> [hereinafter *Mississippi Becomes Latest State to Enact Fantasy Sports Law*].

¹¹⁹ *Id.*

¹²⁰ Wilson, *supra* note 116.

¹²¹ David Gouker, *Lightning Strikes Twice for Fantasy Sports in One Day: Mississippi Passes Bill*, LEGAL SPORTS REPORT, Apr. 19, 2016, <http://www.legalsportsreport.com/9606/mississippi-legislature-passes-dfs-bill> [hereinafter *Lightning Strikes Twice*].

The basic consumer protections in Mississippi’s legislation include: (1) not allowing DFS operator employees to participate; (2) a minimum playing age of 18; (3) providing for the security of data; and (4) segregating player funds from operational funds.¹²² Regulating DFS provisionally was a victory for DraftKings and FanDuel considering the Mississippi Attorney General opined DFS was illegal in the state earlier in the year.

IV. Arizona’s Attempts at Regulation

Arizona is one of five states that has consistently banned DFS.¹²³ Past attempts to legislate and regulate DFS as well as the Arizona Attorney General’s historical stance on fantasy sports are informative on the best way for Arizona to pass DFS legislation in the future. In 1998, the Arizona Attorney General, Grant Woods, published an opinion finding fantasy sports to be illegal gambling.¹²⁴ The opinion was in response to a question about the legality of fantasy sports conducted on liquor-licensed premises.¹²⁵ The opinion focused on season-long fantasy sports and did not consider DFS.¹²⁶ The opinion characterized season-long fantasy sports as a game of chance, which contrasts with the traditional thinking that season-long fantasy is a game of skill.¹²⁷ Further, fantasy sports did not fall under any of the three analyzed exceptions to the general ban on gambling.¹²⁸ Conduct falls under the “amusement gambling” exclusion if it is played for entertainment and (1) the player actively participates, (2) the outcome is not in the control to any material degree of any person other than the players, (3) prizes are not offered to lure the player to participate, and (4) the contest falls within one of four specified categories including athletic

¹²² Miss. Code Ann. §§ 97-33-301 to -315 (West 2016); *Lightning Strikes Twice*, *supra* note 121.

¹²³ Rodenberg, *supra* note 1.

¹²⁴ Ariz. Att’y Gen. Op. No. I98-002, at 1 (Jan. 21, 1998), 1998 WL 48550.

¹²⁵ *Id.*

¹²⁶ *Id.* (defining a fantasy football contest as “[b]ased upon the performance of the participant’s team during the season”).

¹²⁷ *Id.*; *see also* Shapiro, *supra* note 25, at 298-99 (expressing the general assumption that season-long fantasy sport leagues are a common example of games of skill).

¹²⁸ Ariz. Att’y Gen. Op. No. I98-002, at 3-4 (Jan. 21, 1998), 1998 WL 48550.

events.¹²⁹ The “regulated gambling” exclusion includes “gambling conducted in accordance with a tribal-state gaming compact or otherwise in accordance with the requirements of the Indian [G]aming [R]egulatory [A]ct of 1988.”¹³⁰ Consequently, gambling conducted under the Arizona Compact falls within the regulated gambling exception.¹³¹ The “social gambling” exclusion applies to gambling not conducted as a business and that involves players participating on equal terms with each other.¹³²

Current Arizona Attorney General, Mark Brnovich, sent letters to DraftKings and FanDuel asking for records of any transactions with players from Arizona.¹³³ Brnovich also asked what steps the companies were taking to block accounts from Arizona, and questioned if the companies were sufficiently warning Arizona players that participation in DFS for monetary winnings violates Arizona law.¹³⁴ Failing to warn Arizona consumers about the illegality of DFS could be in violation of the state’s Consumer Fraud Act.¹³⁵ The lawsuit filed by Eric Schneiderman in New York included documents indicating DraftKings received \$48,742 from Arizona players in 2014.¹³⁶

Several attempts by the Arizona Legislature to pass DFS legislation have been thwarted by tribal gaming interests. Other states with tribal-state gaming compacts have had similar opposition.¹³⁷ Arizona Senator Adam Driggs thought that it was “almost embarrassing” for

¹²⁹ A.R.S. § 13-3301(1)(a)-(d); Ariz. Att’y Gen. Op. No. I98-002, at 3 (Jan. 21, 1998), 1998 WL 48550.

