

# 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 that they are operating legally. Although UIGEA exempts fantasy sports from traditional internet-gambling regulation, there is no evidence to suggest that 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 (the “Compact”) further complicates the inquiry into whether DFS constitutes illegal gambling. Historically, Arizona has considered DFS a game of chance and therefore illegal gambling. In 1998, then-Arizona Attorney General Grant Woods opined that fantasy sports participation is illegal gambling. Several recent legislative attempts in Arizona to legalize and regulate DFS have been unsuccessful. The limits on what Native American tribes in Arizona can do are eliminated by a “poison pill” provision in the Compact if the state expands permissible off-reservation gaming. The triggering of the poison pill also significantly reduces tribes’ obligation to share revenue with the state.*

*Despite the Arizona ban on DFS, DraftKings received \$48,742 from Arizona participants in 2014. Arizona consumers need protection in this growing industry, and the failure to legalize DFS is depriving Arizona’s economy of revenue. This*

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*Note recommends that Arizona resolve the uncertain legal status of DFS by passing legislation that would legalize and regulate DFS in Arizona while satisfying the countervailing interests of Arizona tribes. The solution this Note proposes incorporates the ideal definition of DFS, appropriate consumer protections, DFS operator licensing fees and taxes, regulatory oversight, and compliance with the Compact.*

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### INTRODUCTION

Arizona is one of five states that has historically categorized daily-fantasy sports (“DFS”) as a game of chance and as such has banned it as illegal gambling.<sup>1</sup> Noting a need for change, state legislators have recently attempted to legalize DFS in Arizona, but these attempts have come up short. For example, S.B. 1515 was introduced in early 2016 but ultimately failed in the Senate Rules Committee.<sup>2</sup> The Bill sought to exempt fantasy-sports-league competitions from laws that have banned DFS as a form of illegal gambling.<sup>3</sup> The proposed legislation’s failure can

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1. Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN, [http://www.espn.com/chalk/story/\\_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states](http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states) (last visited Oct. 7, 2017) (showing Iowa, Louisiana, Montana, and Washington as the other four states that have historically banned DFS).

2. *Bill Status Inquiry*, ARIZ. STATE LEGISLATURE, <https://apps.azleg.gov/BillStatus/BillOverview?SessionID=115> (last visited Nov. 10, 2016) (enter “1515” into Bill Number box and press “search”); *see also infra* Part IV.

3. The Associated Press, *State Legislatures See Flurry of Daily Fantasy Sports Bills*, ARIZ. CAPITOL TIMES (Mar. 7, 2016, 3:15 AM), <http://azcapitoltimes.com/news/2016/03/07/state-legislatures-see-flurry-of-daily-fantasy-sports-bills>.

largely be attributed to issues created by gaming compacts between Arizona and its Native American tribes.<sup>4</sup>

In 2002, Arizona voters passed the Tribal–State Gaming Compact (the “Compact”), giving Native American tribes the exclusive right to operate certain kinds of gambling within state boundaries.<sup>5</sup> The Compact specifically provides technical standards for gaming machines, established state authority to inspect casinos, requires background investigations and licensing of casino employees and vendor companies, and a requires contribution of 1%–8% of gaming revenue to state and local governments.<sup>6</sup> The contribution amount is determined on a sliding scale based on each tribe’s gaming revenue.<sup>7</sup> The Compact requires tribes to have minimum theoretical percentage payouts,<sup>8</sup> law-enforcement plans to address criminal activity at the casinos, and an online electronic monitoring system for slot machine data.<sup>9</sup> The Compact further provides that if Arizona expands the types of gaming allowed off reservation, a “poison pill”<sup>10</sup> is triggered which eliminates any limits on what tribes can do.<sup>11</sup> Additionally, triggering the poison pill absolves the tribes of any obligation to share revenues with the state.<sup>12</sup> The poison pill, if

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4. See, e.g., Michelle Ye Hee Lee, *Bill Legalizing Fantasy Sports in Arizona Fails*, ARIZ. REPUBLIC (Mar. 31, 2014, 9:50 PM), <http://www.azcentral.com/story/news/politics/2014/03/30/fantasy-sports-supporters-hope-see-game-legalized/707682>

7. 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 Native American tribes); The Associated Press, *supra* note 3; see *infra* Section V.A.

6. *Tribal–State Compacts*, ARIZ. DEP’T OF GAMING, <https://gaming.az.gov/law-compacts/tribal-state-compacts> (last visited Jan. 20, 2017).

7. *Calculation*, ARIZ. DEP’T OF GAMING, <https://gaming.az.gov/tribal-gaming/tribal-contributions/calculation> (last visited Jan. 18, 2018). Each tribe contributes 1% for its first \$25 million of the Class III Net Win; 3% of the next \$50 million; 6% of the next \$25 million; and 8% for revenue in excess of \$100 million. *Id.* Class III Net Win is the difference between gaming wins and losses before deducting casino operating costs. *Id.*

8. Minimum theoretical percentage payouts are the minimum amount of winnings that the tribes must payout to participants. NICOLAE SFETCU, GAMING IN ONLINE CASINOS (2014). Winning patterns, payout amounts, and payout frequency are selected to yield a certain percentage of winnings that goes back to the participants. See generally *id.*

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. A poison pill is a strategy companies use to thwart hostile takeovers. Marie Baca, *What Is a Poison Pill?*, CBS NEWS (Aug. 15, 2008, 1:55 PM), <https://www.cbsnews.com/news/what-is-a-poison-pill/>. Here, the poison pill is in place to protect the tribes from State expansion of gaming. See Josh Coddington, *Dissecting the ‘Poison Pill’: A New West Valley Casino Can’t Trigger It, but Tribes Remain Opposed*, ARIZ. CAPITOL TIMES (Feb. 9, 2015, 7:46 AM), <http://azcapitoltimes.com/news/2015/02/09/dissecting-the-poison-pill-a-new-west-valley-casino-cant-trigger-it-but-tribes-remain-opposed/>.

11. The Associated Press, *supra* note 3; see *infra* Section V.A.

12. The Associated Press, *supra* note 3.

triggered, would cost Arizona over \$100 million per year in shared revenues from tribal gaming.<sup>13</sup> There are 16 tribes in Arizona operating 24 Class III casinos in the state.<sup>14</sup> Another five tribes do not have casinos but have slot-machine rights, which they may lease to tribes with casinos.<sup>15</sup> The Arizona Indian Gaming Association (“AIGA”), an organization committed to protecting tribal interests, has continuously opposed DFS legislation in the State.<sup>16</sup> The AIGA even has a website dedicated exclusively to opposing DFS legislation in Arizona.<sup>17</sup> The website claims that, because of the poison-pill provision, the Compact would be null and void if the state passes DFS legislation.<sup>18</sup> If the Compact becomes null and void, tribes would be allowed to operate Class III gaming and table games without limitations.<sup>19</sup> Further, tribes could reduce their contribution to the State.<sup>20</sup> 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.<sup>21</sup>

To operate Class III gaming casinos under the federal Indian Gaming and Regulatory Act (“IGRA”), a tribe must enter into a tribal–state compact, which generally requires the tribes to allow the state to regulate certain gaming activities in exchange for the right to conduct those activities.<sup>22</sup> Shared revenues with the

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13. *Protect Our Compacts: Keep Gaming Limited in Arizona*, ARIZ. INDIAN GAMING ASS’N [hereinafter *Protect Our Compacts*], <http://www.protectourcompacts.org> (last visited Jan. 20, 2017).

