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Unsure Bet: The Future of Daily Fantasy Exchange Wagering

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I. INTRODUCTION

FUELED BY TECHNOLOGICAL CHANGE, fantasy sports have enjoyed incredible growth in the twenty-first century. Since 1980, when writer Daniel Okrent explained his invention of "Rotisserie" major league baseball (MLB) to a few friends in an eponymous New York restaurant,[1] fantasy sports has grown into a global business with over 35 million participants in North America alone.

As originally designed by Okrent and those who followed, a fantasy sports participant acted as a "make believe" general manager who selected real MLB or National Football League (NFL) players for his or her fantasy roster, made trades and other roster moves during the season, determined success from the input statistics generated by real MLB or NFL players in real games, and competed for pride and relatively small cash prizes awarded on a one-time basis at the end of the season.[2]

Since the enactment of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) and the "fantasy sports" exemption contained therein,[3] a new model of fantasy sports has emerged: the "daily fantasy sports league" or "daily league."[4] Instead of engaging in trades and other transactions over the course of a full MLB or NFL season, a daily league—such as www.fanduel.com (FanDuel) and www.starstreet.com (StarStreet)—involves selecting players and receiving a payout or winnings at the end of just one day. Unlike the traditional fantasy sports model, a daily league exhibits the hallmark element of almost all other regulated markets—*daily market action*.[5]

Since April 22, 2013, Atlantic City casinos have been authorized to offer daily leagues or partner with current providers such as FanDuel to offer daily leagues pursuant to regulations promulgated by the state's Division of Gaming Enforcement on March 18, 2013.[6] Notwithstanding weak arguments

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[1] *See* Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARV. J. OF SPORTS & ENT. LAW 7 (2012) ("In April of 1980, Okrent and his friends returned to the La Rotisserie Francaise restaurant…to conduct the first ever Rotisserie League baseball player auction. For purposes of this auction, each of the league's ten participants posted a $260 entry fee. Each participant then used his $260 entry fee to bid on players from Major League Baseball's National League rosters. According to the original Rotisserie League rules, each participant earned points based on his selected players real-life performances….").

[2] Okrent's original official rules provided that "[a]t the end of the Major League Baseball season, the Rotisserie League participant whose team earned the most points would receive a cash prize, as well as a dousing in the chocolate drink Yoo-Hoo." Id. at 8.

[3] 21 U.S.C. § 5362(E)(ix).

[4] Joshua Braustein, *Fantasy Sports and Gambling: Line is Blurred*, N.Y. TIMES, Mar. 11, 2013. ("The segment that includes daily fantasy is now responsible for $492 million in annual spending out of an overall fantasy industry of $1.6 billion spent, according to a study commissioned by the Fantasy Sports Trade Association.")

[5] *Id.* ("In large part, [daily leagues are growing] because people found that other online gambling outlets were being shut down. They include Peter Jennings, who began supporting himself as a pro poker player after graduating from college in 2010. The next year, his source of income was compromised when the federal government cracked down on the biggest poker Web sites. After briefly considering moving to Las Vegas, Jennings began work as a stockbroker. But he was soon carrying an iPad into the office and quietly spending hours each day preparing wagers on FanDuel and other sites. In a good weekend, Jennings could win tens of thousands of dollars, and last December, he won $150,000 in a weekend on a $20 outlay.")

[6] Joshua Braustein, *New Jersey to Allow Casinos to Offer Daily Fantasy Sports*, N.Y. TIMES, Mar. 18, 2013. (Reporting the New Jersey Division of Gaming Enforcement said, "casinos could offer fantasy contests on their grounds or over the internet, reaching people who live outside New Jersey.")

that the UIGEA exemption legalized daily leagues,[7] New Jersey's regulations[8] clearly are the first affirmative authorization and regulation of both daily leagues and of an exchange wagering scheme based in the United States that relates to any sport other than horse racing.[9]

A daily league is neither pure fantasy sports nor is it pure gambling. Rather, a daily league is a hybrid that includes elements of traditional fantasy sports (real player statistics) and traditional sports gambling (daily market action). A daily league is structured as a sports exchange wagering platform that uses mark-to-market scoring to account for player performance as opposed to the accrual scoring system used by the traditional fantasy model.

