



State of West Virginia
Office of the Attorney General

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July 7, 2016

The Honorable William P. Cole III
President of the Senate
Building 1, Room 229M
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear President Cole:

You have asked for an Opinion of the Attorney General about whether offering or participating in certain fantasy sports games is legal in West Virginia. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General shall “render to the president of the Senate . . . a written opinion or advice upon any questions submitted to the attorney general . . . whenever he or she is requested in writing so to do.” To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General or upon the sources cited.

Your letter raises the following legal question:

Whether West Virginia prohibits or criminally sanctions the offering of or participation in fantasy sports games, as defined in Senate Bill 529.

BACKGROUND

Generally speaking, participants in a fantasy sports league “simulate being a sports team owner or manager.”¹ Participants select a lineup of real athletes from real-world sports leagues—such as the National Football League, Major League Baseball, the National Basketball Association, or the National Hockey League—within the limits of either a draft or a fictional salary cap, and then win points for their fantasy sports teams based on the accumulated statistical performance by their team of athletes in real-world games.² A fantasy baseball manager, for

¹ Tex. Op. Att’y Gen. No. KP-0057, 2016 WL 281742 at *1 (2016).

² Ryan B. Frazier, *Don’t Bet on It: Allowing A Fantasy Sports League May Be Gambling with Legal Trouble*, 28 Westlaw J. Ent’t Indus. 1, *1–2 (2016).

example, might win points for each of his hitters' hits, home runs, stolen bases, and walks, as well as points based on his pitchers' earned runs, strikeouts, innings pitched, and saves.³ Because a fantasy team consists of individual players from many real-world teams, the actual outcomes of real-world games do not count toward points in fantasy leagues.⁴

Fantasy sports leagues operate in varying capacities in most states in the nation. Some leagues are free to play and may or may not award prizes; others charge entrance fees and give out cash prizes.⁵ Some last a day; others a season.⁶ At present, pay-to-play online fantasy sports games operate in forty states,⁷ including West Virginia. Ten states currently have no fantasy sports operations: Alabama, Arizona, Hawaii, Idaho, Iowa, Louisiana, Montana, New York, Nevada, and Washington.⁸

Officials and legislatures in several states have addressed the legality of pay-to-play fantasy sports leagues under state law. Some state attorneys general, such as those in Kansas, Massachusetts, and Rhode Island, have found pay-to-play fantasy sports leagues to be lawful. Other state attorneys general, including those in Nevada, New York, and Texas, have found them to be unlawful. In at least eight states, including Indiana, Tennessee, and Virginia, the legislatures have passed laws directly authorizing pay-to-play fantasy sports.⁹

During the last legislative session, one chamber of the West Virginia Legislature took steps toward clarifying the legality of fantasy sports in our state. By an 18 to 16 vote, the Senate passed Senate Bill 529, which provides that state law does not criminally prohibit the offering of or participation in "fantasy games." Committee Substitute, W. Va. S. 529 (2016). A "fantasy

³ See, e.g., *Scoring Settings Custom*, ESPN, <http://games.espn.go.com/flb/resources/help/content?name=scoring-settings-custom> [<https://perma.cc/DZM4-QLUY>] (listing dozens of potential statistical categories).

⁴ R.I. Op. Att'y Gen. at *1 (Feb. 4, 2016), <http://www.legalsportsreport.com/wp-content/uploads/2016/02/Rhode-Island-DFS-Opinion.pdf> [<https://perma.cc/3KAB-EE2S>].

⁵ Nev. Op. Att'y Gen. at *2-*4 (Oct. 16, 2015), <http://www.legalsportsreport.com/wp-content/uploads/2015/10/Nevada-AG-DFS.pdf> [<https://perma.cc/G6HM-ZBC4>].

⁶ Tex. Op. Att'y Gen. No. KP-0057, 2016 WL 281742 at *1 (2016).

⁷ Chris Grove, *What Are The States Where You Can Play Daily Fantasy Sports?*, Legal Sports Report, <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> [<https://perma.cc/8L57-JCH3>].

