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January 15, 2016

The Honorable Thomas V. Mike Miller, Jr.
State House H-107
100 State Circle
Annapolis, Maryland 21401

Dear President Miller:

You have asked for our view as to whether Chapter 346 of 2012, which exempted fantasy sports from the prohibitions against betting, wagering, and gambling contained within Title 12 of the Criminal Law Article, had the effect of expanding commercial gaming and thus should have been subject to referendum under Maryland Constitution Article XIX, § 1(e). Whether Chapter 346 should have been referred to the electorate depends on three subsidiary questions: (1) Does the codification of Chapter 346 within Title 12 of the Criminal Law Article mean that it is exempt from the Article XIX referendum requirement when that requirement does not apply to "[g]aming conducted under Title 12 . . . of the Criminal Law Article"?; (2) If Chapter 346 is not exempt, did it authorize *daily* fantasy sports as well as *traditional* fantasy sports?; and (3) If so, do fantasy sports qualify as "commercial gaming" such that their authorization under Chapter 346 triggered the referendum requirement of Article XIX?

As discussed below, the answers to these subsidiary questions are close calls; none is clear and some involve statutory language and legislative history that conflict in critical respects. In addition, there are many different types of fantasy sports platforms and it is difficult, if not impossible, to reach broad conclusions that would apply to all of them in the absence of the type of factual inquiry for which our advisory function is ill-equipped. Further complicating matters is the fact that *daily* fantasy sports have only emerged in the last few years and there are few judicial opinions—and none in Maryland—that address this new form of fantasy sports.

Subject to those caveats, we believe that the better answer to each question leads to the conclusion that Chapter 346, to the extent it authorized daily fantasy sports, should have been referred to the electorate under Article XIX. However, due to the substantial uncertainty surrounding these issues and because the legislative history surrounding Chapter 346 suggests that the focus of the debate in the General Assembly in 2012 was not on the regulation of daily fantasy sports, we recommend that the Legislature squarely take up the issue this session and clarify whether daily fantasy sports are authorized in Maryland. By contrast, we think it is clear that traditional fantasy sports were authorized by Chapter 346. Because we conclude that it is likely that traditional gaming does not constitute "commercial" gaming within the meaning of Article XIX, Chapter 346, as applied to traditional fantasy sports, may be given effect.

Background

Fantasy sports come in a variety of forms, too numerous to discuss here. The earliest fantasy football games date back to the early 1960's, when Wilfred "Bill the Gill" Winkenbach created the Greater Oakland Professional Pigskin Prognosticators League and held their first draft in August of 1963. Michael B. Engle, *The No-Fantasy League: Why the National Football League Should Ban Its Players from Managing Personal Fantasy Football Teams*, 11 DePaul J. Sports L. & Contemp. Probs. 59, 62 (2015) (hereinafter "Engle"). Scoring was done manually by consulting the local sports section of the newspaper. *Id.* To keep it simple, only touchdowns were considered in scoring. *Id.* Fantasy leagues also developed for other sports. As computers became more common they began to be used for score keeping and the scoring systems became more complex. Eventually, host websites developed that would provide scoring and other services for free.

The traditional form of fantasy sports is descended from these early fantasy leagues. As described in *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. 2007), the providers of traditional online fantasy sports require participants to pay a fee to purchase a fantasy sports team and gain access to the various support services that the host website provides. These services typically include everything the participant needs to manage the fantasy team, including real time statistical information, expert opinions and analysis, and message boards for communicating with other participants. The purchase price also covers the data-management services necessary to run a fantasy sports team by drafting a slate of players, tracking the performance of those players, trading players throughout the season, and deciding which players will start and which are on the bench. *Id.* at *1-2. The teams are grouped into leagues, either by the participants forming their own leagues, or in groups formed by the host website.

Although fantasy games can take a variety of forms, typically no player can be chosen for more than one team in a league. Winners are generally determined based on points earned as a result of the performance of individual players chosen for the team. The team with the highest score is declared the winner at season's end. The website host may provide prizes of nominal value for winning teams in a league, and larger prizes for the highest score among all leagues. *Id.* at *2. Monetary prizes may also be awarded. Whatever the prize, the value is determined in advance as part of the agreement for services. In the rest of this letter, we will refer to this kind of fantasy gaming as traditional fantasy sports ("TFS").

Your question also relates to a more recent type of fantasy game where an online company itself operates a wide variety of games that people can participate in online. These games are not ordinarily based on an entire season, but rather on a week, a day, or even a single time of play, such as all professional football games played at 4 p.m. on a particular Sunday. While a fantasy game is never based on a single game, it is our understanding that there are fantasy games based on as few as three real-life games. These are known as daily fantasy sports ("DFS").

The two types of fantasy sports are similar in many respects; in both versions the participants draft players and the winner is determined on the basis of the selected players' performance over the relevant time period. But that is where the similarity ends. Whereas the archetypal TFS game is a contest among friends, DFS contests include leagues, tournaments, head-to-heads, and multipliers, which can involve hundreds of thousands of people who compete more or less anonymously over the internet. *See People of the State of New York v. FanDuel*, Index No. 453056/15, Decision and Order at 5 (N.Y. Sup. N.Y. County Dec. 11, 2015). Whereas TFS participants manage their teams throughout the season by trading and benching players, DFS participants select players for one day only, and must "lock-in" those selections before the relevant games begin. *Id.* And while TFS providers typically charge a flat rate entry fee for the statistical and analytical support they provide, DFS entry fees vary widely by type of contest. In fact, entry fees for providers such as FanDuel and DraftKings can be as low as $.25 (or even free) but can range as high as $10,600 for a single competition. *See FanDuel*, Index No. 453056/15, at 5; *see also Langone v. Kaiser*, 2013 WL 5567587 at *1 (N.D. Ill. 2013). The prizes too can be much more valuable in DFS; whereas TFS contests typically involve jerseys, televisions, or other modest cash prizes, DFS are advertised as "get rich quick" schemes, with large cash prizes that can be as high as $1 million.

The manner in which a DFS provider funds the prizes it offers seems to be a matter of some debate. In pending litigation brought by the New York Attorney General,[1] FanDuel and DraftKings maintain that the prize pools they offer are set in advance and are funded with money that is entirely separate from the entry fees that they collect. As evidence of this, the providers point out that they actually *lose* money in contests where the number of participants is low enough that the entry fees collected are less than the money paid out. There is, however, some indication in the court decisions and elsewhere that the online providers actually take a "commission" from every entry fee paid. *Langone*, 2013 WL 5567587 at 1, 6 (stating that FanDuel "derives its profit from commissions"); *FanDuel*, Index No. 453056/15 at 5, 7 (stating that "a percentage of every entry fee [is] paid to" FanDuel and DraftKings); *see also* Drew Casey, "DraftKings, FanDuel make millions, and give them away, as fantasy revs up," CNBC (Sept. 20, 2105) (quoting FanDuel's Co-founder Nigel Eccles as stating that "[p]layer prizes [are] really driven by entry fees" and that "[t]he money that comes in, we take about a 10-percent cut and we pay out everything else in prizes, so it's really self-funding"). Whether the financial return derives from a per-entry

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[1] The two cases are *People of the State of New York v. FanDuel, Inc.*, Index No. 453056/15, and *People of the State of New York v. DraftKings, Inc.*, Index No. 453054/15, both of which resulted in the New York Supreme Court (a trial court in the New York system) finding that the Attorney General had established a likelihood of success on the merits of his claim that DFS constituted illegal gambling under New York Law. The court granted temporary injunctions preventing the companies from accepting entry fees, wagers, or bets from New York residents in connection with any competition, game, or contest that the companies run on their websites. The temporary injunctions were subsequently stayed by an appellate court. *People of the State of New York v. FanDuel, Inc., et al.*, Nos. M-6204, M-6206 (N.Y. App. Div. Jan. 11, 2016).

commission or from net profit, DFS providers reportedly clear between 6% and 14% of the entry fees paid to them, *FanDuel*, Index No. 453056/15, at 5, and take in millions of dollars in revenue every week.