Because a daily cash-based league is structured as both a sports exchange wagering platform that generates daily action and a fantasy sports game, a daily league likely must comply with both state law and the UIGEA to be legal. Thus, some states may determine that a particular daily cash-based fantasy sports exchange wagering platform is legal *provided* the platform is authorized and regulated by a state casino commission or gaming control board or division or otherwise expressly exempted from state gambling laws such as in Maryland.

II. HISTORY OF SPORTS EXCHANGE WAGERING AND DAILY LEAGUES

A. *Trade Exchange Network: The original sports exchange wagering platform*

Founded in 2000 by John Delaney, Trade Exchange Network (TEN) pioneered exchange wagering in the United States. On the TradeSports platform, U.S. citizens could engage in exchange wagering on real U.S. sports events (such as NFL games), political elections, and other events. At the same time, Betfair established itself as the leader in sports exchange wagering in Europe.

On November 17, 2005, TEN notified the Commodities Futures Trading Commission (CFTC) of its intention to operate as an exempt board of trade known as the InTrade Board of Trade. In January of 2006, TEN reported it had 60,000 users, had enjoyed 165 percent growth since its inception, and had reached a licensing agreement with Trading Technologies International, Inc. (TTI) to use TTI's MD Trader patents on its platforms.[10]

But that all changed on October 13, 2006. On that day, President George W. Bush signed the UIGEA, which restricted Internet gambling by making it impossible (or at least very difficult) for banks and other financial service providers to assist in processing online gambling transactions. The UIGEA effectively killed TEN's TradeSports platform by cutting off U.S. residents from the platform, and TEN divested itself of TradeSports effective January 1, 2007.[11]

TEN maintained the InTrade trading platform until March 2013, when TEN shut down InTrade

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[7]FanDuel itself acknowledges that the legality of a daily league is so questionable in some states that it does not offer daily leagues to residents of those states. *See* FanDuel, *Is FanDuel Legal: The Long Answer* ("The states where our lawyers believe the law is unclear or questionable about the legality of fantasy sports are Arizona, Iowa, Louisiana, Montana or Vermont. Therefore, we do not offer paid entry games to residents of those states."), *available at* <http://www.fanduel.com/legal>. If the UIGEA truly *authorized* daily leagues, then FanDuel could offer daily leagues in all states because the Supremacy Clause of the United States Constitution would pre-empt any contradictory state law. *Cf.* NCAA v. Christie, 2013 U.S. Dist. LEXIS 27782 (D.N.J. Feb. 28, 2013) ("As drafted, the two statutory regimes cannot co-exist. Accordingly, if [the federal] PASPA is held constitutional, then the [state] Sports Wagering Law must be stricken as preempted by the Supremacy Clause. Conversely, if this Court finds PASPA unconstitutional, it must be invalidated and the New Jersey Sports Wagering Law may be implemented."). Because the UIGEA contained only an exemption for fantasy sports games, not an authorization, it is clear that the UIGEA does not preempt state law and FanDuel itself has recognized as much. *Cf.* In re High Fructose Corn Syrup Antitrust Litigation, 216 F.3d 621, 625 (7th Cir. 2000) ("To exempt is not to authorize, though the effect may be the same.").

[8]N.J. ADMIN. CODE § 13:69P1-1.

[9]Both New Jersey and California have adopted regulations for exchange-style wagering on horse racing. Justin Hubble and Martin Lycka, *The Prohibition of Betting Exchanges is in Beach of EU Law*, 17 GAMING L. REV. & ECON. 121 (2013).