⁸ *Id.*

⁹ Colorado, Indiana, Kansas, Maryland, Mississippi, Missouri, Tennessee, and Virginia have directly authorized fantasy sports games. Colo. HB 16-1404 (signed into law June 10, 2016) (to be codified at Colo. Rev. Stat. § 12-15.5-101); Ind. Pub. L. 212 (S. 339) (signed into law Mar. 24, 2016) (to be codified at Ind. Code § 4-33-24); Kan. Stat. Ann. § 21-6403; Md. Code Ann., Crim. Law § 12-114; Miss. Code Ann. § 97-33-305; Mo. HB 1941 (approved by Governor June 10, 2016) (to be codified at Mo. Rev. Stat. ch. 313); Fantasy Sports Act, 2016 Tenn. Laws Pub. Ch. 978 (S.B. 2109); Fantasy Contests Act, Va. S.B. 646 (to be codified at Va. Code tit. 59.1, ch. 51). The New York legislature has also passed legislation legalizing fantasy sports, which is presently awaiting delivery to the state's governor for approval. N.Y. S 8153 (passed legislature June 17, 2016).

game” is defined as a “fantasy or simulation sports game or educational game or contest” in which:

- (1) The value of all prizes and awards offered to winning participants is established and made known to the participants in advance of the fantasy game.
- (2) All winning outcomes reflect the relative knowledge and skill of participants and are determined predominantly by accumulated statistical results of the performance of individuals, including athletes in the case of sporting events.
- (3) A winning outcome is not based on the score, point spread or performance of a single team or combination of such teams, or on any single performance of an individual athlete or player in a single event.

Id. The House of Delegates did not vote upon this bill before the legislative session concluded.

Although some fantasy sports games are free to play or offer no prizes, this Opinion concerns only the legality of fantasy sports games played for money. Your question is limited specifically to whether West Virginia prohibits or criminally sanctions the offering of or participation in fantasy sports games, *as defined in Senate Bill 529*. As noted above, Senate Bill 529 defines fantasy games as those that offer prizes and awards to winning participants.

DISCUSSION

We conclude that West Virginia does not prohibit the offering of or participation in fantasy sports games, as they are defined in Senate Bill 529. We read state law to prohibit only betting upon games decided at least predominantly by chance. Fantasy sports games, as defined in the Senate Bill, are not so decided. Rather, they are determined predominantly by skill, knowledge, and athletic performance. Because you have not asked, we do not specifically address whether particular fantasy sports games meet the Senate Bill’s definition. But we do note that fantasy sports games, as we have described them in the background discussion above, are likely not decided predominantly by chance.

We further conclude that this Opinion is consistent with the decisions of most other state attorneys general regarding the legality of fantasy sports games. Those state attorneys general who have found their state laws to prohibit only betting upon games decided predominantly by chance, as we have determined about West Virginia law, have similarly found pay-to-play fantasy sports games to be lawful in their states. In contrast, in those states where fantasy sports games have been found unlawful, the state attorneys general have found state gambling laws to apply more broadly than in West Virginia, prohibiting betting in many more games than simply those where chance predominates.

I. West Virginia Does Not Prohibit Fantasy Sports Games Played As Defined In Senate Bill 529.

A. State law prohibits betting on private lotteries and other “games of chance.”

Pursuant to a constitutional directive regarding lotteries, the West Virginia Legislature has prohibited some forms of gaming. Article VI, Section 36 of the West Virginia Constitution specifically forbids private lotteries.¹⁰ Accordingly, there are several provisions of the West Virginia Code that ban private lotteries and other games of chance.¹¹

But the Legislature “has not deemed it necessary to prohibit all forms of gaming.” *State v. Gaughan*, 55 W. Va. 692, 48 S.E. 210, 212 (1904). Under an express exception to the constitution’s ban on lotteries, the Legislature has enacted laws permitting state-operated lotteries (which include table games at casinos)¹² and state-regulated bingos and raffles by charitable organizations.¹³ Moreover, as the Supreme Court of Appeals has observed, “[m]any games may be played in private places” in West Virginia. *Id.* By failing to enact further statutory prohibitions, “[t]he Legislature has, in effect, said that people may indulge in certain games of amusement, or even bet on them.” *Id.*¹⁴

The question, thus, is whether the statutory prohibitions on private lotteries and other “games of chance” apply to online fantasy sports games.

¹⁰ In relevant part, Section 36 of Article VI of the state constitution reads:

The Legislature shall have no power to authorize lotteries . . . and shall pass laws to prohibit the sale of lottery . . . tickets . . . except that the Legislature may authorize lotteries which are regulated, controlled, owned and operated by the State of West Virginia . . . and may authorize state-regulated bingo games and raffles for the purpose of raising money by charitable . . . organizations

W. Va. Const. art. VI, § 36; *see also* Syl. Pt. 1, *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W. Va. 276, 277, 280–81, 438 S.E.2d 308, 309, 312–13 (1993).