14. *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. ARIZ. DEP’T OF GAMING, *Class II and Class III FAQ*, [gaming.az.gov/class-ii-and-class-iii-faq](http://gaming.az.gov/class-ii-and-class-iii-faq) (last visited Oct. 5, 2016).

15. *Tribal–State Compacts*, *supra* note 6.

16. Dustin Gouker, *Tribal Gaming Interests Waking Up on Fantasy Sports: Oklahoma Coalition Quashes Bill*, LEGAL SPORTS REP. (Mar. 21, 2016), <http://www.legalsportsreport.com/9116/tribes-and-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).

17. *Protect Our Compacts*, *supra* note 13.

18. *Id.*

19. ARIZ. TRIBAL–STATE COMPACT § 3(h)(1)(a)–(b) (2003), [https://gaming.az.gov/sites/default/files/documents/files/compact.final\\_.pdf](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 amendment of the Compact).

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

21. ARIZ. TRIBAL–STATE COMPACT § 3(h)(1)(c). 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).

22. Charles W. Galbraith & Julian SpearChief-Morris, *What the Growth of Daily Fantasy Sports Means for Tribes*, LAW360 (July 5, 2016, 3:34), <http://www.law360.com/articles/813931/what-the-growth-of-daily-fantasy-sports-means-for-tribes>.

state in exchange for exclusivity is a common practice in such compacts.<sup>23</sup> The National Indian Gaming Commission has not opined whether DFS would be considered Class III gaming, but it seems likely that if DFS is considered gaming, it would be Class III gaming.<sup>24</sup> If so, the classification of DFS as Class III gaming would negatively impact the exclusivity of Arizona's Compact.

Many states, including Oklahoma, California, Florida, Connecticut, and Wisconsin, have experienced tribal opposition to DFS legislation.<sup>25</sup> States that have successfully passed legislation concerning DFS have done so with consumer protection in mind.<sup>26</sup> Arizona should resolve the uncertain legal status of DFS by passing legislation that would legalize and regulate DFS operations in the State, while satisfying the countervailing interests of the State's tribes.

Part I of this Note explains the creation of fantasy sports and how DFS became a multibillion-dollar industry. DFS market leaders DraftKings and FanDuel have taken advantage of the Internet's growth and the public's desire for more immediate results. DFS occurs on a daily or weekly basis, while season-long fantasy occurs over the course of the entire season. In addition, Part I explains how DFS is played and analyzes whether it is a game of skill or a game of chance. Part II of this Note discusses New York's turbulent path to passing successful DFS legislation. Part III takes Colorado and Mississippi as examples of states with successful DFS legislation and describes how the similarities between the two states and Arizona can help craft a successful bill in Arizona. Part IV analyzes 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 proposes a solution to resolve the uncertain legal status of DFS in Arizona. The solution proposed is informed by past attempts in Arizona, other states' successful DFS legislation, and the Compact. This Note suggests that Arizona legalize and regulate DFS while complying with the terms of the Compact.

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23. *Id.*

24. *Id.* Under the IGRA, Class III gaming is defined as all forms of gambling that are 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).

25. Gouker, *supra* note 16; Don Van Natta Jr., *Welcome to the Big Time*, ESPN (Aug. 24, 2016), [http://www.espn.com/espn/feature/story/\\_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel](http://www.espn.com/espn/feature/story/_/id/17374929/otl-investigates-implosion-daily-fantasy-sports-leaders-draftkings-fanduel).

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

## I. DAILY-FANTASY-SPORTS BACKGROUND

### A. Advent and Growth of Daily Fantasy Sports

DFS has grown into a multibillion-dollar industry with millions playing each week.<sup>27</sup> The two market leaders are DraftKings and FanDuel, which together control 95% of the DFS market in the United States.<sup>28</sup> In only three years, DraftKings went from an idea hatched by three friends in Boston to the multibillion-dollar company it is today.<sup>29</sup> The advent of the Internet allowed fantasy sports to grow from friendly competition amongst friends to large-scale competition against strangers from all around the world.<sup>30</sup> Traditional, season-long fantasy sports have been around since the 1960s, while the first DFS companies began operating around 2007.<sup>31</sup> DraftKings and FanDuel have secured massive amounts of equity funding from private investors and have entered into endorsement deals with major sports leagues.<sup>32</sup>

Both DraftKings and FanDuel have a reputation for their aggressive business models.<sup>33</sup> The two companies focused on building a consumer base first and resolving the DFS industry's uncertain legal status later.<sup>34</sup> This business model brought several issues to the forefront. Questions about the systems DraftKings and FanDuel had built arose after concerns over participants with the deepest pockets always winning DFS contests and insider trading allegations mounted.<sup>35</sup> Only a tiny percentage of daily fantasy participants win consistently: in baseball, for example, only 1.3% of all participants consistently win.<sup>36</sup> Further, DraftKings

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27. 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).

28. *Id.* at 290.

29. Van Natta Jr., *supra* note 25.

30. Marc Edelman, *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).

31. *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.

32. *Id.* at 126–27; *see also* Van Natta Jr., *supra* note 25.

33. *See* Ben Fischer, *Fanduel vs. DraftKings: Are We Seeing the Future of Sports Wagering?*, N.Y. BUS. J. (Nov. 18, 2014, 2:25 PM), <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).

34. *See* Van Natta Jr., *supra* note 25.

35. *Id.*

36. *Id.* In the study conducted by McKinsey and Company, the group of participants paying the lowest entry fees had a -51% return on their investments while the participants 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: THE SWITCH

employees won an estimated \$6 million playing in DFS contests on FanDuel.<sup>37</sup> The employees have access to proprietary information that is unavailable to the public, like participants' percentage of ownership of various players.<sup>38</sup> If employees use this information, it can be considered insider trading.<sup>39</sup> FanDuel warned its employees in a 2012 internal memo to be careful about raising suspicions by winning too often.<sup>40</sup> These issues ultimately led New York Attorney General Eric Schneiderman to file cease-and-desist letters against DraftKings and FanDuel in November 2015.<sup>41</sup> Notwithstanding the turmoil surrounding it, DFS has become a popular staple among sports fans.

### ***B. The Rules of the Game***

People 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.<sup>42</sup> Participants then select athletes to fill their rosters, with each participant allocated a fixed maximum budget to spend on athletes.<sup>43</sup> Each athlete has his own cost, with elite athletes at the highest price.<sup>44</sup> Teams gain points based on athlete performance in real-life games, which is similar to traditional, season-long fantasy sports.<sup>45</sup> However, daily fantasy occurs on a daily or weekly basis, while season-long fantasy occurs over the course of the entire season. Other important differences between daily fantasy and season-long fantasy include how players are selected and how the contests are structured.<sup>46</sup> Next, participants select a game format, like head-to-head matchups, guaranteed-prize-pool contests, and "50-50" games where if the participants finished in the top 50%, they win double the entry fee amount.<sup>47</sup> Head-to-head matchups pit one participant against another: the participant amassing the most team points wins the prize.<sup>48</sup> Guaranteed prize-pool contests tier payouts based on the percentile in which the participant finishes within the pool.<sup>49</sup>

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(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](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).