Chapter 346 and the Regulation of Fantasy Sports

Until recently, no statute or court decision expressly had addressed the legality of fantasy sports under Maryland's gaming laws. Those laws had for many years made it illegal to "bet, wager, or gamble," Crim. Law § 12-102(a)(1), but their applicability to fantasy sports was never made clear. In 2006, an Opinion of the Attorney General on the legality of certain poker tournaments cast doubt on the legality of fantasy sports to the extent that they involved consideration, chance, and reward. These three criteria, the Attorney General stated, are "[t]he three main elements common to all gambling."[2] 91 *Opinions of the Attorney General* 64, 65 (2006) (citing *Chesapeake Amusements, Inc. v. Riddle*, 363 Md. 16, 24 (2001)). As a result of that opinion, many fantasy sports providers blocked Maryland residents from receiving t-shirts and other prizes.[3] *See* Hearing on House Bill 7 Before the Ways and Means Comm., 2012 Leg., Reg. Sess. (March 16, 2012) (testimony of the Hon. John A. Olszewski, Jr.) ("2012 Olszewski Testimony").

In 2008, Delegate Olszewski—himself a participant in fantasy sports—asked the Department of Legislative Services to examine the relationship between traditional fantasy sports competitions and Maryland's gaming laws. Some people apparently had "contended" that TFS constituted gambling because the entry fee is "wagered" and the outcome of the contest depends "on luck more than skill." Memorandum from Lindsay A. Eastwood, Policy Analyst, to Del. John A. Olszewski, Jr., at 1 (Nov. 17, 2008). The policy analyst concluded that fantasy sports "would probably not be considered gambling," but that new legislation on the topic would "clarify" that "fantasy competition should not fall into the realm of gambling." *Id.* at 5. The memorandum did not, however, address *daily* fantasy sports. *See id.* at 1 (describing fantasy sports as allowing for "moment-by-moment team management," where participants "trade players over the course of a season, and decide which players will start and which will be on the bench," and stating, "A winner is declared at the end of the season, with prizes ranging from bobble-head dolls to flat-screen televisions").

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[2] The terms gaming and gambling are interchangeable. Black's Law Dictionary (9th Ed. 2004) at 746; *see also* 94 *Opinions of the Attorney General* 32, 36 (2009).

[3] Maryland is not the only state whose residents' access to online fantasy sports has been limited at one time or another. The current terms of use for FanDuel, for example, note that people who are "physically located" in Arizona, Iowa, New York, Louisiana, Montana, Nevada or Washington are not eligible to participate. *See* www.fanduel.com/terms. DraftKings' terms of use note that residents of these same states (with the exception of New York) are "ineligible for prizes." *See* www.draftkings.com/help/terms.

In response, Delegate Olszewski introduced House Bill 21 in the 2009 session of the General Assembly. The bill, which was unsuccessful, would have enacted § 12-114 in substantially the same form that it exists today. Delegate Olszewski introduced an identical bill in 2010 (H.B. 750) and it also failed. Both bills were focused on the status of traditional fantasy sports and both were intended to enable Maryland residents who participate in fantasy sports to be eligible to receive prizes to the same extent as the residents of other states. *See* 2012 Olszewski Testimony. The relevant fiscal reports made no mention of fantasy sports carried out on a daily basis.

The 2012 session saw the successful enactment of what is now § 12-114 of the Criminal Law Article. 2012 Md. Laws, ch. 346. That section, in its entirety, provides:

> (a) In this section, "fantasy competition" includes any online fantasy or simulated game or contest such as fantasy sports, in which:
>
> (1) participants own, manage, or coach imaginary teams;
>
> (2) all prizes and awards offered to winning participants are established and made known to participants in advance of the game or contest;
>
> (3) the winning outcome of the game or contest reflects the relative skill of the participants and is determined by statistics generated by actual individuals (players or teams in the case of a professional sport); and
>
> (4) no winning outcome is based:
>
> (i) solely on the performance of an individual athlete; or
>
> (ii) on the score, point spread, or any performances of any single real-world team or any combination of real-world teams.
>
> (b) Notwithstanding the provisions of this or any other title, the prohibitions against betting, wagering, and gambling do not apply to participation in a fantasy competition.
>
> (c) The Comptroller may adopt regulations to carry out the provisions of this section.[4]

Although the focus of the 2012 legislation—like its earlier iterations—was traditional fantasy sports, the legislative history mentions that some fantasy sports platforms operate on competitions "based on performance on one given day." H.B. 7, Revised Fiscal and Policy Note at 4; Ways and Means Committee Floor Report at 3.

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[4] The Comptroller has begun the process of gathering information and conferring with other agencies and officials in order to promulgate appropriate regulations.

Section 12-114 is based on 31 U.S.C. § 5362(1)(E)(ix), which excludes fantasy and simulation sports games and educational games and contests from the provisions of the Unlawful Internet Gambling Enforcement Act ("UIGEA"). 2012 Olszewski Testimony. The federal Act, which was enacted in 2006 before the advent of DFS,[5] does not make any gaming activity legal or illegal, but prohibits the acceptance of credit, electronic funds transfers and other forms of payment in connection with the participation of another person in unlawful Internet gambling. *See* 31 U.S.C. § 5363; *see also* Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law. J. 79, 95 (2015) (hereinafter "Ehrman"); Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 214 (2015) (hereinafter "Trippiedi"). Unlawful Internet gambling is defined as transmitting bets or wagers by means that include the use of the Internet "where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made." 31 U.S.C. § 5362(10)(A).[6]

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[5] Although we have not researched the issue, it has been reported that the only mention of short-term fantasy sports contests in the legislative history surrounding the passage of UIGEA raises it as a potential concern. *See Internet Gambling: Hearing Before the Subcomm. on Tech., Terrorism, and Gov't Information of the Sen. Comm. on the Judiciary*, 106th Cong., 1st Sess. (March 23, 1999) (Sen. Kyl stating with respect to fantasy sports that "generally—and as far as I know, totally right now—the leagues are based upon competition over time, over a long enough period of time that it would be very difficult to influence the final result by any particular player's actions" and asking "at what point does that become a problem, when you have a week of activity or a month of activity or a couple days of activity"); *see also* Ryan Rodenberg, *The true Congressional origin of daily fantasy sports*, ESPN.com (Oct. 28, 2015) (stating that the exchange involving Sen. Kyl was "the closest any Congressional hearing got to addressing concerns specific to short-duration fantasy leagues").