¹³⁰ A.R.S. § 13-3301(6)(a); Ariz. Att’y Gen. Op. No. I98-002, at 4 (Jan. 21, 1998), 1998 WL 48550.

¹³¹ A.R.S. § 13-3301(6)(a).

¹³² A.R.S. § 13-3301(7); Ariz. Att’y Gen. Op. No. I98-002, at 4 (Jan. 21, 1998), 1998 WL 48550.

¹³³ Adams & Woodward, *supra* note 98.

¹³⁴ *Id.*; *See also* Fischer, *supra* note 98.

¹³⁵ Fischer, *supra* note 98.

¹³⁶ Adams & Woodward, *supra* note 98.

¹³⁷ A pair of bills regulating DFS in Oklahoma passed committee votes in the House and Senate, but were dropped because of opposition from tribal gaming interests. *Tribal Gaming Interests Waking Up on Fantasy Sports*, *supra* note 14. Similar stances have been taken by tribal gaming interests in California, Florida, and Wisconsin. *Id.*

Arizona to be one of the few states where DFS is technically illegal.¹³⁸ Thus, in February 2014, Senator Driggs and 17 others sponsored Senate Bill 1468, which aimed specifically to define fantasy sports competitions in A.R.S. § 13-3301.¹³⁹ S.B. 1468 made it through the first and second Senate read, passed a vote by the Senate Commerce, Energy, and Military Committee, and then finally stalled in the Rules Committee.¹⁴⁰ The Bill would have added a definition for “fantasy competitions” to A.R.S. § 13-3301, and included “fantasy competitions” as an exception to the definition of “gambling.”¹⁴¹ Initially, there was no formal opposition to the Bill, but AIGA eventually opposed it because of the potential impact on the Compact.¹⁴²

The next attempt at DFS legislation in Arizona came in early 2016 with Senate Bill 1515. Once again, Senator Driggs introduced the DFS Bill.¹⁴³ Senator Driggs added a strike-everything amendment to S.B. 1515 that would have explicitly excluded “fantasy sports league competitions” from Arizona’s definition of gambling.¹⁴⁴ Further, the provisions of the Bill were to be conditionally repealed if they triggered the poison pill.¹⁴⁵ This Bill made it through the first and second Senate read, passed a vote by the Judiciary Committee, and then failed a vote by the Rules Committee.¹⁴⁶ Senator Driggs was the only sponsor of S.B. 1515, and the Bill was met with much

¹³⁸ Lee, *supra* note 4.

¹³⁹ S.B. 1468, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <http://www.azleg.gov/legtext/51leg/2r/bills/sb1468p.pdf>. A.R.S. § 13-3301 is the definition section of the gambling chapter in Arizona’s criminal code.

¹⁴⁰ Ariz. State Legislature, *Bill Status Inquiry*, <https://apps.azleg.gov/BillStatus/BillOverview?SessionID=115> (last visited Nov. 10, 2016) [hereinafter *Bill Status Inquiry*].

¹⁴¹ Ariz. S.B. 1468.

¹⁴² Lee, *supra* note 4. AIGA is the Arizona Indian Gaming Association.

¹⁴³ Alia Beard Rau, *Bill Would Legalize Fantasy Sports in Arizona*, THE REPUBLIC, Feb. 18, 2016, <http://www.azcentral.com/story/news/arizona/politics/2016/02/18/bill-would-legalize-fantasy-sports-arizona/80564968>.

¹⁴⁴ *Id.*

¹⁴⁵ Ariz. State Senate, *Strike Everything Amendment to S.B. 1515, Relating to Fantasy Sports League Competitions; Definitions*, 52nd Leg., 2d Reg. Sess., at 1 (Feb. 22, 2016), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/441329>.