37. Van Natta Jr., *supra* note 25.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*; *see infra* Part II.

42. Shapiro, *supra* note 27, at 291. DFS operators also run promotions to encourage participants to deposit more money into their account with the promise that the DFS operator will match their funds. *Id.* at 291 n.4.

43. *Id.*

44. *Id.*

45. *Id.*

46. *See* Nathaniel J. Ehrman, *Out of Bounds?: A legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 *SPORTS LAW J.* 79, 85–88 (2015).

47. Shapiro, *supra* note 27, at 291.

48. *Id.*

49. *Id.* at 291–92.

Beginner DFS participants can fill out a roster in minutes and hope for a good outcome.<sup>50</sup> In contrast, experienced DFS participants can spend hours creating projections, tweaking models, watching video, and constructing rosters.<sup>51</sup> The long hours of research are more lucrative depending on how familiar the average participant is with the specific sport.<sup>52</sup> For example, the typical sports fan might know more about football than other sports, so experienced participants will focus their research efforts in the other sports, like baseball and basketball.<sup>53</sup> The participant looks to find value where players' prices are too low relative to their expected production.<sup>54</sup> Experienced participants analogize their DFS play to investments jobs.<sup>55</sup>

### C. Legal Issues Surrounding Daily Fantasy Sports

While DFS initially flew under the radar, the industry has grown and daily-fantasy games now operate in a space of questionable legality.<sup>56</sup> Beginning in 2006, the UIGEA appeared to exempt DFS activities from traditional federal regulation of Internet gambling because it provides a carve-out for fantasy sports that meet particular requirements, for skill-based games, and for legal intrastate and inter-tribal gaming.<sup>57</sup> The UIGEA prohibits gambling businesses from “knowingly accepting payments” in connection with a bet or wager using the Internet and that is unlawful under any federal or state law.<sup>58</sup> The DFS sites have pointed to the UIGEA to argue they are operating legally, but there is no evidence that consumers were playing DFS at the time of the statute's drafting. Therefore, the drafters of the UIGEA could not have contemplated DFS.<sup>59</sup> Rather, it is only clear that the statute meant to exempt season-long fantasy sports.<sup>60</sup>

The distinction between games of skill and games of chance is often the key feature determining whether a particular activity should be considered illegal gambling or legal activity.<sup>61</sup> Among the early skeptics of the meteoric rise of DFS

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50. Jonathan Bales, *Here's What It Takes to Make a Living Playing Fantasy Sports*, BUS. INSIDER (Nov. 6, 2013, 3:53 PM), <http://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11>.

51. *Id.*

52. *See id.*

53. *See id.*

54. *Id.*

55. *Id.*

56. Shapiro, *supra* note 27, at 295.

57. *Id.* at 295–96.

58. *Id.* (quoting UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006 OVERVIEW 1, FED. DEPOSIT INS. CORP. <https://www.fdic.gov/news/news/financial/2010/fil10035a.pdf>). UIGEA was added as Title VIII to the SAFE Port Act, which regulates harbor and port security. *Id.* at 295.

59. *Id.* at 296; *see supra* Section I.A.

60. Shapiro, *supra* note 27, at 297.

61. *Id.* at 297. State laws apply differing standards to determine whether a game is a game of skill or chance. *Id.* 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. *Id.* at 297–98.



and the legality of the industry were Major League Baseball (“MLB”) executives, who conducted a two-year study of the legality of DFS.<sup>62</sup> But a law firm hired by the MLB concluded that DraftKings overwhelmingly offered games of skill, not chance.<sup>63</sup> This distinction is crucial because 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.<sup>64</sup> 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.<sup>65</sup> Alternatively, proponents of DFS argue that preparing a DFS lineup requires skill, as creating a successful team requires extensive knowledge.<sup>66</sup>

Like the MLB, DraftKings also wanted to know whether DFS would survive a legal challenge, so it hired a Las Vegas lawyer to analyze this issue.<sup>67</sup> 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.”<sup>68</sup> Exactly whether DFS is a game of skill or chance will ultimately rest on state law interpretations.<sup>69</sup> Since the distinction between skill and chance is a highly subjective determination, DFS continues to operate in a legal grey area, lacking any clear legislative guidance.<sup>70</sup>

Federal gambling laws only help enforce state gambling laws; therefore, the ultimate legalization of DFS rests with individual states.<sup>71</sup> Currently, the state-by-state approach to legalizing DFS has varied across the country. States are widely split on the issue: 14 states have explicitly allowed DFS, 5 states have banned DFS, 18 states have legislation currently pending, 9 states have recently contested the issue, and 4 states do not have any current legislation on the issue whatsoever.<sup>72</sup> Currently, DFS is played in all but nine states.<sup>73</sup> The nine states

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62. Van Natta Jr., *supra* note 25.

63. *Id.*

64. Shapiro, *supra* note 27, 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).

65. *Id.*

66. *Id.* Traditional hallmarks of skill include learned or developed ability, identifiable strategy or tactics that result in positive outcomes, and technical expertise. *Id.* Gin rummy, pool, darts, and season-long fantasy sports are common examples of games that require skill. *See id.*

67. Van Natta Jr., *supra* note 25.

68. *Id.*

69. Shapiro, *supra* note 27, at 299.

70. *Id.* at 301.

71. *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. § 3001(a)(1) (2012).

72. Rodenberg, *supra* note 1.

include the five that ban DFS, and four more where FanDuel and DraftKings have decided not to take participants because of the legal uncertainty.<sup>74</sup> 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.<sup>75</sup> The same companies that ignored questions about the legal status of the DFS industry are now embracing limited regulation, so long as DFS is not subjected to the same exacting standards as traditional gambling operations.<sup>76</sup>

## II. HISTORY OF DAILY FANTASY SPORTS IN NEW YORK

New York is one of the most notable states at the forefront of efforts to legalize and regulate DFS. Initially, New York looked poised to deal a major blow to DraftKings and FanDuel, but the state's efforts softened into an encouraging step forward in the industry's search for legal clarification. New York's proactive approach to regulation is good for the DFS industry, because New York is the second most lucrative market for DraftKings and FanDuel.<sup>77</sup> New York's actions prompted heightened attention from the two market leaders because of the potential loss of major revenue from a DFS operations ban in the state.