[6] The legality of fantasy gaming under other federal laws is less than clear. The sole case on point, *Humphrey v. Viacom*, involved traditional season-long fantasy games and the court held that the entry fee paid at the beginning of the season was not a bet or wager, and thus, in the view of the court, not gaming under federal law. It has been suggested, however, that fantasy games could be subject to prosecution under federal laws other than UIGEA, including the Wire Act, 18 U.S.C. § 1804, the Travel Act, 18 U.S.C. § 1952, the Interstate Transportation of Wagering Paraphernalia Act, 18 U.S.C. § 1953, the Illegal Gambling Business Act, 18 U.S.C. § 1955, and the Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701-3704. Ehrman, at 88-92; Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 34-38 (2012); Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. Jefferson L. Rev. 317 (2009).

The Regulation of Commercial Gaming and Article XIX of the Maryland Constitution

The legalization of casinos and large video lottery facilities in Maryland was one of the most controversial legislative measures of the last 20 years, and the idea reflected in Article XIX—that the *people* should have the power to determine the extent to which commercial gaming would be allowed in Maryland—has a long legislative history. As early as 1995, legislators turned to our Office for guidance in formulating a legislative approach to ensure that the people had that power. *See* 80 *Opinions of the Attorney General* 151 (1995). Bills introduced starting in the late 1990's would have amended the Constitution to authorize the licensing and regulation of video lottery gaming and would have prohibited additional forms and expansion of commercial gaming in the future, effectively requiring an amendment to the Constitution for any additional forms or expansion of commercial gaming. *See* House Bill 678 of 1998, House Bill 1170 of 2001, House Bill 732 of 2002. Other bills would have enacted similar language in statute. *See* H.B. 1190 of 1999, H.B. 1170 of 2000 and H.B. 78 of 2003. None of these bills made it out of committee, but all of them included some mechanism limiting the introduction of additional forms or expansion of commercial gaming. *See also* Third Reader version of S.B. 322 of 2003, S.B. 197 of 2004, S.B. 205 of 2005, H.B. 1178 of 2006, and H.B. 166 of 2007.

With Maryland facing an impending $1.7 billion deficit for the 2009 fiscal year, Governor Martin O'Malley issued an Executive Order in October 2007 calling the General Assembly into special session to, among other things, permit the use of video lottery machines as a source of tax revenue. *See* Exec. Ord. 01.01.2007.23; *Stop Slots Md. 2008 v. State Board of Elections*, 424 Md. 163, 169 (2012); *Smigiel v. Franchot*, 410 Md. 302, 305 (2009). The legislative consensus that the electorate should decide whether to allow commercial gaming had not lost its strength by the time of the 2007 Special Session. During that session, legislative leaders expressly emphasized the desire to give the people the right to vote on expanding commercial gaming. The issue was highlighted in House proceedings by Delegate Sheila Hixson, the Chair of the Ways and Means Committee, when she brought forth the favorable committee report on the bill proposing the new constitutional amendment to allow video lottery facilities. House Proceedings on H.B. 4 of the Special Session of 2007, Calendar day November 16, 2007.[7]

In that special session, the General Assembly ultimately enacted what is now Article XIX of the Maryland Constitution. Two aspects of Article XIX are important here. First, § 1(d) and (e) provide that:

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[7] Delegate Hixson noted that 80% of the people of Maryland had indicated that they believed the issue of commercial gaming should be put to a statewide vote. This is apparently a reference to the poll mentioned in *Support builds for referendum on slots*, Steven T. Dennis, Gazette.net (April 30, 2004), where Speaker Busch states that "he was struck by a recent poll showing 80 percent of Marylanders would prefer that the issue be decided at the ballot box instead of in Annapolis."

> (d) Except as provided in subsection (e) of this section, on or after November 15, 2008, the General Assembly may not authorize any additional forms or expansion of commercial gaming.
>
> (e) The General Assembly may only authorize additional forms or expansion of commercial gaming if approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State.

These two provisions thus require that any subsequent authorization of "additional forms or expansion of commercial gaming" must be approved by the voters through a referendum. The General Assembly has done this on only one occasion, authorizing an additional video lottery facility in Prince George's County and the use of table games in Chapter 1 of the Second Special Session of 2012, which was approved on referendum in the 2012 general election.

The second part of Article XIX that bears on the question you ask is subsection (a), which made clear that the prohibition in subsection (d) and (e) did not apply to the existing statutory provisions that governed gaming, including bingo and lotteries:

> (a) This article does not apply to:
>
> (1) Lotteries conducted under Title 9, Subtitle 1 of the State Government Article of the Annotated Code of Maryland;
>
> (2) Wagering on horse racing conducted under Title 11 of the Business Regulation Article of the Annotated Code of Maryland; or
>
> (3) Gaming conducted under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland.

To answer the question you ask, we must analyze three subsidiary questions. First, we will determine whether the codification of Chapter 346 within Title 12 of the Criminal Law Article means that it is exempt from the Article XIX referendum requirement. If Chapter 346 is not exempt, we will turn to whether it authorized daily fantasy sports as well as traditional fantasy sports. We will conclude with whether fantasy sports, to the extent that they are authorized under Chapter 346, qualify as "commercial gaming" such that their authorization triggered the referendum requirement of Article XIX.

Analysis

I. Article XIX, § 1(a)(3) Does Not Exempt the Forms of Gaming That Were Authorized Under § 12-114 of the Criminal Law.

At first blush, the interplay between Article XIX and Chapter 346 seems fairly straightforward: The authorization of fantasy sports provided by Chapter 346 was codified in Chapter 12 of the Criminal Law Article, which is expressly exempted from the reach of the Article XIX by the plain language of (a)(3) of the constitutional amendment. The process of statutory interpretation typically begins with the plain language, and, if statutory language is clear and unambiguous, the "inquiry ordinarily ends there." *Smith v. State*, 399 Md. 565, 578 (2007). When the plain language is unambiguous, "the Legislature is presumed to have meant what it said and said what it meant." *Kushell v. Dep't Of Nat. Res.*, 385 Md. 563, 577 (2005) (internal quotations marks omitted). A reviewing court applying the plain language here might conclude that the referendum requirements of Article XIX simply do not apply to Chapter 346.