¹⁴⁶ *Bill Status Inquiry*, *supra* note 140.

more formal opposition than S.B. 1468.¹⁴⁷ Thirteen representatives from various tribal gaming interests came out against S.B. 1515.¹⁴⁸

The Bill included several legislative findings that defined the scope of the Bill and helped clarify why the Senate was seeking to introduce DFS legislation.¹⁴⁹ First, the legislature defined “fantasy sports league competition” similarly to S.B. 1468.¹⁵⁰ Second, the legislature noted that UIGEA expressly exempted fantasy sports league competition from the definition of “bet or wager.”¹⁵¹ Third, it was noted that millions of Americans play fantasy sports and most states allow it.¹⁵² Fourth, the legislature found that fantasy sports league competitions have been played in Arizona since the 1990s.¹⁵³ The findings went on to say that the legislature has never considered fantasy sports as gambling, and that fantasy sports league competitions would be subject to significant regulation if they were gambling.¹⁵⁴ Fifth, it noted the legal confusion around fantasy sports in Arizona, and how this confusion has deprived Arizona of business opportunities, business investment, and tax revenue.¹⁵⁵ Sixth, the legislature addressed the 1998 Arizona Attorney General advisory opinion finding fantasy sports to be illegal gambling.¹⁵⁶ The legislative findings stated that an attorney general advisory opinion is not law, and the opinion did not reflect the intent of the legislature.¹⁵⁷ Last, the findings stated that fantasy leagues should operate within an appropriate consumer protection regulatory framework.¹⁵⁸ No legislation regarding DFS is currently being

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Committee on Judiciary Senate Amendments to S.B. 1515, 52nd Leg., 2d Reg. Sess., at 7 (Ariz. 2016), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/437714>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 8.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Committee on Judiciary Senate Amendments to S.B. 1515, 52nd Leg., 2d Reg. Sess., at 8 (Ariz. 2016).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 9.

considered by the Arizona State Legislature. Unlike S.B. 1515, the legislation proposed later in this Article specifies appropriate consumer protections and addresses tribal concerns.¹⁵⁹

Although Colorado is in a similar position as Arizona since tribal-state gaming compacts in Colorado need to be considered, Colorado's compacts are much less restrictive on the state. Although the exact reasons are not known, the Native American tribes in Arizona may have been able to negotiate for the poison pill provision because the state is sharing in the revenues the tribes make from gaming. There are 21 tribes in Arizona that have a gaming compact with the state, and only two tribes in Colorado with a compact.¹⁶⁰ Also, the gaming operations of the tribes in Arizona are much larger than in Colorado, creating a better opportunity for Arizona to share in the revenues.¹⁶¹ Arizona receives over \$100 million in shared revenues from tribal gaming annually, while the total economic impact of tribal gaming in Colorado is around \$30 million annually.¹⁶²

V. Resolution of the Status of Daily Fantasy Sports in Arizona

The popularity of fantasy sports among sports fans in the United States is apparent. DraftKings and FanDuel commercials and advertisements seem to be at lurking around every sporting event.¹⁶³ In 2015, the Fantasy Sports Trade Association estimated that 51.8 million people in the United States and Canada played season-long fantasy sports, with a smaller subset playing

¹⁵⁹ See *infra* Part V.B.

¹⁶⁰ *Tribal-State Compacts*, *supra* note 6; *Tribal Casinos in Colorado*, *supra* note 104.

¹⁶¹ Arizona Department of Gaming, *Tribal Contributions*, gaming.az.gov/tribal-gaming/tribal-contributions (last visited Jan. 20, 2017) [hereinafter *Tribal Contributions*] (“[Arizona] [t]ribes have contributed nearly \$1 billion since the Compacts went into effect in 2003.”); *Tribal Casinos in Colorado*, *supra* note 104 (“[A]n annual average of \$29.0 million and \$33.3 million circulated in the Colorado economy from 1995-1999 as a result of the two casino operations.”).

¹⁶² Arizona Department of Gaming, *Tribal Contributions from Gaming Revenue to the State, Cities, Towns, & Counties*, Nov. 3, 2016, <https://gaming.az.gov/sites/default/files/Cumulative%20TC%20amts%20-%20States%20FY2017%20-%20at%20110316.pdf>; *Tribal Casinos in Colorado*, *supra* note 104.