On November 10, 2015, New York Attorney General Eric Schneiderman issued a cease-and-desist order to DraftKings and FanDuel.<sup>78</sup> Schneiderman argued that DFS participants were risking something of value on contests where they have no control or influence over the outcome.<sup>79</sup> 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.<sup>80</sup> Schneiderman then asked for, and was granted, a temporary injunction to force DraftKings and FanDuel to halt services to participants in the state.<sup>81</sup> The same court later granted a temporary stay of the injunction.<sup>82</sup>

In March 2016, Schneiderman declared victory, as the parties reached a settlement requiring DraftKings and FanDuel to cease operations in the state pending legislative action.<sup>83</sup> Under the settlement, the DFS market leaders stopped

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73. *Id.*; see also Chris Grove, *What Are the States Where You Can Play Daily Fantasy Sports*, LEGAL SPORTS REP., <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> (last visited Oct. 7, 2017).

74. Grove, *supra* note 73.

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

76. The Associated Press, *supra* note 3; see also Van Natta Jr., *supra* note 25.

77. Van Natta Jr., *supra* note 25 (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”).

78. *People v. Fanduel, Inc.*, No. 453056/15, 2015 WL 8490461, at \*1 (N.Y. Sup. Ct. Dec. 11, 2015); Shapiro, *supra* note 27, at 306; Van Natta Jr., *supra* note 25.

79. See *Fanduel*, 2015 WL 8490461, at \*1; Shapiro, *supra* note 27, at 306.

80. *Fanduel*, 2015 WL 8490461, at \*2; Shapiro, *supra* note 27, at 306.

81. *Fanduel*, 2015 WL 8490461, at \*9.

82. Shapiro, *supra* note 27, at 307.

83. Van Natta Jr., *supra* note 25.

accepting wagers from New York participants for their less lucrative National Basketball Association (“NBA”), National Hockey League (“NHL”), and MLB contests in exchange for clearing a major hurdle with New York legislators to get DFS legislation passed.<sup>84</sup> DraftKings and FanDuel felt that winning the battle in New York was essential to getting other state legislatures to follow.<sup>85</sup> The New York Gaming Association (“NYGA”) opposed New York DFS legislation, citing concerns about the how bill handled DFS.<sup>86</sup>

Ultimately, the New York legislation was passed despite New York tribal opposition. New York has tribal–state gaming compacts with three tribes in the state.<sup>87</sup> 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.<sup>88</sup> 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 that gaming must be located outside of the defined geographic area.<sup>89</sup>

New York’s DFS bill passed, and the governor signed it into law on August 3, 2016.<sup>90</sup> The legislation creates a regulatory framework for the New York State Gaming Commission’s oversight of DFS and implements important consumer protections against fraud and abuse.<sup>91</sup> The specific protections include the following: prohibiting minors from participation; eliminating inaccurate or

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84. *Id.*

85. The settlement between Schneiderman and the DFS operators ultimately proved fruitful 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.*

86. Dustin Gouker, *New York Fantasy Sports Bill Clears First Hurdle, But Opposition on Display*, LEGAL SPORTS REP. (June 1, 2016, 10:28 AM), <http://www.legalsportsreport.com/10261/new-york-dfs-bill-clears-vote>.

87. *Native Americans and Gambling in New York State*, N.Y. ST. GAMING COMM’N, [https://gaming.ny.gov/gaming/indian\\_dig1.php#compacts](https://gaming.ny.gov/gaming/indian_dig1.php#compacts) (last visited Nov. 11, 2016).

88. *Compare* NATION-STATE GAMING COMPACT BETWEEN THE SENECA NATION OF INDIANS AND THE STATE OF NEW YORK § 12(a)(1) (Apr. 12, 2002), <https://sni.org/media/2940/gaming.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](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).

89. *See, e.g., NYS Gaming Compact*, SENECA NATION OF INDIANS, <https://sni.org/government/nys-gaming-compact/> (last visited Dec. 1, 2017) (describing the tribal–state gaming compact as giving the Seneca Nation of Indians exclusivity “west of State Route 14”).

90. Van Natta Jr., *supra* note 25.

91. *Interactive Fantasy Sports*, N.Y. ST. GAMING COMM’N, <http://www.gaming.ny.gov/ifs> (last visited Dec. 1, 2017). *See generally* N.Y. RAC. PARI-MUT. WAG. & BREED. LAW §§ 1400–12 (McKinney 2016).

misleading advertising about the chances of winning; identifying all highly experienced participants; listing information concerning assistance for compulsive play on the website; protecting participants' funds upon deposit; and offering introductory procedures to new participants.<sup>92</sup> The law requires DFS operators to register with the state and allows companies that were already operating in the state to have temporary permits to continue operating while registration is pending.<sup>93</sup> Registrants are taxed 15% of their DFS gross revenue generated in New York and an additional 0.5% annually.<sup>94</sup> The tax money collected goes in the New York Lottery fund to provide aid to New York's public schools.<sup>95</sup>

Eric Schneiderman's aggressiveness prompted DraftKings and FanDuel to take the offensive in pursuing DFS legislation in any state where there was legal uncertainty.<sup>96</sup> Obtaining legal certainty necessarily requires the state to impose taxes and regulations on the DFS industry.<sup>97</sup> This approach allows DraftKings and FanDuel to continue operating without the possibility of the state shutting them down. Nationally, the New York action also opened the eyes of many other states' top officials.<sup>98</sup>

### 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 14 states have legalized DFS.<sup>99</sup> DraftKings and FanDuel are currently operating in 41 states, regardless of where the state is in its legalization efforts.<sup>100</sup> Along with Arizona, only four other states explicitly ban DFS.<sup>101</sup> Other states with strong Native American tribe opposition to DFS regulation have been unsuccessful in passing legislation.<sup>102</sup> States without tribal gaming compacts do not have the added concern of how DFS legislation will affect tribal-gaming interests.

Although Colorado has a tribal-state gaming compact like Arizona, the state successfully passed DFS legislation.<sup>103</sup> Mississippi also shares similarities

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92. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1404; *Interactive Fantasy Sports*, *supra* note 91. Notably left out of the protections is anything prohibiting a company's employee with proprietary information from playing and winning on a different site. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1404.

93. *Id.* § 1402(1)–(2).

94. *Id.* § 1407.

95. *Interactive Fantasy Sports*, *supra* note 91.

96. *See* Van Natta Jr., *supra* note 25.

97. *See id.*

98. *Id.*

99. Rodenberg, *supra* note 1.

100. *Id.*; *see also* Grove, *supra* note 73 (showing that DraftKings or FanDuel can be played in every state except Arizona, Alabama, Hawaii, Idaho, Iowa, Louisiana, Montana, Nevada, and Washington State).

101. Rodenberg, *supra* note 1.

102. *See infra* note 146.

103. Dustin Gouker, *Rocky Mountain High for Daily Fantasy Sports: Colorado Bill Heads to Governor*, LEGAL SPORTS REP. (May 9, 2016, 1:38 PM), <http://www.legalsportsreport.com/9952/colorado-legislature-passes-dfs-bill>.

with Arizona. Mississippi Attorney General Jim Hood issued an opinion in early 2016 expressly stating that DFS is considered illegal gambling in Mississippi.<sup>104</sup> The Mississippi legislature promptly legalized and regulated DFS. Similarly, Arizona's Attorney General has expressed his concerns that DFS is illegal in Arizona.<sup>105</sup> The legislation passed by Colorado and Mississippi took different approaches to DFS regulation. Analyzing the approaches taken by Colorado and Mississippi will help shed light on how Arizona should proceed.