[10]*Id.*

[11]On October, 27, 2006—just two weeks after the UIGEA became law—one of the authors, Kevin Braig, met with TEN's founder, John Delaney, at the Berkeley Hotel in London. During this meeting, Mr. Delaney discussed the UIGEA and stated that the new law "completely changed the environment" in the United States for platforms such as TEN and that TEN would reorganize as a result. Mr. Delaney also predicted that "in time the environment will become friendlier in the United States," but tragically, he did not live to see that change in the form of New Jersey's legalization of Internet gambling and launch of fantasy sports exchange wagering. *See* Julie Creswell, *John Delaney, Founder of InTrade, Dies at 42*, N.Y. TIMES, May 26, 2011 ("John Delaney, an Irish businessman who founded InTrade, an online prediction market that allows customers to bet on world political, entertainment and financial events died on Saturday after coming within 50 yards of the summit of Mount Everest. He was 42.").

after the CFTC filed a complaint in federal court alleging that TEN violated the Commodity Exchange Act "by offering for trading to U.S. customers, confirming the execution of, and soliciting and accepting orders from U.S. customers for the trading of, commodity option contracts ('options' or 'binary options') prohibited by the Commission's ban on trading off-exchange options."[12]

B. FanDuel: The next generation sports exchange wagering platform

While the UIGEA killed TEN's TradeSports exchange wagering business in the United Sates, the UIGEA's fantasy sports exemption gave birth to the daily league business model. Daily leagues did not exist at the time Congress enacted the UIGEA. Fantasy Day Sports Corporation launched the first daily leagues in mid-2007.[13] In early 2008, the daily leagues began to takeoff. FanDuel launched in spring 2010 and reportedly averaged 20,000 users per month by the fall of that year.[14] Thus, the historical record is clear that Congress was not blessing daily leagues when it enacted the UIGEA; rather, daily leagues developed in response to the UIGEA to exploit the exemption Congress included for the traditional fantasy sports model.

Based on the publicly available factual allegations in the pending case of *Langone v. Kaiser & FanDuel, Inc.*,[15] FanDuel is a sports exchange wagering platform that uses mark-to-market scoring to account for player performance, as opposed to the accrual scoring system used by the traditional fantasy model.

1. FanDuel is a sports exchange wagering platform

In *The Prohibition of Betting Exchanges is in Breach of EU Law*, Betfair's director and legal compliance officer, Justin Hubble, and Betfair's legal advisor, Martin Lycka, summarized how a sports exchange wagering platform is structured financially:

> Online exchange betting is a market-driven gambling system which enables customers to request bets on either side of the market. Every exchange customer may place either side of the market. Every exchange customer may place either a request for a "back" bet (i.e., a bet that something will happen—for example, that Manchester United will beat Barcelona in the Champions League final) or a request for a "lay" bet (i.e., betting that something will not happen). Using the same example, a winning lay bet against Manchester United would mean that at the end of the regular time, the "Barca" players have won the game or the game goes to overtime.
>
> Exchange customers request the odds at which their bets may be placed, but (depending on the model and legal terms governing the betting contract) that request may or may not be accepted by either the exchange operator itself (acting as counterparty to all bets) or by another customer. At the end of every match, the exchange betting provider matches the two sides of the market and pays out the winnings to the winning customers, having first deducted a commission in the form of a percentage of the winning bet. In this sense, an exchange operator is indistinguishable from a traditional bookmaker (except it perfectly manages its risk) or a pari-mutuel or tote operator (except that fixed odd bets can be secured on the exchange). The unmatched bets, i.e., those requests for bets that have not been accepted by the exchange operator or by the customers, are voided, and the money is returned to the customer, once again becoming available for that customer to bet.

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[12] *See* U.S. Commodity Futures Trading Commission v. Trade Exchange Network Limited, Case No. 1:12-cv-01902 (Nov. 26, 2012); *See also* Derek Thompson, *InTrade Shuts Down—Why?* THEATLANTIC.COM, Mar. 10, 2013; Adam Martin, *InTrade Suddenly Folds, Citing "Financial Irregularities*," N.Y. TIMES MAGAZINE, Mar. 11, 2013.

[13] Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, CONTRA COSTA TIMES, Sept. 26, 2010.