¹¹ W. Va. Code § ch. 61, art. 10.

¹² State Lottery Act, W. Va. Code ch. 29, art. 22, State Racetrack Video Lottery Act, W. Va. Code ch. 29, art. 22a, State Limited Video Lottery Act, W. Va. Code ch. 29, art. 22b; West Virginia Lottery Racetrack Table Games Act, W. Va. Code ch. 29, art. 22c; W. Va. Code St. R. tit. 179. Casino gaming is limited to state-owned lottery table games. W. Va. Code § 29-25-34. *See* W. Va. Code ch. 29, art. 25; W. Va. Code St. R. tit. 179, series 4.

¹³ Charitable Bingo Act, W. Va. Code ch. 47, art. 20; W. Va. Code St. R. tit. 110, series 16; Charitable Raffle Boards & Games Act, W. Va. Code ch. 47, art. 23; W. Va. Code St. R. tit. 110, series 37.

¹⁴ We note that under the common law, it is a criminal “public nuisance” in West Virginia to keep a gaming house. *Woods v. Cottrell*, 55 W. Va. 476, 47 S.E. 275, 277 (1904); *see also State v. Baker*, 69 W. Va. 263, 71 S.E. 186, 187 (1911). But we do not believe this law to be relevant to your question. Convictions for this offense have historically involved a physical room in which people play games in person, *State v. Shelton*, 78 W. Va. 1, 88 S.E. 454, 455 (1916), usually with an in-person operator “in charge” of or having “supervision of the game,” *State v. Self*, 130 W. Va. 515, 518, 44 S.E.2d 582, 583 (1947). *See also* 38 Am. Jur. 2d Gambling § 91.

B. The statutory prohibitions on private lotteries and other “games of chance” apply to any games decided wholly or predominantly by chance.

Several statutes in Article 10 of Chapter 61 of the West Virginia Code prohibit private lotteries and other games of chance. Specifically, under Section 61-10-11, it is unlawful to play any private “lottery or raffle” that is won by “using dice, or by any other game of chance.”¹⁵ And under Section 61-10-5, it is unlawful to “bet or wage money or other thing of value on any game of chance.”¹⁶

For a number of different reasons, we conclude that these statutes are best interpreted to refer only to games decided wholly or predominantly by chance.

1. We look first to multiple opinions of the Supreme Court of Appeals, as well as opinions issued by previous West Virginia attorneys general, which suggest that these statutes prohibit only betting on games decided wholly or predominantly by chance. As we explain below, these authorities formulated a predominance test in the course of interpreting the state constitution’s prohibition on private lotteries, which test appears to have been extended to the statutory bans in Sections 61-10-11 and 61-10-5.

In several cases and attorney general opinions, the state constitution’s prohibition on private lotteries has been interpreted to apply to “any scheme or device, by which a person, for a consideration, is permitted to receive a prize or nothing, as may be determined predominantly by chance.” *State ex rel. Cities of Charleston, Huntington & its Cntys. of Ohio & Kanawha v. W. Va. Econ. Dev. Auth.*, 214 W. Va. 277, 289, 588 S.E.2d 655, 667 (2003) (citing Syl. Pt. 4, *State v. Hudson*, 128 W. Va. 655, 656, 37 S.E.2d 553, 554 (1946)). As one previous attorney general opinion has summarized, “if the dominating element of a game is that of knowledge or skill, instead of pure chance, a lottery does not exist.” 64 W. Va. Op. Att’y Gen. No. 8, 1991 WL 628003, at *1 (Jan. 8, 1991) (citing 45 W. Va. Op. Att’y Gen. 605, 1954 WL 45555, at *1 (1954)). Thus, then-Attorney General Roger Tompkins concluded that sports betting is not a prohibited game of chance, because “the amount of skill involved . . . places this form of

¹⁵ In relevant part, Section 61-10-11’s prohibition on lotteries and raffles reads:

If any person shall set up . . . a lottery or raffle, for money or other thing of value . . . or knowingly permit money or other property to be raffled for in such house, or to be won therein, by throwing or using dice, or by any other game of chance, or knowingly permit the sale in such house of any chance or ticket, or share of a ticket, in a lottery . . . shall be guilty of a misdemeanor

W. Va. Code § 61-10-11; *see also* W. Va. Code § 61-10-10 (prohibiting poolrooms and lottery tickets); *id.* § 61-10-11a (prohibiting “lottery policies” or “numbers”); *id.* § 61-10-11b (same).