That said, the "cardinal rule of statutory construction is to ascertain and effectuate legislative intent." *McClanahan v. Washington County Dep't of Soc. Servs.*, No. 79 Sept. Term 2014, 2015 WL 9300639, at *4 (Dec. 22, 2015) (quoting *Motor Vehicle Admin. v. Shrader*, 324 Md. 454, 462 (1991). Although courts, in their efforts to discover that intent, start with the plain language of the statute, "the plain-meaning rule 'is not a complete, all-sufficient rule for ascertaining a legislative intention . . . .'" *Kaczorowski v. Mayor & City Council of Baltimore*, 309 Md. 505, 513-15 (1987) (quoting *Darnall v. Connor*, 161 Md. 210, 215 (1931)). Rather, "the meaning of the plainest language is controlled by the context in which is appears." *Montgomery County v. Phillips*, 445 Md. 55, 63 (2015). If the statutory language, when read in context, is "reasonably capable of more than one meaning," it is ambiguous and we turn to other interpretive aids. *Mayor & Council of Rockville v. Rylyns Enterprises, Inc.*, 372 Md. 514, 551-52 (2002).

We believe the language subsection (a)(3), when read in context of the larger constitutional provision, is capable of more than one meaning. That language provides that the referendum requirement of Article XIX does not apply to "[g]aming conducted under Title 12." It is not clear from this language whether the Legislature intended to exempt from the Constitution's reach *any* gaming that might subsequently be conducted under Title 12 or only those gaming activities that, at the time the amendment was enacted, were "conducted under Title 12." For a number of reasons, however, we believe the latter interpretation best reflects legislative intent.

First, reading subsection (a)(3) so as to exempt gaming activities that are subsequently regulated under Title 12 would create a loophole that would render paragraphs (d) and (e) of the constitutional amendment essentially meaningless. That is, any subsequent Legislature could circumvent the referendum requirement of Article XIX simply by codifying an expansion of commercial gaming in Title 12 or Title 13 of the Criminal Law Article. Not only would such a result render the referendum requirement essentially meaningless, it would lead to the conclusion that the Legislature, while crafting a provision that was important both to the passage of the bill and acceptance by the public, left itself a way to subvert that purpose at will. That is not how

constitutions are made, and it is not the kind of intent that courts attribute to the Legislature. *See In re Adoption/Guardianship of Tracy K.*, 434 Md. 198, 206-07 (2013) (stating that a statute must be interpreted "as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless or nugatory, or given an interpretation that is absurd, illogical, or incompatible with common sense" (internal quotation marks and citations omitted)); *see also Kadan v. Bd. of Sup'rs of Elections of Baltimore County*, 273 Md. 406, 416 (1974) (describing the rules of statutory construction and concluding that "these rules should be applied here in the process of interpretation of the Constitution of this State").

Second, the interpretation described above is contrary to the legislative history of the provision. The House Floor Report on House Bill 4 of the Special Session of 2007 specifically forecloses a reading of Article XIX that would allow it to be circumvented in the manner described above:

> It is the intent of the Ways and Means Committee, in adopting this bill and its amendments, that the exclusion provided for gaming conducted under Titles 12 and 13 of the Criminal Law Article is intended to cover all gaming conducted under those titles as of November 15, 2007. It is not the intention of the Committee to allow any subsequent forms of gaming that would otherwise be subject to General Assembly approval and referendum to instead be placed in Titles 12 and 13 in an effort to circumvent the constitutional amendment.

The Fiscal and Policy Note on House Bill 4 corroborates what the floor report states; it makes clear that the exemption provided in the constitutional amendment applied only to "*currently authorized* forms of gambling." (Emphasis added.) The non-technical ballot summary of the amendment that was provided to the voters for ratification of the amendment similarly suggests that the exemption provided by (a)(3) was not intended to encompass new forms of gaming regulated under Title 12 of the Criminal Law Article: "this constitutional amendment provides that it does not apply to gaming conduct as authorized by certain other laws, such as lotteries, wagering on horse racing, and charitable gaming." Inasmuch as lotteries and horse racing are exempt under paragraphs (a)(1) and (a)(2) respectively, the clear implication is that the (a)(3) exemption was intended to cover "charitable gaming," which is all that Title 12 authorized at the time.

In other respects as well, the legislative history does not support an intent to allow the Legislature to circumvent the constitutional limitations on the expansion of gambling simply by codifying any expansion in Title 12 or Title 13. When the bill was brought out on the floor of the House on November 16, 2007, the chair explained, repeatedly, that the determination had been made that it was important to allow the people to vote on any expansion of gaming, that the people wanted, and were to have, the right to vote on any expansion of commercial gaming, and that all such issues would be sent to them.

We recognize that it could be argued that limiting (a)(3) to existing gaming might also render it meaningless, since existing gaming would not require a subsequent legislative enactment that might trigger Article XIX's referendum requirement. But it appears that the purpose of the provision, as described in the House Floor Report, was simply to assure legislators that currently authorized forms of gaming would not be affected. Indeed, as initially drafted, subsection (a)(3) identified the specific types of gaming that were authorized at the time, namely, "gaming conducted by a bona fide fraternal, civic, war veterans', religious or charitable organization, volunteer fire company, or substantially similar organization included under Title 12 or Title 13 of the Criminal Law Article of the Annotated Code of Maryland." This initial formulation would have made clear that other, subsequently-authorized forms of gaming would not fall within the exemption. The Ways and Means Committee Amendments ultimately struck the language relating to the different entities conducting the gaming, but at the same time clarified in the floor report that, by doing so, it was not opening the door to a legislative expansion of gaming under Title 12. Based on the legislative record, it seems clear that the purpose of the exemption was simply to address the general concern that the constitutional amendment might disrupt existing, authorized forms of gaming.

In light of the above, it is our view that the exemption from referendum provided at subsection (a)(3) of Article XIX is limited to the forms of gaming that had been authorized as of 2007, and because Chapter 346 was enacted after that date, it is not covered by the exemption.[8] As a result, the bill would have been required to go to referendum if it authorized "additional forms" of, or the "expansion" of, "commercial gaming." We turn next to what types of fantasy sports Chapter 346 authorized and whether they qualify as "commercial gaming."

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[8] The conclusion that we reach does not, we believe, call into question the validity of other gaming law provisions that have been amended since the adoption of Article XIX. For example, Chapter 603 of the 2012 session extended a sunset provision that would have foreclosed the operation of electronic instant bingo machines that had been in operation as of 2007 and early 2008. We do not believe that the extension of that provision had the effect of "expanding" gaming when it allowed only for machines that were operated "in the same manner" and in the same number as they were at the earlier time. *See* Crim. Law § 12-308. The bill also made other adjustments that restricted, rather than expanded, gaming. *See* 2012 Md. Laws, ch. 603 (revising the definition of "slot machine" in Crim. Law § 12-301(2) and (3) so as to create new restrictions on gaming over the Internet and on handheld bingo machines; adding regulatory oversight and certification of "electronic gaming devices" under Crim. Law § 12-301.1). And while that legislation removed from the definition of "slot machine" any "skills-based amusement device that awards prizes of minimal value" approved by regulation, Crim. Law § 12-301(3)(vii), the provision would seem to call for a regulatory refinement of existing devices, rather than an expansion or new form of gaming. But if a court were to determine that these provisions were, in fact, additional forms or an expansion of gaming—and "commercial" gaming at that—the remedy would be to subject them to referendum under Article XIX, not to exempt Chapter 346 from that requirement.