[14] *Id.*

[15] Amended Complaint, Case No. 1:12-cv-02073 (July 17, 2012). In *Langone*, the plaintiff makes a claim under the Illinois Loss Recovery Statute, 720 ILCS 5/28-8(b), "against FanDuel, Inc., and Patrick Kaiser, jointly and severally, to recover money lost by gamblers who paid 'commission' or 'vigorish' or 'rake' to Internet sites and their partners." *Id.* at 1–2. Nothing herein should be construed as an endorsement, rejection, or criticism of any party's position or argument in the case.

In *Langone*, the plaintiff alleged that FanDuel's financial structure is nearly identical to a exchange wagering structure:

> 33. For example, on www.fanduel.com, the winning wager is determined by the number of participants multiplied by the wager minus "vigorish" or "rake." *See* Fan Duel Chart below.
>
> | | *Head 2 Head* | *5 person league* | *10 person league* |
> |---|---|---|---|
> | $5 entry | $9 | $22.50 | $45 |
> | $10 entry | $18 | $45 | $90 |
> | $25 entry | $45 | $112.50 | $225 |
> | $50 entry | $90 | $225 | $450 |
> | $100 entry | $180 | $450 | $900 |
>
> 34. According to FanDuel, Inc., rules, if the game is not completely filled by the maximum number of participants at the start of the game then all entries on that game are voided and the entry fees returned to the users accounts.[16]

In other words, just as BetFair matches two sides on Champions League matches, FanDuel matches two-to-ten sides on a fantasy sports match and pays out the winnings to the winning customers, having first deducted a commission in the form of a percentage of the winning wagers.[17] Also, like BetFair, FanDuel voids unmatched wagers.

Financially, FanDuel is "indistinguishable" from a sports exchange wagering platform. But FanDuel is distinguishable from the traditional fantasy sports model offered by ESPN and Yahoo! where, "[w]hether or not a participant is a successful league manager, their entry fee never hangs in the balance in any way in connection with their participation in the league."[18]

2. FanDuel Uses Mark-to-Market Scoring

In defending itself in the *Langone* case, FanDuel has taken the position that the only difference between its daily leagues and the traditional fantasy sports model is the "duration of the games."[19] That is one way to state the difference. More precisely, FanDuel uses a mark-to-market scoring system to account for player performance that is fundamentally different than the accrual system the traditional fantasy sports model uses as its scoring system.

At its foundation, scoring in every fantasy sports game—whether a daily or traditional league—is based on accounting principles.[20] For the purposes that are relevant here, there are two types of accounting: mark-to-market accounting—which is also known as "fair value accounting"—and historical cost accrual accounting.[21]

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[16]Amended Complaint, Case No. 1:12-cv-02073 at 8 (July 17, 2012). In its initial response to the plaintiff's amended complaint, FanDuel accepted the plaintiff's allegations as true and moved to dismiss the amended complaint for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In doing so, FanDuel contended that its "offerings differ from [the traditional fantasy sports model] only by the duration of the games, which last one week or one day, and involve from two to ten players and entry fees from $5 to $100." Memorandum in Support of Defendants' Motion to Dismiss, Case No. 12-cv-02073 at 3 (July 17, 2012).

[17]According to the plaintiff's allegation, FanDuel takes a 10 percent commission on every match that it makes, which is more than double the usual and customary 4.55 percent commission—known as the vigorish or the "juice"—on a straight wager on an MLB or NFL game in Nevada. At least some of this spread undoubtedly can be attributed to the additional legal risk that unregulated daily leagues must take to provide their services that regulated and clearly legal sports books in Nevada do not have to take.

[18]Humphrey v. Viacom, Inc., 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 2007). In the traditional fantasy sports model, in addition to the entry fees at issue in *Humphrey*, participants fund prize money by paying transaction fees—usually $1—to make trades and other roster moves. These transaction fees are separate and distinct from the entry fees that ESPN and Yahoo! charge for their administrative services and the service providers do not "rake" any percentage of the transaction fees from the participants. In contrast, FanDuel participants do not contribute transaction fees because no transactions occur when a fantasy contest is compressed into just one day or one week.