¹⁶ In relevant part, Section 61-10-5 reads:

If any person at any place, public or private, bet or wage money or other thing of value on any game of chance, or shall knowingly furnish any money or other thing of value to any other person to bet or wage on any such game, he shall be guilty of a misdemeanor

W. Va. Code § 61-10-5.

gambling outside the parameters of a lottery.” 64 W. Va. Op. Att’y Gen. No. 8, 1991 WL 628003, at *5 (Jan. 8, 1991) (opining that the state constitution allows wagers on sports games). Attorney General Tompkins relied in significant part on the fact that it is lawful in West Virginia to bet on horse and dog racing,¹⁷ which he also described as turning more on skill than chance. *Id.*

This predominance test has been expressly extended by the Supreme Court of Appeals and previous attorneys general to Section 61-10-11, to determine whether a game constitutes a prohibited private “lottery or raffle” that is won by “using dice, or by any other game of chance.” W. Va. Code § 61-10-11. This statute has been interpreted to apply to games with elements of “consideration, prize and chance,” *but only* where “chance predominates, even though skill or judgment may enter to some extent.” *State v. Hudson*, 128 W. Va. 655, 664–65, 37 S.E.2d 553, 558 (1946). In that circumstance, a game is “not a game of skill, but a game of chance and as such, . . . a lottery” prohibited by Section 61-10-11. 42 W. Va. Op. Att’y Gen. 206, 1947 WL 30406, at *2 (1947). Section 61-10-11 has thus been held to criminalize all manner of privately operated games that are decided wholly or predominantly by chance—including punchboards, numbers rackets, giveaway raffles, bingo, and even pinball machines.¹⁸ And conversely, the statute has been held not to apply to privately run quiz shows with questions that are “within the capacity of the general public,” because “the element of chance could not be said to predominate.”¹⁹

The same predominance test appears also to have been applied by the Supreme Court of Appeals to Section 61-10-5, which makes it unlawful to “bet or wage money or other thing of value on any game of chance.” W. Va. Code § 61-10-5. In *United States v. Dobkin*, the court was asked by certified question whether video poker violated Section 61-10-5. 188 W. Va. 209, 211, 423 S.E.2d 612, 614 (1992). It answered that “although there is some element of skill involved, poker or any electronic simulation thereof, is a game of chance” prohibited by Section 61-10-5. *Id.* The court’s emphasis that poker involves merely “*some*” element of skill tracks the court’s language in previous cases applying the predominance test. *Id.* (emphasis added); *Cf. Hudson*, 128 W. Va. at 664–65, 37 S.E.2d at 558 (prohibited games of chance for purposes of Section 61-10-11 are those where “chance predominates, even though skill or judgment may enter to *some* extent” (emphasis added)).²⁰ Although the court did not expressly apply the predominance test to

¹⁷ See W. Va. Code ch. 19, art. 23 & 24; W. Va. Code St. R. tit. 178.

¹⁸ *State v. Wassick*, 156 W.Va. 128, 136, 191 S.E.2d 283, 288 (1972) (pinball machines with payouts); Syl. Pt. 4, *State v. Greater Huntington Theatre Corp.*, 133 W.Va. 252, 253, 55 S.E.2d 681, 682–83 (1949) (commercial raffles); *State v. Hudson*, 128 W. Va. 655, 666, 37 S.E.2d 553, 559 (1946) (punchboards); *State v. Matthews*, 117 W. Va. 97, 184 S.E. 665, 665 (1936) (numbers rackets); 42 W. Va. Op. Att’y Gen. 206 (1947) (bingo).

¹⁹ 43 W. Va. Op. Att’y Gen. 476, 1950 WL 42538, at *3 (1950); *see also* 45 W. Va. Op. Att’y Gen. 166, 1952 WL 47166, at *1 (1952) (finding a radio program that offered a prize for correctly identifying a “mystery melody” did not violate the lottery law).