II. What Types of Fantasy Sports Are Covered by § 12-114 of the Criminal Law Article?

The first step in determining whether Chapter 346 authorized the expansion of commercial gaming is identifying what types of activities are included within its reach. As noted above, Chapter 346 was modeled on TFS and it seems clear that TFS is included. Whether the bill was intended to encompass DFS as well is less clear.

Although the focus of the bill was traditional fantasy sports, there is some indication that the Legislature was aware that the bill would encompass *daily* fantasy sports as well. The Fiscal and Policy Note, for example, indicates that, "[w]hile competition over the course of an entire season is common, some fantasy competitions have far shorter durations, including competitions based on performance on one given day." This language also appears in the Ways and Means Committee Floor Report. Still, there was not a thorough discussion of the daily games or how they worked; in 2012, daily fantasy sports were still in their "infancy." Darren Heitner, "An Abbreviated History of FanDuel and DraftKings," Forbes (Sept. 20, 2015). Rather, the clear focus of the bill was on traditional fantasy gaming between friends and the fact that many online sites had blocked Maryland residents from receiving modest prizes such as t-shirts. Moreover, the language of the statute exempts *participation* in fantasy competition, not the companies that provide the competition itself. That makes sense with respect to TFS, where the participants themselves organize the games and the online platforms provide statistical and other services. It does not make sense with respect to DFS, where the online provider establishes the competition and does not participate in the competition. Finally, a recent statement attributed to former Delegate Olszewski seems to confirm that the daily fantasy sites to which the Department of Legislative Services referred are not the type of DFS that concern us here: "I don't think anyone even back in 2012 envisioned the evolution we've seen. We're not talking about friends and family leagues anymore." Jeff Barker, "Maryland warily eyes fantasy sports boom," Baltimore Sun (Nov. 22, 2015).

Notwithstanding the uncertainty as to whether applicability to DFS was envisioned by the Legislature, DFS may well satisfy the statutory criteria for the exemption provided by § 12-114. DFS participants own, manage, or coach imaginary teams; the prizes offered to winning participants are established and made known to participants in advance of the contest; and no winning outcome is based solely on the performance of an individual athlete or a real-world team. *See* § 12-114(a)(1), (2), and (4). It also seems clear that the winning outcomes are determined by statistics generated by actual players on sports teams as required by § 12-114(a)(3). The question with respect to DFS is whether the winning outcome of the game "reflects the relative skill of the participants" in the fantasy games themselves, as is further required by § 12-114(a)(3). Ultimately, this poses a question of fact that cannot be determined by this office, but it seems plausible that a reviewing court would conclude that DFS meets this criterion as well.[9] For

[9] As discussed below, the DFS providers maintain that skill is in fact the *predominant* factor in determining who wins their contests, with experienced players consistently outperforming the more casual participant.

purposes of this letter, therefore, we assume that at least some forms of DFS would be covered by § 12-114. We turn next to whether DFS constitutes "gaming" and, if so, whether it qualifies as "commercial gaming" such that its authorization under § 12-114 would have triggered the Article XIX referendum requirement.

III. Do Fantasy Sports Qualify as "Commercial Gaming" Under Article XIX?

Article XIX does not define the term "commercial gaming" and no statutory provision, court decision, or Attorney General opinion establishes a generally-accepted meaning of the term. The legislative history surrounding the development of what eventually became the 2007 constitutional amendment contains some indication that the referendum requirement was focused on additional slot machines and slots venues, not on other forms of commercial gaming. For example, in a 2004 letter to then-Governor Robert Ehrlich, House Speaker Michael Busch explained that "[p]ressure to expand the number of slots locations and machines will begin immediately after a bill is enacted as it has in every jurisdiction that has approved slots at [horse-racing] tracks. Only a constitutional amendment will slow that process and make the lobbying more transparent." David Nitkin, "Taking aim at Bush, Ehrlich," Baltimore Sun (Aug. 31, 2004).[10]

Early versions of the amendment seemed to focus on more than just slots facilities, however, by including within their reach "casino-style gaming" more generally. For example, legislation introduced in the 2003 session stated that "the general assembly . . . may not authorize statutorily any additional forms or expansion of commercial gaming, including casino-style gaming, card games, dice games, roulette, slot machines, and video lottery terminals." House Bill 890 (§ 2(a)); *see also id.* (preamble, stating that "[t]he authorization of any additional forms or expansion of commercial gaming, such as casino-style gaming, in the State is prohibited by this Act"). As enacted in 2007, the amendment omitted the illustrative term "such as casino-style gaming," and instead categorically required a referendum to approve legislation authorizing "commercial gaming," including "additional *forms*" of commercial gaming.[11] We turn to the constituent parts of that term next, first to whether DFS constitutes "gaming" under Maryland law and, if so, then to whether DFS constitutes "commercial" gaming.

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[10] Mr. Nitkin is currently the Director of Communications for the Office of the Maryland Attorney General.

[11] Although the legislative history surrounding the enactment of Article XIX does not mention fantasy sports as one such "additional form" of commercial gaming, one would not expect it to do so. DFS as we know it now was not a going concern as of 2007; the two online providers that began DFS—FanDuel and DraftStreet—were both created in 2009. DraftKings, which ultimately acquired DraftStreet, was not founded until 2012. *See The Complete History of the Daily Fantasy Sports Industry*, available at http://dailyfantasynews.com.

A. Does DFS Qualify as "Gaming" Under Maryland Law?

Maryland's gaming laws contain two prohibitions that could be implicated by DFS: (1) § 12-102(a)(1) of the Criminal Law Article, which provides that a person may not "bet, wager, or gamble"; and (2) subsection (a)(2) of that same provision, which states that a person "may not . . . make or sell a book or pool on the result of a race, contest, or contingency." We will address each in turn.

1. Section 12-102(a)(1) and What it Means to "Bet, Wager, or Gamble"

It is our view that, at the time Chapter 346 was enacted, fantasy gaming for which an entry fee or other consideration is paid could be found to violate Criminal Law Article, § 12-102(a)(1). Although the terms "bet, wager, or gamble" are not defined by statute, the Attorney General opined that "[e]stablishing a violation of this provision requires a showing of 'consideration, chance, and reward.'" 91 *Opinions of the Attorney General* at 65 (quoting *Chesapeake Amusements*, 363 Md. at 24); *see also* 94 *Opinions of the Attorney General* at 36 n.10. All three seem to be present in DFS.