¹⁶³ In the summer of 2015, DraftKings and FanDuel spent more than \$750 million on advertising, with a DFS commercial airing every 90 seconds on television. Van Natta Jr., *supra* note 23.

the more recently created DFS.¹⁶⁴ The demand for DFS in Arizona creates an opportunity for both the state and the Native American tribes in Arizona. Passing DFS legislation in Arizona does not have to be to the detriment of the tribes. The best resolution for DFS in Arizona will be a win-win situation for both the state and the tribes. Using past attempts at legislation by Arizona, successful legislation passed by other states, and keeping in mind the Arizona Compact will all help inform the introduction of a successful DFS bill in Arizona.

A. Arizona Tribal-State Compact

The IGRA requires states to negotiate in good faith with Native American tribes to conduct Class III gaming.¹⁶⁵ The content of these compacts vary from state to state and can vary from tribe to tribe.¹⁶⁶ Arizona voters passed the current Arizona Tribal-State Compact in 2002.¹⁶⁷ The Compact was then entered into between the state and 21 tribes within the state.¹⁶⁸ The “poison pill” provision of the Compact is set forth in Section 3(h) and reads as follows:

If, on or after May 1, 2002, State law changes or is interpreted in a final judgment of a court of competent jurisdiction or in a final order of a State administrative agency to permit either a Person or entity other than an Indian tribe to operate Gaming Devices; any form of Class III [g]aming . . . that is not authorized under this Compact . . . then, upon the effective date of such State law, final judgment, or final order: (A) [t]he Tribe shall be authorized under this Compact to operate Class III Gaming Devices without limitations . . . and without the need to amend this Compact (B) [t]he Tribe shall be authorized under this Compact to operate table games, without limitations . . . and without the need to amend this Compact . . . and (C) . . . the Tribe’s obligation under Section 12 to make contributions to the State shall be immediately reduced¹⁶⁹

¹⁶⁴ Darren Heitner, *The Hyper Growth of Daily Fantasy Sports is Going to Change Our Culture and Our Laws*, FORBES, Sept. 16, 2015, <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#1b646e5e5f25>.

¹⁶⁵ *Tribal-State Compacts*, *supra* note 6.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *See id.*

¹⁶⁹ Arizona Tribal/State Compact § 3(h)(1)(A)-(C) (2003), https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf.

Under the Compact, tribes contribute 1 to 8% of their revenue each year to the state, cities, towns, and counties.¹⁷⁰ In the first 11 years that the current Compact has been in effect, tribes have contributed nearly \$1 billion.¹⁷¹ Tribes distribute 12% of the contributions “to the cities, towns, and counties of their choosing for community services and public safety programs for local governments.”¹⁷² The remaining 88% goes to the Arizona Benefits Fund on a quarterly basis.¹⁷³ The Arizona Benefits Fund provides funding for the Arizona Department of Gaming, the Office of Problem Gambling, instructional improvement for schools, trauma and emergency care, Arizona tourism, and wildlife conservation.¹⁷⁴

The Arizona Indian Gaming Association (“AIGA”) says that this funding will “all but disappear” if DFS is legalized in Arizona because the legalization would trigger the poison pill in the Compact.¹⁷⁵ If the poison pill is triggered, tribes in Arizona would only be obligated to contribute 0.75% of the Class III Net Win, versus the current 1 to 8% contribution.¹⁷⁶ Further, AIGA states that “Arizona risks all of this to legalize a multibillion-dollar commercial gambling industry that will share no revenues with the state.”¹⁷⁷ As we have seen with other states’ successful DFS legislation, DraftKings and FanDuel are willing to contribute a share of their revenues to operate with legal clarity in a given state.¹⁷⁸ AIGA also claims that it is definitive that legalizing

¹⁷⁰ *Tribal Contributions*, *supra* note 161; *See also supra* note 4 and accompanying text.

¹⁷¹ *Tribal Contributions*, *supra* note 161.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Protect Our Compacts*, *supra* note 11.