²⁰ Since *Dobkin*, the Legislature has expressly recognized that casino table games, including poker, are games in which the outcome is predominantly determined by chance. See W. Va. Code §§ 29-22C-2(b)(5), 29-22C-3(32) (listing “poker” as a “West Virginia Lottery table game” that is “determined predominantly by chance”).

the phrase “game of chance,”²¹ it would make little sense to read the case differently. Longstanding principles of statutory interpretation instruct that “identical words used in different parts of the same act are intended to have the same meaning.” *In re Greg H.*, 208 W. Va. 756, 761, 542 S.E.2d 919, 924 (2000) (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

2. Our second reason for applying the predominance test is Section 61-10-10, another part of the West Virginia gaming statutes in Article 10 of Chapter 61. As a statute “relate[d] to the same subject matter,” it “should be read and applied together so that the Legislature’s intention can be gathered from the whole of the enactments.” Syl. Pt. 3, *Smith v. State Workmen’s Comp. Comm’r*, 159 W. Va. 108, 109, 219 S.E.2d 361, 362 (1975).

We know from Section 61-10-10 that a “game of chance” is not simply any game that involves *any* element of chance. Section 61-10-10 concerns “poolroom-style” wagers.²² And it bars such wagers not only on “games of chance,” but also on “any horse race, prizefight, . . . game of skill or science, or other sport or contest all manner of activities.” W. Va. Code § 61-10-10. This means that “games of chance” must be interpreted in a way that leaves room for “games of skill” and “games of sport,” even though the latter plainly involve some element of chance.

Though the predominance test is not compelled by Section 61-10-10, it is consistent with that statutory provision.

3. The third reason for applying the predominance test is that the majority of courts across the country share West Virginia’s definition of a lottery or other game of chance as a game wholly or predominantly decided by chance.²³ In *Roberts v. Commc’ns Inv. Club of*

²¹ The court was asked whether its answer would change if the video poker results were determined “by chance” or “predominantly by chance,” but it did not speak to that question.

²² In relevant part, Section 61-10-10 defines “poolroom” to mean:

any room where any pool ticket, chance voucher or certificate is sold entitling or purporting to entitle the holder or promisee thereof . . . to money or other thing of value, contingent upon the result of any horse race, prizefight, game of chance, game of skill or science, or other sport or contest.

W. Va. Code § 61-10-10.

²³ *E.g.*, *Johnson v. Phinney*, 218 F.2d 303, 306 (5th Cir. 1955) (“[I]f [chance] is present and predominates in the determination of a winner, the fact that players may exercise varying degrees of skill is immaterial; and the game or device is a lottery”); *Nat’l Football League v. Gov’r of the State of Delaware*, 435 F. Supp. 1372, 1385 (D. Del. 1977) (“‘lottery’ should be interpreted to encompass not only games of pure chance but also games in which chance is the dominant determining factor”); *Opinion Of The Justices*, 795 So. 2d 630, 641 (Ala. 2001) (“[E]ven if skill is present, it is the question whether chance dominates that determines whether a lottery exists.”); *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973) (“[A] game should be classified as one of skill or chance depending on the dominating element, not on the presence or absence of a small element of skill.”); *Hotel Employees & Rest. Employees Int’l Union v. Davis*, 21 Cal.4th 585, 592, 88 Cal.Rptr.2d 56, 981 P.2d 990, 996 (1999) (“‘Chance’ means that winning and losing depend on luck and fortune rather than, or at least more than, judgment and skill.”); *Commonwealth v. Lake*, 317 Mass. 264, 267, 57 N.E.2d 923, 925 (1944) (“[B]y the weight of authority a game is now considered a lottery if the element of chance predominates”); *State ex Inf. McKittrick v. Globe-Democrat Pub. Co.*, 341 Mo. 862,

Woonsocket, for example, the Supreme Court of Rhode Island held that “[i]n deciding whether the element of chance is present, we adopt, as have most jurisdictions which have faced this issue, the ‘dominant factor’ doctrine, under which a scheme constitutes a lottery when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.” 431 A.2d 1206, 1211 (R.I. 1981). Indeed, this definition is known as the American Rule. 38 Am. Jur. 2d Gambling § 5; *see also State v. Coats*, 74 P.2d 1102, 1108 (Or. 1938) (Kelly, J., specially concurring) (same).²⁴

This majority understanding of the term “game of chance” comports with the definition that phrase is given in Black’s Law Dictionary, a source that the Supreme Court of Appeals consults for the interpretation of state law. *E.g., Mylan Labs. Inc. v. Am. Motorists Ins. Co.*, 226 W. Va. 307, 317 & n. 17, 700 S.E.2d 518, 528 & n. 17 (2010). According to the entry for “game of chance,” “the test of the character of the game is not whether it contains an element of chance or an element of skill, but which of these is the dominating element that determines the result of the game.” *Game*, Black’s Law Dictionary (10th ed. 2014). (quoting 38 Am. Jur. 2d Gambling § 4, at 109–10 (1968)).