[19]Memorandum in Support of Defendants' Motion to Dismiss, Case No. 12-cv-02073 at 3 (July 17, 2012).

[20]Around the same time he invented Rotisserie Baseball, Daniel Okrent flew to Lawrence, Kansas to interview an innovative baseball writer named Bill James, who self-published a statistically driven periodical called the *Baseball Abstract*. MICHAEL LEWIS, MONEYBALL 86 (2003). In 1981, *Sports Illustrated* published Okrent's article on James and, in 1982, Ballantine Books began publishing the *Baseball Abstract* and made it a national best-seller. *Id.* at 87. James' writing style employed frequent use of rhetorical questions to which he provided the answer. For example, with respect to baseball fielding, James asked, "So if we can't tell who the good fielders are accurately from the record books, and we can't tell accurately from watching, how can we tell?" His answer: "By counting things." *Id.* at 69.

[21]Vinod Kumar, *Difference between Historical Cost and Fair Value*, ACCOUNTING EDUCATION, June 6, 2011, <http://www.svtuition.org/2011/06/difference-between-historical-cost-and.html>. ("There are two methods to calculate the value of fixed assets of a company. One is value of fixed assets on the basis of historical cost and the other is on the basis of fair value. But there are many differences between historical cost and fair value.").

Consistent with its business model, FanDuel uses mark-to-market scoring to account for player performance and generate daily market action. This mark-to-market scoring system is quite similar to the accounting principles first developed among traders on futures exchanges[22] and used by traders of over-the-counter or "OTC" derivatives such as interest rate swaps.[23] Mark-to-market accounting requires "continuous reevaluation of assets."[24] However, mark-to-market accounting can make it difficult to calculate long-term earnings. Because mark-to-market does not define the cause of change in earnings expectations, mark-to-market accounting alone does not provide enough information to form expectations of long-term future earnings.[25]

FanDuel's scoring system clearly is based on mark-to-market accounting principles that are characteristic of markets with daily market action, such as commodity futures markets and OTC derivatives markets. Pursuant to those principles, a FanDuel participant "continuously reevaluates" his or her players and "books" both player statistics and the profit or loss that he or she realizes on the same day or week that the daily fantasy contest is played.

By using mark-to-market scoring to account for player performance, FanDuel generates daily market action for those who participate in its contests. Further, because a FanDuel participant is not concerned with his or her players' accrued statistical "earnings" over an entire year, the limitations of mark-to-market scoring are irrelevant to FanDuel participants.

FanDuel's mark-to-market scoring system contrasts vividly with the accrual scoring system that defines the traditional fantasy sports model. Traditional accrual accounting uses the realization principle as its bedrock.[26]

Likewise, the traditional fantasy sports model's bedrock is an accrual scoring system to account for player performance that waits until all the events

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[22]Trading futures in commodities such as corn, wheat, and oil is similar to fantasy sports in that futures contracts "involve a form of *pretending* an ownership or other interest in the benchmark source and reaping some economic consequences as if a genuine transaction were occurring. It is 'Let's make believe' using real money." PHILIP MCBRIDE JOHNSON, DERIVATIVES: A MANAGER'S GUIDE TO THE WORLD'S MOST POWERFUL FINANCIAL INSTRUMENTS 1 (1999).

[23]Bank One Corp. v. Commissioner, 120 T.C. 174, 209–10, 292–93 (U.S. Tax Ct. 2003) ("Swap dealers generally attempted during the relevant years to mark their swap positions to market daily. The concept of mark-to-market accounting requires that the market value of an asset such as a swap be recorded on the balance sheet at each financial reporting date and that any changes in market value from one reporting date to the next be currently reflected in income or loss.... Mark-to-market accounting is particularly appropriate for OTC derivatives dealers. Swaps dealers employ mark-to-market accounting for commercial and financial purposes because they believe mark-to-market accounting is a superior method of clearly reflecting a swaps dealer's annual income. Swaps dealers rely extensively on hedging techniques to reduce or eliminate their exposure primarily to interest rate changes and other first-order economic risks. Many of these hedging transactions, such as exchange-traded futures contracts, have maturities that are much shorter than the long-term swaps contracts on a swaps dealer's books, and other hedging transactions (e.g., a long position in physical securities) are regularly liquidated or unwound as new customer swaps change the risk profile of a swaps dealer's book.").