¹⁷⁶ Arizona Tribal/State Compact § 3(h)(1)(C) (2003).

¹⁷⁷ *Protect Our Compacts*, *supra* note 11.

¹⁷⁸ *See, e.g.*, N.Y. Rac. Pari-Mut. Wag. & Breed. § 1407 (McKinney 2016); Colo. Rev. Stat. Ann. § 12-15.5-105 (West 2016).

DFS would trigger the poison pill.¹⁷⁹ This is not necessarily true, as the National Indian Gaming Commission has not opined whether DFS would be considered Class III gaming.¹⁸⁰

Although it is likely DFS would be Class III gaming, it is still unclear whether DFS is even gaming at all.¹⁸¹ The distinction between games of skill and chance is critical to answer this question. This determination is a difficult one that has led to varying interpretations in different states.¹⁸² The 1998 Arizona Attorney General Opinion concluding that fantasy sports were illegal gambling was decided when fantasy sports were not as mainstream, and the opinion did not consider DFS.¹⁸³ The study estimating that 91% of winnings were collected by 1.3% of daily fantasy baseball players is far from a normal distribution expected from a game of chance.¹⁸⁴ Further, the Arizona Legislature's findings in S.B. 1515 noted that the legislature has never considered fantasy sports as gambling.¹⁸⁵

Arizona legalizing and regulating DFS does not need to jeopardize the well-intended policies underlying the Compact's "mutually beneficial and well-regulated gaming system."¹⁸⁶ AIGA is concerned that over 15,000 jobs employing non-tribal and tribal employees, and tribal infrastructure would be lost after DFS legislation.¹⁸⁷ Allowing DFS operators to offer DFS in Arizona would be in addition to the current gaming landscape that is exclusive to tribal land. Additionally, the New York Attorney General found that DraftKings received \$48,742 from Arizona players in 2014.¹⁸⁸ This shows that despite the current ban on fantasy sports in Arizona,

¹⁷⁹ *Protect Our Compacts*, *supra* note 11.

¹⁸⁰ *See supra* note 15 and accompanying text.

¹⁸¹ *See supra* note 15 and accompanying text.

¹⁸² Shapiro, *supra* note 25, at 300-01.

¹⁸³ Ariz. Att'y Gen. Op. No. 198-002 (Jan. 21, 1998), 1998 WL 48550.

¹⁸⁴ Shapiro, *supra* note 25, at 299.

¹⁸⁵ Committee on Judiciary Senate Amendments to S.B. 1515, 52nd Leg., 2d Reg. Sess., at 8 (Ariz. 2016).

¹⁸⁶ *Protect Our Compacts*, *supra* note 11.

¹⁸⁷ *Id.*

¹⁸⁸ *See Adams & Woodward*, *supra* note 98.

Arizona citizens are still playing. Explicitly allowing DFS in the state would expand the number of participants living in Arizona, and allow the state to regulate the industry. In addition, AIGA has expressed a concern that DFS operators would be “in Arizona without oversight, regulation, or rules.”¹⁸⁹ A successful DFS bill in Arizona would need to contain consumer protection safeguards like those found in other states’ successful DFS legislation. AIGA’s concerns over DFS operators not having to pay tax revenues is another example of an easy issue for the Arizona Legislature to address in a DFS bill.¹⁹⁰

B. Proposal for Daily Fantasy Sports Legislation in Arizona

It is important for Arizona to legalize and regulate DFS. Failure to legalize is depriving the state’s economy of revenue and holding back Arizona citizens from participating in DFS contests that are explicitly legal in many states across the country. Additionally, DFS regulation is needed to ensure appropriate consumer protections are in place. New York, Colorado, and Mississippi all have good examples of what it takes to create a successful DFS bill while keeping tribal interests in mind. The tribes in Arizona and AIGA have a vested interest in the outcome of any proposed legislation regarding DFS. Arizona must work with these tribal interests to ensure the success of a DFS bill. Also, any potential bill’s impact on the Compact must be addressed. With these considerations in mind, the remainder of this Section will provide recommendations for successful DFS legislation in Arizona.