Consideration. Consideration means that there must be money or another thing of value given for the opportunity to receive the reward. 91 *Opinions of the Attorney General* at 65-66. Consideration can include not only money paid to participate, but such things as donations to charity, a "nominal fee," payment of a cover charge to enter the bar where the tournament is held, and entrance fees, as well as membership fees for a poker league. *Id.* at 66. Under this broad definition, fantasy games with any sort of entry fee would likely be found to involve consideration.[12] In the *Humphrey* case, the federal district court concluded that the entry fees paid for TFS "do not constitute bets or wagers where they are paid unconditionally for the privilege of participating in a contest, and the prize is for an amount certain that is guaranteed to be won by one of the contestants (but not the entity offering the prize)." *Id.* at *8 (parentheses in original). Regardless of whether it is a bet or wager, money paid to participate is clearly consideration. The *FanDuel* court did not expressly disagree with the conclusion of the *Humphrey* court, but differentiated the fees charged by FanDuel and DraftKings for DFS, which were charged for each separate game, and were, in some cases, significantly higher than those charged for seasonal play. As a result, the New York court found that the entry fees were "consideration." Neither *Humphrey* nor *FanDuel* is binding on Maryland courts, but together with the 2006 Attorney General's Opinion, they suggest that the variable "entry fees" for DFS would constitute consideration, though an entry fee for TFS may not if it is charged uniformly and in a manner that reflects that it is for services rendered, such as statistics and computer time.

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[12] By contrast, contests that are free to enter would not satisfy this criterion and thus would not constitute gaming under Maryland law.

Chance. Courts around the country have taken a number of different approaches to determining whether a game depends on chance or skill. The majority view is the "dominant element" test, which examines whether chance or skill is the major factor in the result of a contest. This test has been described as looking to whether an activity is one of chance, where "greater than 50 percent" of the result is derived from chance, Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 Harv. J. Sports & Ent. L. 1, 28-29 (2012) (hereinafter "Edelman"), or whether the outcome of a given game is controlled by mere chance or factors that the participant is able to control. Ehrman at 96 (2015). While this test is fairly straightforward, there is no definitive way to determine whether chance or skill predominates, and courts have reached differing conclusions in borderline games such as poker, backgammon and three-card monte. Jon Boswell, *Fantasy Sports: A Game of Skill That is Implicitly Legal Under State Law, and Now Explicitly Under Federal Law*, 25 Cardozo Arts & Ent. L.J. 1257, 1265 (2008) (hereinafter "Boswell").

There are other tests used in a small number of states. Among them is the "material element test," which will prohibit wagering on a game "if chance has more than a mere incidental effect on the game," even if "skill may primarily influence the outcome." Anthony N. Cabot et al., *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L. Rev. 383, 392-93 (2009). New York follows this approach. *See* New York Penal Code, § 225.00 (defining "gambling" as risking something of value on a "contest of chance" or "a future contingent event not under his control or influence," and defining "contest of chance" as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein"). Also included among these more marginal tests are the "any chance" test, under which the element of chance will be found if there is *any* chance that influences the outcome of the game, and the "gambling instinct" test, which looks to the nature of an activity to determine if it appeals to one's gambling instinct. Edelman at 29. Finally, in Illinois it appears that the degree of chance or skill is irrelevant to whether an activity qualifies as "gambling." *See* 720 Ill. Comp. Stat. Ann. 5/28-1(a)(1) ("A person commits gambling when he or she . . . knowingly plays a game of chance or skill for money or other thing of value"); *see also id.* at (b)(2) (exempting participants in "any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest").

None of these tests have been adopted by Maryland courts, but in *Brown v. State*, 210 Md. 301, 307 (1956), the Court of Appeals held that the law prohibiting the operation of a "gaming table" was not confined to games of chance, but also applied to games of skill.[13] *Brown* thus suggests that DFS could qualify as gaming even if, as the providers maintain, skill figures prominently in determining the outcome of the DFS contest. Indeed, *Brown* notes that, "[i]n its broader aspects, playing any game for money is gaming," particularly when "the inducement to

[13] The slot machine law, on the other hand, has been held to require an element of chance. *Chesapeake Amusements*, 363 Md. at 24; *State v. 158 Gaming Devices*, 304 Md. 404 (1985).

play was, in part at least, the chance of gain." *Id.* (internal quotation marks omitted); *see also F.A.C.E. Trading, Inc. v. Todd*, 393 Md. 364, 378 (2006) (quoting *Brown*).

Although no court has elaborated on how these tests relate to fantasy gaming,[14] several Attorneys General have addressed the issue. The Kansas Attorney General, applying the dominant element test, concluded that fantasy sports leagues, as defined in proposed legislation based on the federal law, would not constitute a "lottery." Kan. Atty. Gen. Op. No. 2015-9, 2015 WL 1923114 (2015). The opinion concluded that the language in the proposed legislation incorporating the federal definition of "fantasy sports leagues"—including the requirement that "all winning outcomes reflect the relative knowledge and skill of participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events,"—effectively incorporated the dominant element test (which it referred to as the "dominant factor test"). Applying that test, the Attorney General concluded that games permitted by the legislation would be games of skill, and thus not lottery. The Attorney General did not, however, have any particular type of fantasy game before him. In contrast, the Louisiana Attorney General opined that the presence of an element of skill was relevant to whether an activity was a lottery, but not to whether it is gambling, and thus concluded that fantasy gaming was illegal gambling in that State. La. Op. Atty. Gen. 91-14, 1991 WL 575105 (1991).[15] Most recently, the Illinois Attorney General has determined that DFS is illegal gambling under Illinois law—a conclusion that DFS providers have challenged in court. *See* Ill. Op. Atty. Gen., No. 15-006 (Dec. 23, 2015).

In general, commentators seem to be of the view that a traditional fantasy sports contest is a game of skill. Ehrman at 102; Edelman at 28; Boswell at 1270. Some express doubt, however, about whether *daily* fantasy sports meet that standard. Trippiedi at 202; Edelman at 30; *but see* Ehrman at 81. Although both types of fantasy sports undoubtedly require skill in the selection of players,[16] DFS does not allow for the forms of roster management that simulate what a real-life

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[14] The *Humphrey* court recited as fact that the success of a traditional fantasy sports team depended on the participants' skill. *Id.* at *2. The *FanDuel* court, on the other hand, presumably must have believed that the daily games met the chance requirement of New York law.

[15] Although daily fantasy sports sites block residents of Louisiana, *see supra* note 3, that has not stopped Louisiana residents from filing suit against FanDuel and DraftKings over the recent use of inside information by DraftKings employees to win money from FanDuel. *Latest Daily Fantasy Sports Lawsuit Has A Twist: The Plaintiff Played From A Banned State*, Legal Sports Report (Oct. 13, 2015) www.legalsportsreport.com/5019/louisiana-daily-fantasy-sports-lawsuit.

[16] In fact, DFS providers maintain that their type of draft, which allows participants to select *any* player within salary cap constraints, requires more skill than the so-called "snake draft" used in many TFS games, where a randomly-generated draft order and other players' selections interject an element of chance. At least one commentator disagrees, arguing that TFS allow one participant to pick a player simply to prevent another participant from doing so and thereby weaken his opponent. That type of selection mechanism "allows for a greater use

team manager does, such as "negotiating trades with other owners, or engaging in other 'team management' activities, such as adding or dropping players." Edelman at 30. Instead, once a DFS player has made his or her final selections, those selections are locked in before the relevant games begin. At that point, the participant can do nothing but hope that the players he has picked perform well.