[24]Newby v. Enron Corp., 762 F. Supp. 2d 942, 993 (S.D. Tex. 2010). Instead of seeing a commitment to deliver natural gas as something that necessarily involved a pipeline, Enron's former president, Jeffrey Skilling, saw it as a financial commitment. BETHANY MCLEAN AND PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 37 (2004). In 1990, the New York Mercantile Exchange began trading natural-gas futures. *Id.* at 38. Consistent with his view, Skilling demanded as part of his agreement to leave his job as a consultant and join Enron that his division be permitted to use mark-to-market accounting, rather than the traditional accounting that heretofore had been used in the natural gas business, so that Enron could book the entire estimated value of a long-term gas contract on the day it signed the contract. *Id.* at 39. Skilling insisted that mark-to-market accounting gave a truer reading of the company's financial reality. *Id.* at 40. On May 17, 1991, about a year after Skilling joined the company, Enron's board approved Skilling's use of mark-to-market accounting in his energy trading business. *Id.* at 41. On June 11, 1991, Enron asked the Securities and Exchange Commission not to object to Enron's use of mark-to-market accounting on the basis that "'as a trader, Skilling's new business 'creates value and completes its earnings process at the end of…when the transactions are finalized' and 'other commodity trading businesses which are analogous'" used mark-to-market accounting. *Id.* On January 30, 1993, the SEC informed Enron that it would not object to its use of mark-to-market accounting. *Id.* at 42. Reportedly, upon receiving this news, Skilling was "ecstatic" and gathered his staff for a champagne toast. *Id.*

[25]Ray Ball, *Mark-to-Market Accounts Signal Caution for Investors*, BLOOMBERG, May 2, 2012.

[26]*Bank One Corp.*, 120 T.C. at 293.

of a baseball or football season are completed to determine who earned a prize.[27] A participant in a traditional fantasy sports game does not act like a futures trader. Rather, he or she acts like the Oakland A's executives in the book *Moneyball*: General Manager Billy Beane and his former assistant Paul DePodesta.

Author Michael Lewis described the role in *Moneyball* as follows:

> Before the 2002 season, Paul DePodesta had reduced the coming six months to a math problem. He judged how many wins it would take to make the playoffs: 95. He then calculated how many more runs the Oakland A's would need to score than they allowed to win 95 games: 135.... Then, using the A's players' past performance as a guide, he made reasoned arguments about how many runs they would actually score and allow. If they didn't suffer an abnormally large number of injuries, he said, the team would score between 800 and 820 runs and give up between 650 and 670 runs. From that he predicted the team would win between 93 and 97 games and probably would wind up in the play-offs.[28]

In contrast to FanDuel, the traditional fantasy sports model is based on historic accrual accounting principles that mirror the interests of real-world baseball executives like Beane and DePodesta.[29] Pursuant to those accrual principles, a traditional fantasy sports participant "books" player statistics as they accrue or accumulate throughout a full season and only at the conclusion of the season does a participant determine whether the season is a profit (prize won > transaction fees + administrative/statistical services fees expended) or a loss (prize won < transaction fees + administrative/statistical services fees expended).[30]

III. THE FUTURE OF REGULATED FANTASY SPORTS EXCHANGE WAGERING

The purpose of legitimate government regulation is not to meddle in the operation of private business activity. Rather, the purpose of legitimate government regulation is to encourage the private business activity that is subject to the regulation.[31]

Congress exempted fantasy sports from the prohibitions contained in the UIGEA in 2006. But Congress did not encourage fantasy sports providers to innovate because Congress failed to provide for any regulation of fantasy sports in the UIGEA.