#### A. Colorado

In 2016, Colorado became the fifth state to pass DFS legislation.<sup>106</sup> Colorado's bill is unique because it specifically covers smaller DFS operators.<sup>107</sup> DFS sites with less than 7,500 in-state participants must register with the state, but do not have to be licensed or go through an annual audit.<sup>108</sup> Other important provisions include the following: (1) the Division of Professions and Occupations ("DPO") in the Department of Regulatory Agencies will oversee DFS operators; (2) the DPO sets the licensing and renewal fees since those numbers are not in the bill; (3) operators with 7,500 participants 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.<sup>109</sup>

Colorado has gaming compacts with two Native American tribes that allow the tribes to conduct casino-style gaming on their reservations.<sup>110</sup> The two tribes are not subject to taxation and are not required to report their revenues to the state.<sup>111</sup> In the five years after the compacts were entered into (1995–1999), an annual average economic impact of between \$29 and \$33 million circulated in the Colorado economy.<sup>112</sup> Unlike the Arizona Compact, the Colorado compacts do not provide for revenue to be shared with the state.<sup>113</sup> Also, the Colorado compacts do

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104. Fantasy Sports Wagering in the State of Mississippi, Miss. Att'y Gen. Op. No. 2015-00445 (Jan. 29, 2016), 2016 WL 695680.

105. Curt Woodward & Dan Adams, *Lawsuit Accuses DraftKings of Flouting Bans in 5 States*, BOS. 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, 3:29 PM), <http://azcapitoltimes.com/news/2016/02/18/bill-to-exclude-fantasy-sports-from-gambling-law-draws-derision>.

106. See COLO. REV. STAT. ANN. §§ 12-15.5-102 to -112 (West 2016); Gouker, *supra* note 103.

107. Gouker, *supra* note 103.

108. *Id.*

109. *Id.*

110. Colo. Dep't of Revenue, *Tribal Casinos in Colorado*, COLO. OFFICIAL ST. WEB PORTAL [hereinafter *Tribal Casinos in Colorado*], <https://www.colorado.gov/pacific/enforcement/tribal-casinos-colorado> (last visited Jan. 20, 2017). The two tribes are the Southern Ute Indian Tribe and the Ute Mountain Ute Tribe. *Id.*

111. *Id.*

112. *Id.*

113. See generally THE UTE MOUNTAIN UTE TRIBE AND STATE OF COLORADO GAMING COMPACT (Oct. 27, 1995) [hereinafter UTE MOUNTAIN UTE TRIBE COMPACT]; THE

not contain a poison-pill provision.<sup>114</sup> One Colorado compact provides that if the state authorizes Class III gaming activities in addition to those described in the compact, such authorization shall extend to the tribe without need to amend the compact.<sup>115</sup> DFS is included in the Class III gaming category.<sup>116</sup> The other Colorado compact is silent on what happens in the event Colorado authorizes additional gaming activities.<sup>117</sup> Both compacts contemplate voluntary termination—either by both parties or by just the tribe.<sup>118</sup> Although Colorado successfully 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, Mississippi Attorney General Jim Hood stated that fantasy sports gambling was illegal under Mississippi law.<sup>119</sup> Hood mentioned that any change to the law would be a matter within the purview of the state’s legislature.<sup>120</sup> He also noted that even though fantasy sports gambling is considered illegal, daily and season-long fantasy sports games were being offered to the state’s citizens online without regulation.<sup>121</sup>

Mississippi Governor Phil Bryant signed S.B. 2541 into law in May 2016.<sup>122</sup> The bill legalized and regulated DFS but on a provisional basis.<sup>123</sup> The bill created and tasked the Fantasy Contest Task Force to review the DFS industry and suggest more comprehensive regulations.<sup>124</sup> The bill included basic consumer protections and required fantasy-sports operators to register with the state at no charge.<sup>125</sup> The bill was automatically repealed in July 2017, which allowed

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SOUTHERN UTE INDIAN TRIBE–STATE OF COLORADO GAMING COMPACT (June 15, 1995) [hereinafter SOUTHERN UTE INDIAN TRIBE COMPACT], [https://www.colorado.gov/pacific/sites/default/files/Southern%20Ute%20Compact%201995\\_0.pdf](https://www.colorado.gov/pacific/sites/default/files/Southern%20Ute%20Compact%201995_0.pdf).

114. UTE MOUNTAIN UTE TRIBE COMPACT, *supra* note 113; SOUTHERN UTE INDIAN TRIBE COMPACT, *supra* note 113.

115. UTE MOUNTAIN UTE TRIBE COMPACT, *supra* note 113, at § 12(D).

116. *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).

117. *See* SOUTHERN UTE INDIAN TRIBE COMPACT, *supra* note 113.

118. UTE MOUNTAIN UTE TRIBE COMPACT, *supra* note 113, at § 12(B); SOUTHERN UTE INDIAN TRIBE COMPACT, *supra* note 113, at § 15(b).

119. Fantasy Sports Wagering in the State of Mississippi, *supra* note 104.

120. *Id.*

121. *Id.*

122. MISS. CODE ANN. §§ 97-33-305 (West 2016); Steve Wilson, *Bet on It: Mississippi Legalizes Daily Fantasy Sports*, WATCHDOG.ORG (May 17, 2016), <http://watchdog.org/265477/daily-fantasy-sports>.

123. Wilson, *supra* note 122.

124. Dustin Gouker, *Mississippi Becomes Latest State to Enact Fantasy Sports Law*, LEGAL SPORTS REP. (May 13, 2016, 10:49 AM), <http://www.legalsportsreport.com/10012/mississippi-governor-signs-dfs-bill>.

125. *Id.*

Mississippi to enact permanent legislation that included the Fantasy Contest Task Force's recommendations on regulations and fees.<sup>126</sup> The bill did not include any fees or taxes to be paid by DFS operators to conduct business in the state.<sup>127</sup> But in March 2017, Mississippi enacted permanent DFS legislation before the provisional basis expired.<sup>128</sup> The new law includes a \$5,000 licensing fee and an 8% tax on revenue generated by DFS operators in the state.<sup>129</sup> The legislation tasks the Mississippi Gaming Commission with oversight authority.<sup>130</sup>

The basic consumer protections in Mississippi's legislation include the following: (1) prohibiting DFS operator employees from participating; (2) requiring a minimum playing age of 18; (3) requiring data security; and (4) segregating participant funds from operational funds.<sup>131</sup> Regulating DFS provisionally was a victory for DraftKings and FanDuel, considering Hood had previously opined that DFS was illegal in Mississippi earlier in the year.