Nor does DFS provide time for the participant's management skills to offset "chance factors such as the physical and mental conditions of player, potential problems between team members, and game time weather conditions." Edelman at 30. For example, if a DFS participant's star player is injured on the first play, the platform provides no opportunity to insert a bench player into the lineup or select a free agent to fill the void created by the injury, as a TFS participant would be able to do. Thus, while an untimely injury will hurt both types of participants, it will *devastate* a DFS participant's chances.

None of the foregoing dictates what path a Maryland court will take. There certainly seems to be an element of skill involved in DFS; a small percentage of experienced DFS participants consistently outperform the average player.[17] At the same time, there can be no question that chance is an element in fantasy sports. Everyone involved in the debate over the legality of fantasy sports agrees that winning depends on how well one *predicts* how real-world players will perform. While a participant might vastly improve the accuracy of his or her predictions by studying the past performance of players, finding bargain players who outperform their salaries, and employing other selection strategies, ultimately the participant has no control over the athletes' performances, which can hinge on any number of unknown factors. Engle at 79. In this respect, DFS bears some resemblance to betting on horse races—which is commonly accepted as gambling—in which one can improve one's chances by reading up on the records of horses, the conditions in which individual horses perform well, the condition of the track and the weather on the day of the race, and the health of the horse, including whether it has been administered Lasix. Just as wagering on horses tends to reward the bettor who finds a horse that is stronger than its odds would suggest, the salary cap feature of DFS rewards a participant for

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of skill, knowledge, and strategy." Trippiedi at 220.

[17] At least one of the private suits against FanDuel and DraftKings suggests that the DFS providers manipulate DFS participation in order to inflate the success rate of experienced players. In *Genchanok v. FanDuel*, Case 2:15-cv-05127-MVL-KWR (filed October 13, 2015), the Complaint alleges that FanDuel and DraftKings actively seek new customers because they rely on inexperienced new customers to keep its most active users on their site, presumably by making it more likely that the more active users will win. Complaint at ¶¶ 6 and 7. Presumably, the higher levels of wins by experienced players then boost the statistics that the sites use to support their claim that DFS is a game of skill. The *Genchanok* complaint further alleges, however, that many of the top winners supporting these statistics are employees of other DFS sites who have inside information from their employers. Complaint at ¶ 38. If shown, this would obviously weaken the skill argument.

finding a player who outperforms his or her salary. In both activities, participants use skill to improve their chances of winning, but ultimately their success will hinge on the real-world players' performances, which, like a roll of the dice or a dealt hand of cards, is something over which DFS participants, like bettors at the race track, have no control.

This most likely explains why the cases involving games of skill typically involve betting by participants *in the game itself* rather than betting by people who seek to predict either the result of the game of skill or events within that game or a series of games. In fact, prior to a change in New York law that essentially eliminated the dominant element test in that State, the practice commentary to N.Y. Penal Code, § 225.00 noted that betting on the outcome of a chess game would constitute gambling "[d]espite chess being a game of skill, X and Y are gambling because the outcome depends upon a future contingent event that neither has any control or influence over." *See* Donnino, Practice Commentary, McKinney's Penal Law Book 39, p 355, cited in *People v. Jun Feng*, 2012 WL 28563, *3, 946 N.Y.S.2d 68 (Table) (N.Y. Crim. Kings County 2012). By contrast, the same practice commentary noted that wagering between the two chess players would not similar constitute gambling. *Id.*

We cannot predict with certainty whether a Maryland court would find that either TFS or DFS is a game of skill and therefore would not satisfy the "chance" requirement necessary to establish a violation of § 12-102(a)(1) of the Criminal Law Article. That uncertainty has both a legal and a factual component. Legally, it is difficult to predict how the Court of Appeals might rule with respect to the level of chance that is required to establish a violation of the law against betting, wagering, or gambling. Factually, it is difficult to draw broad conclusions with respect to the many different types of TFS and DFS formats available. But given that TFS and DFS contain an element of chance (*i.e.*, the performance of the players, over which the participants have no control), We believe a reviewing court could conclude that both forms of fantasy sports—and particularly DFS—meet the "chance" criterion of the "consideration, chance, and reward" test for purposes of Criminal Law § 12-102(a)(1). This is especially true in light of § 12-113 of the Criminal Law Article, which requires the Office of the Attorney General, the State Lottery and Gaming Control Commission, the Department of State Police, local law enforcement units, and the court to "construe liberally this title relating to gambling and betting to prevent the activities prohibited." *See F.A.C.E. Trading*, 393 Md. at 377 (recounting long history of liberal construction requirement).

Reward. As for the third element of gambling, it has been said that a reward may take the form of money, or some other thing of value, such as chips convertible to money, or points convertible to some sort of prize. 91 *Opinions of the Attorney General* 64, 65 (2006). Some fantasy games apparently do not provide rewards, and, as such, would not be deemed gaming. Most, however, do provide some sort of prize, and this factor would be satisfied.

2. Section 12-102(a)(2) and What it Means to "Make or Sell a Book or Pool"

It is also our view that DFS might qualify as a "pool" or "bookmaking" under § 12-102(a)(2) of the Criminal Law Article. That provision states that a person "may not . . . make or sell a book or pool on the result of a race, contest, or contingency." Unlike subsection (a)(1), discussed above, this provision does not depend in any way on whether the race, contest, or contingency involved skill, or whether success in picking the winner would depend on skill. It simply prohibits the making of or selling of a book or pool on the result of a race, contest or contingency.[18]

The term "pool" is not defined by Maryland law, and there are no Maryland cases that construe it. Resorting to the dictionary, a pool is defined as a "gambling scheme in which numerous persons contribute stakes for betting on a particular event (such as a sporting event)." Black's Law Dictionary (9th Ed. 2009) at 1278. The common form is a combination of stakes, in which the money collected is to go to the winner. It is not necessary, however, that all of the money go to the winner, as the person running the pool ordinarily takes a share. *Commonwealth v. Sullivan*, 105 N.E. 895 (Mass. 1914). Thus, the criminal offense is established if there is a combination of stakes, a part of which is to go to the winner. *Id.* at 895-96.

As for "bookmaking," it too is not defined by Maryland law. Dictionaries define it as "[g]ambling that entails the taking and recording of bets on an event, esp. a sporting event such as a horse race or football game." Black's Law Dictionary (9th Ed. 2009) at 207. As discussed above, the salary cap feature of DFS seems to function much as "odds" or the "point spread" does when betting on individual games; both reward the participant for finding under-valued picks. Still, it might be difficult to characterize DFS as bookmaking when DFS providers have no stake in the outcome of the wagers placed with them. Instead, DFS providers play a role that seems more akin to the role the "house" plays with respect to poker tables; they profit from the underlying transaction but they do not participate in it the same way that a bookmaker does. Still, we cannot rule out the possibility that a court would conclude that DFS, with its differing combinations and numbers of participants, might also qualify as "bookmaking."