New Jersey has moved to fill the void. By promulgating regulations pursuant to which Atlantic City casinos can provide fantasy sports games—including daily fantasy sports exchange wagering[32]—to

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[27]*See, e.g.*, Metro Leasing Development Corp. v. Commissioner, 376 F.3d 1015, 1023 (9th Cir. 2004) ("We must interpret the phrase 'accrued during the taxable year' to determine whether Metro Leasing's 1995 tax liability that was paid in 2001 qualifies as such. The ordinary meaning of this statutory language has been well-established in the tax context for many years. Basic principles of accrual accounting were first set forth by the United States Supreme Court in *United States v. Anderson*, 269 U.S. 422, 70 L. Ed. 347, 46 S. Ct. 131, 62 Ct. Cl. 743 (1926). The Court held that before an expense becomes deductible, all events which fix the amount and the taxpayer's unconditional obligation to pay must have occurred. *Id.* at 440–41. In 1984 this 'all events test' was engrafted into the Internal Revenue Code. *See* Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 91(a), 98 Stat. 494 (1984), codified at 26 U.S.C. § 461(h). In general, an accrual basis taxpayer may not deduct an expense until (1) all events have occurred that determine the fact of liability; (2) the amount of the liability can be determined with reasonable accuracy; and (3) economic performance or payment has occurred. *See* 26 U.S.C. § 461(h); *see also* Treas. Reg. § 1.461-1(a)(2) (reflecting these three elements in the codified version of the all events test).").

[28]Lewis, *supra* note 20, at 124.

[29]*Id.* at 87 ("[Rotisserie Baseball], which sought to simulate an actual baseball game, put the players in the role of general manager of a team of real life baseball players, which he picked himself from actual teams.").

[30]*See* Humphrey v. Viacom, Inc., 2007 U.S. Dist. LEXIS 44679 (D.N.J. June 2007) ("The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.... Only at the end of the sports season are prizes awarded, in amounts fixed by the contracts that govern participation in the leagues.").

[31]*See, e.g.,* City of Cleveland v. Ameriquest Mortgage Securities, Inc., 621 F. Supp. 2d 513, 526 (N.D. Ohio 2009) (finding there is a "difference between conduct that is merely 'lawful,' as in 'not legally prohibited,' and conduct that is subject to regulation and, within the framework of a regulatory scheme, encouraged"), *aff'd*, 615 F.3d 496 (6th Cir. 2010).

[32]N.J. Admin. Code § 13:69P1-1. New Jersey's regulations state that fantasy sports tournaments shall not be considered "gaming" or "gambling" for purposes of state tax laws. N.J.Admin. Code § 13:69P1-1(b). However, simply because New Jersey has determined that daily fantasy sports contests are not gambling for state tax purposes does not change the fact that a daily league's financial structure and mark-to-market scoring systems define these contests as exchange wagering as a matter of fact.

persons who patronize those casinos both physically and virtually over the internet, New Jersey is encouraging fantasy sports platforms to innovate and provide new offerings while simultaneously benefitting the consumers of those new offerings. Further, other states can use New Jersey's regulations as a template and authorize their casinos to provide fantasy sports exchange wagering if they choose to do so.

Consumers of daily fantasy sports exchange wagering will benefit in at least two ways from New Jersey's encouragement of daily fantasy sports exchange wagering. First, consumers will know that the exchanges on which they wager are being held accountable to maintain fair and honest daily fantasy games. Second, consumers should see the 10 percent commission that FanDuel currently charges drop by at least half—and possibly more—as competition between casinos and their partners—including, perhaps FanDuel itself—drives down the price that daily fantasy sports exchange wagering platforms can demand from consumers.

It is state regulation's consumer benefits that support the conclusion that a particular daily fantasy sports exchange wagering platform is legal *provided* the platform is authorized and regulated by a state casino commission or gaming control board.