#### IV. ARIZONA'S ATTEMPTS AT REGULATION

Arizona is one of five states that has consistently banned DFS.<sup>132</sup> Past attempts to legislate and regulate DFS, along with the Arizona Attorney General's historical stance on fantasy sports, inform the best way for Arizona to pass DFS legislation in the future. In 1998, then-Arizona Attorney General Grant Woods published an opinion stating that fantasy sports were illegal gambling.<sup>133</sup> The opinion was in response to a question about the legality of fantasy sports conducted on liquor-licensed premises.<sup>134</sup> The opinion focused on season-long fantasy sports and did not consider DFS.<sup>135</sup> Further, the opinion characterized season-long fantasy sports as a game of chance, which contrasts with the traditional view that season-long fantasy is a game of skill.<sup>136</sup> The opinion also

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126. See Wilson, *supra* note 122.

127. Dustin Gouker, *Lightning Strikes Twice for Fantasy Sports in One Day: Mississippi Passes Bill*, LEGAL SPORTS REP. (Apr. 19, 2016, 3:59 PM), <http://www.legalsportsreport.com/9606/mississippi-legislature-passes-dfs-bill>.

128. Dustin Gouker, *Mississippi Gov. Phil Bryant Signs New Fantasy Sports Law into Effect*, LEGAL SPORTS REP. (Mar. 13, 2017, 2:59 PM), <https://www.legalsportsreport.com/13354/mississippi-gov-phil-bryant-signs-new-fantasy-sports-law/>.

129. *Id.*

130. Dustin Gouker, *Daily Fantasy Sports Scores First Legislative Victory of 2017*, LEGAL SPORTS REP. (Mar. 1, 2017, 10:10 AM), <https://www.legalsportsreport.com/13209/daily-fantasy-sports-mississippi/>.

131. MISS. CODE ANN. §§ 97-33-301 to -315 (West 2016); Gouker, *supra* note 127.

132. Rodenberg, *supra* note 1.

133. Howard Adams, *Ariz. Att'y Gen. Op. No. 198-002*, at \*1 (Jan. 21, 1998), 1998 WL 48550.

134. *Id.*

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

136. *Id.*; see also Shapiro, *supra* note 27, at 298–99 (expressing the general assumption that season-long fantasy sport leagues are a common example of games of skill).

stated that fantasy sports did not fall under any of the three exceptions to the general ban on gambling: the amusement-gambling exception, the regulated-gambling exception, or the social-gambling exclusion.<sup>137</sup>

Conduct falls under the amusement-gambling exclusion if it is played for entertainment and meets the following criteria: (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 events.<sup>138</sup> 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 Gaming Regulatory Act] of 1988.”<sup>139</sup> Consequently, gambling conducted under the Arizona Compact falls within the regulated gambling exception.<sup>140</sup> The social-gambling exclusion applies to gambling not conducted as a business and that involves players participating on equal terms with each other.<sup>141</sup>

In 2015, current Arizona Attorney General Mark Brnovich sent letters to DraftKings and FanDuel asking for records of any transactions with participants from Arizona.<sup>142</sup> Brnovich also asked what steps the companies were taking to block accounts from Arizona and whether the companies were sufficiently warning Arizona participants that engaging in DFS for monetary winnings violates Arizona law.<sup>143</sup> Failing to warn Arizona consumers about the illegality of DFS could be violate the state’s Consumer Fraud Act.<sup>144</sup> The New York lawsuit filed by Eric Schneiderman included documents indicating DraftKings received \$48,742 from Arizona participants in 2014.<sup>145</sup>

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.<sup>146</sup> Arizona State Senator Adam Driggs

137. Howard Adams, *supra* note 133, at \*3–4.

138. ARIZ. REV. STAT. ANN. § 13-3301(1)(a)–(d) (2015); Howard Adams, *supra* note 133, app. A.

139. § 13-3301(6)(a); *see* Howard Adams, *supra* note 133, at \*4.

140. § 13-3301(6)(a).

141. § 13-3301(7); *see* Howard Adams, *supra* note 133, at \*4.

142. Woodward & Adams, *supra* note 105.

143. *Id.*; *see also* Fischer, *supra* note 105.

144. Fischer, *supra* note 105.

145. Woodward & Adams, *supra* note 105. DraftKings found that most of the fees collected from participants initially associated with banned states actually came from participants living in other states where DFS is allowed. Curt Woodward, *DraftKings Says Most Disputed Fees Didn’t Come from Banned States*, BOS. GLOBE (Nov. 28, 2015), <https://www.bostonglobe.com/business/2015/11/28/draftkings-says-most-disputed-fees-didn-come-from-banned-states/Oiri7sKhgYjhOVcqQpusMO/story.html>. DraftKings suggested participants may have moved, had residences in multiple states, or mistakenly filled out their registration forms. *Id.*

146. 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.



thought that it was “almost embarrassing” for Arizona to be one of the few states where DFS is technically illegal.<sup>147</sup> Thus, in February 2014, Senator Driggs and 17 others sponsored S.B. 1468, which specifically aimed to define fantasy sports competitions in A.R.S. § 13-3301.<sup>148</sup> 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*.<sup>149</sup> S.B. 1468 made it through the first and second Senate reads; passed a vote by the Senate Commerce, Energy, and Military Committee; and then finally stalled in the Rules Committee.<sup>150</sup> Initially, there was no formal opposition to the bill, but the AIGA eventually opposed it because of the potential impact on the Compact.<sup>151</sup>

The next attempt at DFS legislation in Arizona came in early 2016, when Senator Driggs introduced S.B. 1515.<sup>152</sup> 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.<sup>153</sup> Further, the provisions of the bill were to be conditionally repealed if they triggered the poison pill.<sup>154</sup> This bill made it through the first and second Senate reads, passed a vote by the Judiciary Committee, and then failed a vote by the Rules Committee.<sup>155</sup> Senator Driggs was the only sponsor of S.B. 1515, and the bill was met with much more formal opposition than S.B. 1468.<sup>156</sup> Thirteen representatives from various tribal gaming interests spoke out against S.B. 1515.<sup>157</sup>

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Gouker, *supra* note 16. Similar stances have been taken by tribal-gaming interests in California, Florida, and Wisconsin. *Id.*

147. Lee, *supra* note 4.

148. S.B. 1468, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <http://www.azleg.gov/legtext/51leg/2r/bills/sb1468p.pdf>. For Arizona’s definition of what gambling is under its criminal code, see ARIZ. REV. STAT. ANN. § 13-3301 (2015).

149. S.B. 1468, 51st Leg., 2d Reg. Sess. (Ariz. 2014), <http://www.azleg.gov/legtext/51leg/2r/bills/sb1468p.pdf>.

150. See *Bill Status Inquiry*, ARIZ. STATE LEGISLATURE, <https://apps.azleg.gov/BillStatus/BillOverview?SessionID=115> [enter “1468” into Bill Number box and press “search”] (last visited Nov. 10, 2016).

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

152. See Alia Beard Rau, *Bill Would Legalize Fantasy Sports in Arizona*, ARIZ. REPUBLIC (Feb. 18, 2016, 4:50 PM), <http://www.azcentral.com/story/news/arizona/politics/2016/02/18/bill-would-legalize-fantasy-sports-arizona/80564968>.

153. *Id.*

154. ARIZ. STATE SENATE RES. STAFF, STRIKE EVERYTHING AMENDMENT TO S.B. 1515, RELATING TO FANTASY SPORTS LEAGUE COMPETITIONS; DEFINITIONS 1 (Feb. 22, 2016), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/441329>.