To qualify as a "pool" or "book," however, the wager must hinge on the "result of a race, contest, or contingency." Although a sporting event is obviously a contest, neither variety of fantasy sports involves predicting the outcome of actual games or the result of a particular play. Instead, the outcome of fantasy sports hinges on an *accumulation* of the plays that make up the games. Those discrete plays are then reflected in the selected players' aggregate statistics and, ultimately, the participant's "points." While it seems a stretch to regard each of those underlying

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[18] In fact, the original version of Criminal Law Article, § 12-102(a)(2), enacted as Chapter 206, Laws of Maryland 1890, was designed to ensure the illegality of betting on horse races after the Court of Appeals found that activity was not covered by the provisions on gaming devices in *James v. State*, 63 Md. 242 (1885).

plays as a "contest" within the meaning of the statute, they could qualify as "contingencies." *See* Black's Law Dictionary (9th Ed. 2009) at 362 (A contingency is "[a]n event that may or may not occur; a possibility."). Although DFS participants wager on a series of contingencies across multiple games, the use of the singular in a statute includes the plural, General Provisions Article, § 1-202, and betting that involves predicting the results of multiple games has been held to be a game of chance and not a game of skill. *Commonwealth v. Laniewski*, 98 A.2d 215, 217 (Pa. Super. 1953); *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1370 (Wash. 1972) (en banc).

In sum, it is by no means clear that fantasy sports were legal under § 12-102 of the Criminal Law Article at the time that Chapter 346 was enacted. Given the liberal construction to which we must give our gambling laws, there are good reasons to believe that fantasy sports involved a "bet, wager, or gamble" under subsection (a)(1) of that statute or a "pool" or "book" under subsection (a)(2). Indeed, the express purpose of Chapter 346 was to "*exempt*[] certain fantasy competitions from gaming prohibitions," which presupposes that those prohibitions applied or at least might have applied at the time. *See* 2012 Md. Laws, ch. 346 (preamble, emphasis added). Under the circumstances, a court could conclude that the effect of Chapter 346 was to authorize an additional form, or expansion, of gaming.[19] If so, the question then becomes whether the gaming that fantasy sports involves is "commercial" gaming.

B. Does DFS Qualify as "Commercial" Gaming Within the Meaning of Article XIX?

Prior to the adoption of Criminal Law Article, § 12-114, Maryland law provided for three categories of legalized gaming: (1) for profit (*i.e.*, commercial gaming); (2) non-profit (*i.e.*, conducted for charitable, social, fraternal and other purposes); and (3) governmental (*i.e.*, the lottery). Section 12-114 was the first provision to legalize any form of *private* gaming.[20] It seems clear, however, that the term "commercial gaming" was not intended to include private gaming, and, as a result, that Article XIX, § 1(e) would not apply to a law permitting private gaming of a type not previously permitted.

Thus, where the participants in TFS gather to form a league, hold their own draft, and simply rely on a host to supply the necessary computer and other services for a seasonal fee, the gaming is operated by the participants and is private rather than commercial gaming. The host is no more conducting gaming than are companies who sell cards, dice, bingo supplies, trophies or other similar items. Other participants in TFS may use additional services from the host, and, depending on the facts, might still be conducting the games themselves. And the TFS-providers' purpose in offering statistical and other services seems to be to draw more traffic to their websites

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[19] The Florida Attorney General reached a similar conclusion with respect to a Florida statute prohibiting betting on "the result of any trial or contest of skill, speed or power or endurance of man or beast." *See* Fla. Op. Att'y Gen. 91-3, 1991 WL 528146 (Fla. A.G. 1991).

[20] By private gaming we mean social poker games in private homes, office NCAA brackets, picking squares at Super Bowl parties, and similar activities.

and otherwise foster greater consumer interest in the sports coverage that they offer. It is not possible to analyze all of the possible factual situations, but, in general, these considerations suggest that most TFS would not be considered commercial gaming.

DFS presents a different situation. In DFS the *provider* creates the games, determining which events are included, how many people play, and the basis of the distribution of the winnings. Far from conducting the games themselves, individual participants pick the games they will play from those that are being offered by the provider on the day they log on. Moreover, DFS providers collect a portion of the entry fee for each game—whether as a "commission" or as a built-in profit margin—rather than charging a single charge for service as appears to be the case with TFS. And unlike some online companies that provide services to TFS participants more or less to drive website traffic, the DFS provider's *entire business model* is based on getting as many participants as possible to pay to play as frequently as possible, so as to generate millions of dollars in entry fees. Based on these limited facts, it seems clear that DFS companies, if they are conducting gaming, are conducting it for profit.

In sum, if DFS constitutes gaming under Maryland law, it would constitute "commercial gaming" that could not have been authorized by Chapter 346 without a referendum. Because no referendum was conducted, any authorization of daily fantasy sports that Chapter 346 might otherwise have provided would not be effective.

IV. Chapter 346 Can Be Given Effect to the Extent That it Reaches Gaming That Is Not Commercial

Finally, while Chapter 346 would be invalid to the extent that it could be applied to authorize an additional form of commercial gaming, it is our view that it could still validly apply to any fantasy games that were found not to be commercial or not to constitute gaming. General Provisions Article, § 1-210(a) provides that the provisions of all statutes enacted after July 1, 1973 are severable. This provision does not control in all situations, but in general, the courts will separate valid from invalid portions of a statute where it appears that the General Assembly would have intended that the statute be given partial effect if it had known that the remainder was invalid. In this case, the legislative history shows that the main focus of the General Assembly was TFS. The sponsor of the bill talked about his league and others talked about sports and news sites that offered traditional fantasy games. While the word "daily" was mentioned in one of the hearings and daily play was mentioned in the Fiscal and Policy Note and repeated in the Ways and Means Committee Floor Report, there was not a thorough discussion of daily games or how they worked. Rather, the intent of the legislation, as revealed in the testimony, was to address the fact that most traditional fantasy sports platforms had blocked Maryland residents from receiving prizes. *See* 2012 Olszewski Testimony. This aim would be best served by allowing Chapter 346 to be given effect to the full extent permissible under the Maryland Constitution.

Conclusion

Whether Chapter 346 was subject to the referendum requirement of Article XIX depends on a number of subsidiary questions, each of which is a close call. In addition, there are many different types of fantasy sports platforms and it is difficult, if not impossible, to reach broad conclusions that would apply to all of them in the absence of the type of factual inquiry for which our advisory function is ill-equipped. Further complicating matters is the fact that *daily* fantasy sports have only emerged in the last few years and there are few judicial opinions—and none in Maryland—that address this new form of fantasy sports.

Subject to those caveats and as discussed above, we believe that the better answer to each question leads to the conclusion that Chapter 346, to the extent it authorized daily fantasy sports, should have been referred to the electorate under Article XIX. However, due to the substantial uncertainty surrounding these issues and because the legislative history surrounding Chapter 346 suggests that the General Assembly did not focus on the regulation of daily fantasy sports in 2012, and could not realistically have considered daily fantasy sports as they exist today, we recommend that the Legislature squarely take up the issue this session and clarify whether daily fantasy sports are authorized in Maryland. By contrast, we think it is clear that traditional fantasy sports were authorized by Chapter 346. Because we conclude that it is likely that traditional gaming does not constitute "commercial" gaming within the meaning of Article XIX, Chapter 346, as applied to traditional fantasy sports, may be given effect.

Sincerely,

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