Arizona’s legislation should carefully define DFS when exempting it from illegal gambling. “Fantasy contests” is too vague of a description and is likely to result in flawed policy.¹⁹¹

¹⁸⁹ *Protect Our Compacts*, *supra* note 11.

¹⁹⁰ *Id.*

¹⁹¹ Chris Grove, *States Passing Daily Fantasy Sports Bills May be Authorizing Far More Sports Betting Than They Realize*, LEGAL SPORTS REPORT, Feb. 19, 2016, <http://www.legalsportsreport.com/8421/dfs-bills-authorize-sports-betting/>. “Fantasy contests” could possibly include award shows, political debates, and spelling bees. *Id.*

A broad and vague definition will make it more likely that operators will push the outer limits of the definition.¹⁹² Arizona’s two attempts at DFS legislation included the descriptions “fantasy competitions” and “fantasy sports league competition.”¹⁹³ Either description would be acceptable if the scope of the definition makes it clear that the legislation narrowly applies to DFS contests alone.

In addition, Arizona’s DFS legislation should include a provision mandating a licensing fee and a tax on revenues for DFS operators to conduct business in the state. For the licensing fee, a distinction should be drawn between large and small DFS operators. Colorado defined small DFS operators to be DFS sites with less than 7,500 in-state users.¹⁹⁴ For example, large DFS operators would pay a one-time fee of \$50,000 to be licensed in Arizona, while small DFS operators would just need to register with the state for no charge. This would enable smaller DFS operators to conduct business in the state and provide competition to companies like DraftKings and FanDuel. This competition could further consumer protection in the state.

The tax on revenues can be modeled after New York’s DFS legislation. In New York, registrants are taxed 15% of their DFS gross revenue generated in the state, and an additional 0.50% annually.¹⁹⁵ The funds generated through taxes and licensing fees can go to the state and municipalities, the Arizona Benefits Fund, and the tribes. The licensing fees and taxes paid by DFS operators will be a new source of revenue for the state. This could create an incentive for the tribes and the state to amend the Compact to exclude DFS from triggering the poison pill. As consideration for the amendment, the state and the tribes could then have a separate agreement

¹⁹² *Id.*

¹⁹³ S.B. 1468, 51st Leg., 2d Reg. Sess. (Ariz. 2014); Committee on Judiciary Senate Amendments to S.B. 1515, 52nd Leg., 2d Reg. Sess., at 7 (Ariz. 2016).

¹⁹⁴ *Rocky Mountain High for Daily Fantasy Sports*, *supra* note 99.

¹⁹⁵ N.Y. Rac. Pari-Mut. Wag. & Breed. § 1407 (McKinney 2016).

giving the tribes a percentage of the fees the state receives from the regulation of DFS operators. Alternatively, even if the poison pill is triggered, the state would still receive the reduced contribution from the tribes in addition to the new funds being collected from the DFS operators. This reduced contribution is not the ideal option. The best solution for Arizona is to enact legislation that will not trigger the poison pill.

The Arizona Legislature should also include a provision that repeals the DFS legislation if a court determines the poison pill of the Compact is triggered. Arizona's second attempt at DFS legislation, S.B. 1515, included conditionally repealing the provisions of the Bill if it triggered the poison pill.¹⁹⁶ This would allow the opportunity for DFS legislation to be successful in Arizona, while lessening the risk of losing the current revenue sharing under the Compact. Additionally, Mississippi was successful in legalizing and regulating DFS on a provisional basis. Mississippi's bill created a task force to review the DFS industry and suggest more comprehensive regulations.¹⁹⁷ Arizona could use this model to pass DFS legislation in the state. The bill would automatically repeal itself after a defined period, and allow the created task force to recommend regulations that would work specifically for Arizona. The task force would be able to observe how the DFS bill effects the Compact and the state's economy, allowing the task force to propose permanent solutions.

Moreover, it is crucial to include appropriate consumer protections in the Arizona DFS legislation. Mississippi's bill lends some insight into what these protections should look like. Mississippi's safeguards included: (1) not allowing employees of DFS operators to participate, (2) a minimum playing age of 18, (3) consumer data security, and (4) keeping player and operational

¹⁹⁶ Ariz. State Senate, *Strike Everything Amendment to S.B. 1515, Relating to Fantasy Sports League Competitions; Definitions*, 52nd Leg., 2d Reg. Sess., at 1 (Feb. 22, 2016).