155. *Bill Status Inquiry*, ARIZ. STATE LEGISLATURE, <https://apps.azleg.gov/BillStatus/BillOverview?SessionID=115> [enter “1515” into Bill Number box and press “search”] (last visited Nov. 10, 2016).

156. See *id.*

157. See *id.*

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.<sup>158</sup> First, the legislature defined *fantasy-sports-league competition* similarly to S.B. 1468.<sup>159</sup> Second, the legislature noted that UIGEA expressly exempted fantasy-sports-league competition from the definition of *bet or wager*.<sup>160</sup> Third, the legislature noted that millions of Americans play fantasy sports and most states allow it.<sup>161</sup> Fourth, the legislature found that fantasy-sports-league competitions have been played in Arizona since the 1990s.<sup>162</sup> The findings went on to say that the legislature has never categorized fantasy sports as gambling, and that fantasy-sports-league competitions would be subject to significant regulation if fantasy sports were gambling.<sup>163</sup> 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.<sup>164</sup> Sixth, the legislature addressed the 1998 Arizona Attorney General advisory opinion finding fantasy sports to be illegal gambling.<sup>165</sup> The legislative findings stated that an attorney-general advisory opinion is not law, and the opinion did not reflect the intent of the legislature.<sup>166</sup> Last, the findings stated that fantasy leagues should operate within an appropriate consumer protection regulatory framework.<sup>167</sup> Following the failure of S.B. 1515, no legislation regarding DFS is currently being considered by the Arizona State Legislature. Unlike S.B. 1515, the legislation proposed later in this Note specifies appropriate consumer protections and addresses tribal concerns.<sup>168</sup>

Although Colorado's consideration of tribal-state gaming compacts put it in a similar position as Arizona, Colorado's compacts are much less restrictive on the state. Although the exact reasons for this are unclear, the tribes in Arizona may have been able to negotiate for the poison-pill provision because the state shares in the revenues the tribes make from gaming. There are 21 tribes in Arizona that have a gaming compact with the state, and only 2 tribes in Colorado with a compact.<sup>169</sup> Also, the tribal gaming operations in Arizona are much larger than those in Colorado, creating a better opportunity for Arizona to share in the revenues.<sup>170</sup>

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158. Committee on Judiciary Senate Amendments to S.B. 1515, 52nd Leg., 2d Reg. Sess., at 7–9 (Ariz. 2016), <https://apps.azleg.gov/BillStatus/GetDocumentPdf/437714>.

159. *See id.* at 7.

160. *Id.* at 8.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 9.

168. *See infra* Section V.B.

169. *See Tribal-State Compacts, supra* note 6; *Tribal Casinos in Colorado, supra* note 110.

170. *Compare Tribal Contributions, ARIZ. DEP'T OF GAMING*, <http://www.gaming.az.gov/tribal-gaming/tribal-contributions> (last visited Jan. 20, 2017) (“[Arizona] [t]ribes have contributed nearly \$1 billion since the Compacts went into effect in 2003.”), with *Tribal Casinos in Colorado, supra* note 110 (“[A]n annual average of \$29.0

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.<sup>171</sup>

## V. RESOLUTION OF THE STATUS OF DAILY FANTASY SPORTS IN ARIZONA

It's hard to ignore the popularity of fantasy sports among sports fans in the United States. DraftKings and FanDuel commercials and advertisements seem to be lurking around every sporting event.<sup>172</sup> 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 the more recently created DFS.<sup>173</sup> 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 detrimental to the tribes. Instead, the best resolution for DFS in Arizona will be a win-win situation for both the state and the tribes. Using past unsuccessful Arizona attempts at DFS legislation, successful legislation passed by other states, and the Arizona Compact will help inform 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.<sup>174</sup> The content of gambling compacts vary from state to state and can vary from tribe to tribe.<sup>175</sup> Arizona voters passed the current Arizona Tribal-State Compact in 2002.<sup>176</sup> At the time, the state and 21 tribes entered into the Compact.<sup>177</sup> 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

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million and \$33.3 million circulated in the Colorado economy from 1995–1999 as a result of the two casino operations.”).

171. See *Tribal Contributions from Gaming Revenue to the State, Cities, Towns, & Counties*, ARIZONA DEP'T OF GAMING (Nov. 3, 2016), <https://gaming.az.gov/sites/default/files/Cumulative%20TC%20amts%20-%20States%20FY%202018%20-%202nd%20QTR.pdf>; *Tribal Casinos in Colorado*, *supra* note 110.

172. 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 25.

173. 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>.

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

175. *Id.*

176. *Id.*

177. *See id.*

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 reduced . . .<sup>178</sup>

Under the Compact, tribes contribute 1%–8% of their revenue each year to the state, cities, towns, and counties.<sup>179</sup> In the current Compact's first 11 years, tribes have contributed nearly \$1 billion.<sup>180</sup> 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.”<sup>181</sup> The remaining 88% of the contributions go to the Arizona Benefits Fund on a quarterly basis.<sup>182</sup> 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.<sup>183</sup>

The 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.<sup>184</sup> 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%–8% contribution.<sup>185</sup> Further, the AIGA states that “Arizona risks all of this to legalize a multibillion-dollar commercial gambling industry that will share no revenues with the state.”<sup>186</sup> However, 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.<sup>187</sup> The AIGA also claims that it is definitive that legalizing DFS would trigger the poison pill.<sup>188</sup> This is not necessarily true, and the National Indian Gaming Commission has not opined whether DFS would be considered Class III gaming.<sup>189</sup>

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178. ARIZ. TRIBAL–STATE COMPACT § 3(h)(1)(A)–(C) (2003), [https://gaming.az.gov/sites/default/files/documents/files/compact.final\\_.pdf](https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf).

179. *Tribal Contributions*, *supra* note 170; *see also supra* note 4 and accompanying text.

180. *Tribal Contributions*, *supra* note 170.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Protect Our Compacts*, *supra* note 13.

185. ARIZ. TRIBAL–STATE COMPACT § 3(h)(1)(C) (2003), [https://gaming.az.gov/sites/default/files/documents/files/compact.final\\_.pdf](https://gaming.az.gov/sites/default/files/documents/files/compact.final_.pdf).

186. *Protect Our Compacts*, *supra* note 13.

187. *See, e.g.*, N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1407 (McKinney 2016); COLO. REV. STAT. ANN. § 12-15.5-105 (West 2016).

188. *Protect Our Compacts*, *supra* note 13.

189. *See supra* note 24 and accompanying text.

Although it is likely DFS would be Class III gaming, an argument can be made that DFS is not gaming at all.<sup>190</sup> The difficult distinction between games of skill and chance is critical and one that has led to varying interpretations in different states.<sup>191</sup> 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.<sup>192</sup> The study estimating that 91% of winnings were collected by 1.3% of daily fantasy baseball participants is far from a normal distribution expected from a game of chance.<sup>193</sup> Further, the Arizona Legislature's findings in S.B. 1515 noted that the legislature has never considered fantasy sports as gambling.<sup>194</sup>

Arizona legalization and regulation of DFS does not need to jeopardize the well-intended policies underlying the Compact's "mutually beneficial and well-regulated gaming system."<sup>195</sup> The AIGA is concerned that tribal infrastructure and over 15,000 jobs employing non-tribal and tribal employees would be lost after DFS legislation.<sup>196</sup> Allowing DFS to operate in Arizona would add to the current gaming landscape that is exclusive to tribal land. Additionally, New York Attorney General Eric Schneiderman found that DraftKings received \$48,742 from Arizona participants in 2014.<sup>197</sup> This shows that despite the current ban on fantasy sports in Arizona, Arizona citizens are still playing. Explicitly allowing DFS in Arizona would likely increase the number of Arizona participants and allow the state to regulate the industry. The AIGA has also expressed a concern that DFS operators would be "in Arizona without oversight, regulation, or rules."<sup>198</sup> However, a successful DFS bill in Arizona would need to contain consumer protection safeguards like those found in other states' successful DFS legislation. In addition, the AIGA's concerns over DFS operators not having to pay tax revenues are easily addressed by the Arizona Legislature in a DFS bill.<sup>199</sup>

### ***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 that comports with tribal interests. The tribes in Arizona and the AIGA have a vested interest in the outcome of any proposed legislation regarding DFS. Therefore, Arizona's

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190. See *supra* note 24 and accompanying text.

191. Shapiro, *supra* note 27, at 299–301.

192. Howard Adams, *supra* note 133, at \*4.

193. Shapiro, *supra* note 27, at 299.

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

195. *Protect Our Compacts*, *supra* note 13.

196. *Id.*

197. See Woodward & Adams, *supra* note 105.

198. *Protect Our Compacts*, *supra* note 13.

199. See *id.*

legislature must consider tribal interests to ensure the success of a DFS bill. Also, the legislature must address any potential impact on the Compact. With these considerations in mind, the remainder of this Part 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 and is likely to result in flawed policy.<sup>200</sup> A broad and vague definition will make it more likely that operators will push the outer limits of the definition.<sup>201</sup> Arizona's two attempts at DFS legislation included the descriptions *fantasy competitions* and *fantasy-sports-league competition*.<sup>202</sup> Either description would be acceptable if the scope makes it clear that the legislation narrowly applies to DFS contests alone.

In addition, Arizona's DFS legislation should mandate 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* as DFS sites with less than 7,500 in-state participants.<sup>203</sup> For example, large DFS operators would pay a one-time fee of \$50,000 to be licensed in Arizona, while small DFS operators would 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 at a rate of 15% of their DFS gross revenue generated in the state and an additional 0.5% annually.<sup>204</sup> 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 tribes and the state to amend the Compact to exclude DFS from triggering the poison pill. As consideration for the amendment, the state and tribes could then have a separate agreement 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. Rather, 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.

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200. Chris Grove, *States Passing Daily Fantasy Sports Bills May be Authorizing Far More Sports Betting Than They Realize*, LEGAL SPORTS REP. (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.*

201. *Id.*

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

203. Gouker, *supra* note 103.

204. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1407 (McKinney 2016).

Arizona's second attempt at DFS legislation, S.B. 1515, included a conditional repeal of the provisions if it triggered the poison pill.<sup>205</sup> This would allow DFS legislation the opportunity to be successful in Arizona while lessening the risk of losing the current revenue sharing under the Compact. Further, Mississippi successfully legalized and regulated DFS on a provisional basis. Mississippi's bill created a task force to review the DFS industry and suggest more comprehensive regulations.<sup>206</sup> Arizona could use Mississippi as a model: the bill would automatically repeal itself after a defined period and allow the task force to recommend regulations that would work specifically for Arizona. The task force would be able to observe how the DFS bill affects the Compact and the Arizona 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. Mississippi's safeguards included the following: (1) not allowing employees of DFS operators to participate; (2) a minimum playing age of 18; (3) consumer data security; and (4) keeping participant and operational funds separate.<sup>207</sup> Arizona also should implement additional consumer protections found in New York's legislation, including the following: (1) eliminating inaccurate or misleading advertising about the chances of winning; (2) identifying all highly experienced participants; and (3) listing information concerning assistance for compulsive play on operators' websites.<sup>208</sup> These consumer protections will ensure that Arizona citizens are not exploited and should help quell some of the AIGA's fears about DFS operators conducting business in Arizona without consumer protection.

Arizona should follow the lead of New York, Colorado, and Mississippi by tasking 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.<sup>209</sup> Colorado tasked the Division of Professions and Occupations in the Department of Regulatory Agencies to oversee DFS operators.<sup>210</sup> 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

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205. Ariz. State Senate, *Strike Everything Amendment to S.B. 1515, Relating to Fantasy Sports League Competitions; Definitions*, 52nd Leg., 2d Reg. Sess., at 9 (Feb. 22, 2016).

206. Gouker, *supra* note 124.

207. Gouker, *supra* note 127; MISS. CODE ANN. §§ 97-33-301 to -315 (West 2016).

208. N.Y. RAC. PARI-MUT. WAG. & BREED. LAW § 1404 (McKinney 2016).

209. *Interactive Fantasy Sports*, *supra* note 91. Similarly, Mississippi tasked the Mississippi Gaming Commission with regulatory oversight. *See supra* note 130.

210. *Office of Fantasy Contest Operator Registration and Licensure: Program Information*, COLO. DEP'T OF REGULATORY AGENCIES, [https://www.colorado.gov/pacific/dora/Fantasy\\_Contests\\_Program\\_Info](https://www.colorado.gov/pacific/dora/Fantasy_Contests_Program_Info) (last visited Jan. 21, 2017).

martial arts.<sup>211</sup> The Department's experience with tribal interests would also infuse 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 binding, that Arizona citizens have been playing fantasy sports for decades, and that the legislature has never considered DFS to be gambling. This may help to quell public concern about legalizing DFS, a practice that has been historically banned in the state.

### CONCLUSION

The ultimate solution for DFS legislation in Arizona will be a win-win scenario for both the state and the tribal interests within the state. Legalizing and regulating DFS will boost Arizona's economy and allow its citizens to join the majority of states that allow DFS. The AIGA's consumer-protection concerns will be addressed and the tribes in Arizona will share in the financial benefits of allowing 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 DFS operator's revenue taxes, 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 the AIGA.

Past attempts by the Arizona Legislature to legalize and regulate DFS have been unsuccessful.<sup>212</sup> However, analysis of these past attempts, an examination of the Compact's poison-pill provision, and guidance from other states' successful DFS legislation will help inform the drafting of a successful DFS bill in Arizona. Arizona is one of only five states that explicitly bans DFS. 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 state's attorneys general, have realized the social and economic opportunities that come from DFS. Now, it is Arizona's turn to reap the benefits of legalizing, regulating, and taxing DFS.

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211. *About Arizona Gaming*, ARIZ. DEP'T OF GAMING, <https://gaming.az.gov/about-arizona-gaming> (last visited Jan. 21, 2017).

212. *See supra* Part IV.