¹⁹⁷ *Mississippi Becomes Latest State to Enact Fantasy Sports Law*, *supra* note 118.

funds separate.¹⁹⁸ Additional consumer protections in New York’s legislation that Arizona should implement include: (1) eliminating inaccurate or misleading advertising about the chances of winning, (2) identifying all highly experienced players, and (3) listing information concerning assistance for compulsive play on operators’ websites.¹⁹⁹ These consumer protections will ensure that Arizona citizens are not exploited and should help quell some of AIGA’s fears about DFS operators being able to conduct business in Arizona without consumer protection.

Arizona should follow the lead of New York and Colorado and task a state governing body with regulatory oversight of DFS operators. New York’s legislation created a regulatory framework for the New York State Gaming Commission’s oversight of DFS.²⁰⁰ Colorado tasked the Division of Professions and Occupations in the Department of Regulatory Agencies to oversee DFS operators.²⁰¹ Arizona should task the regulatory oversight of DFS operators to the Arizona Department of Gaming. The Arizona Department of Gaming currently regulates tribal gaming, pari-mutuel racing and wagering, and boxing and mixed martial arts.²⁰² The department’s experience with tribal interests would also infuse some added insight to the proper regulation of DFS operators.

Finally, Arizona’s DFS legislation should include a legislative disclaimer like the legislative findings in S.B. 1515. It is important to note that Attorney General opinions are not law, that Arizona citizens have been playing fantasy sports for decades, and that the legislature has

¹⁹⁸ *Lightning Strikes Twice*, *supra* note 121; Miss. Code Ann. §§ 97-33-301 to -315 (West 2016).

¹⁹⁹ N.Y. Rac. Pari-Mut. Wag. & Breed. § 1404 (McKinney 2016).

²⁰⁰ *Interactive Fantasy Sports*, *supra* note 88.

²⁰¹ Colorado Department of Regulatory Agencies, *Office of Fantasy Contest Operator Registration and Licensure: Program Information*, https://www.colorado.gov/pacific/dora/Fantasy_Contests_Program_Info (last visited Jan. 21, 2017).

²⁰² Arizona Department of Gaming, *About Arizona Gaming*, <https://gaming.az.gov/about-arizona-gaming> (last visited Jan. 21, 2017).

never considered DFS to be gambling. This may help to quell public concern about legalizing DFS considering Arizona has historically banned DFS.

Conclusion

The ultimate solution for DFS legislation in Arizona will be a win-win scenario for both the state and the tribal interests in the state. Legalizing and regulating DFS will boost the state's economy and allow Arizona citizens to join in with the majority of the country playing DFS. AIGIA's consumer protection concerns will be addressed and the tribes in Arizona will share in the financial benefits of allowing DFS.

Past attempts by the Arizona Legislature to legalize and regulate DFS have been unsuccessful. The analysis of these past attempts, an examination of the Compact's poison pill provision, and guidance from other states' successful DFS legislation help inform the drafting of a successful DFS bill in Arizona. Arizona is one of only five states that explicitly bans DFS in the state. DFS has been embraced by sports fans around the country and has seen a meteoric rise in the number of participants. Even states like New York and Mississippi, where DFS was initially declared illegal by the states' attorney generals, have realized the social and economic opportunities that come from DFS. It is Arizona's turn to legalize and regulate DFS.

The Arizona Tribal-State Compact presents a significant hurdle to DFS legislation in Arizona. Triggering the poison pill provision would significantly reduce the amount of money tribes in Arizona contribute to the state and would allow the tribes to offer Class III gaming without limitations. Successful DFS legislation must include appropriate consumer protections, licensing fees and taxes of DFS operator's revenues, and clarification that DFS has never been considered illegal by the legislature. Enacting this legislation will resolve the uncertain legal status of DFS and satisfy the concerns expressed by AIGA.