4. Finally, were there any question, we believe the rule of lenity would militate in favor of construing our state’s statutes to apply only to games where chance predominates, as that would be a narrowing construction that favors defendants. In *United States v. Dobkin*, the Supreme Court of Appeals held that if a criminal gaming statute is ambiguous after a careful examination of the statute’s text, context, and prior precedent, “every reason” would exist “to invoke the time-honored maxim that criminal laws will always be construed most strongly in favor of the defendant and the corollary that any ambiguity in a criminal statute must be resolved in favor of the defendant and against the state.” 188 W. Va. 209, 213, 423 S.E.2d 612, 616 (1992). This holding superseded past cases in which the court liberally construed gaming statutes as remedial. *E.g., State v. Wassick*, 156 W. Va. 128, 133–34, 191 S.E.2d 283, 287 (1972); *see W. Va. Code* § 61-10-14.

875, 110 S.W.2d 705, 713 (1937) (“[A] contest may be a lottery even though skill, judgment, or research enter therein to in some degree, if chance in a larger degree determine the result.”); *Hoff v. Daily Graphic, Inc.*, 132 Misc. 597, 600, 230 N.Y.S. 360, 363 (1928) (“The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game.”); *State v. Stroupe*, 238 N.C. 34, 37, 76 S.E.2d 313, 316 (1953) (“[A] game of chance is one in which the element of chance predominates over the element of skill.”); *Stevens v. Cincinnati Times-Star Co.*, 72 Ohio St. 112, 148, 73 N.E. 1058, 1061 (1905) (“[I]f the dominating, determining element is one of chance, that element gives character to the whole scheme.”). *Commonwealth v. Laniewski*, 173 Pa. Super. 245, 250, 98 A.2d 215 (1953) (“It is sufficient that chance be the dominant factor.”); *Seattle Times Co. v. Tielsch*, 80 Wash.2d 502, 507, 495 P.2d 1366, 1369 (1972) (“Chance within the lottery statute is one which dominates over skill or judgment.”); *State v. Dahlk*, 111 Wis.2d 287, 296, 330 N.W.2d 611, 617 (1983) (“[C]hance rather than skill must therefore be the dominant factor controlling the award in a lottery.”); 135 A.L.R. 104 (1941) (more cases).

²⁴ As we discuss further below, some of the states in this majority have adopted a prohibition on gaming in addition to bans on lotteries or games of chance, and it is those additional (and broader) prohibitions that have led their attorneys general to find fantasy sports games to be unlawful. *See infra* Pt. II.B. But that is not true in West Virginia, as noted above. Nor is it the case in states like Rhode Island, where the attorney general has applied the predominance test to find fantasy sports games lawful. *See infra* Pt. II.A.

C. Fantasy sports games, as defined in Senate Bill 529, are not wholly or predominantly decided by chance.

In light of our conclusions above, we believe a court would find that fantasy sports games, as defined in Senate Bill 529, are not prohibited under West Virginia law. A fantasy sports game is defined in Senate Bill 529 as one in which “[a]ll winning outcomes reflect the relative knowledge and skill of participants and are determined predominantly by accumulated statistical results of the performance of individuals, including athletes in the case of sporting events.” As the Kansas attorney general concluded when faced with identical language, that statutory definition “specifically incorporates the dominant factor test.” Kan. Op. Att’y Gen. No. 2015-9, 2015 WL 1923114, at *3 (Apr. 24, 2015) (discussing Kan. HB 2155, codified at Kan. Stat. § 21-6403). In other words, the definition in Senate Bill 529 describes a game in which chance does *not* predominate and, therefore, a game that is not an unlawful game of chance under West Virginia law.

But you have not asked, and we do not answer, whether a court would find that a particular fantasy sports game falls within the definition in Senate Bill 529. The answer to that question would turn on the specific rules of a particular fantasy sports game, and possibly other factual information that you have not provided.

Nevertheless, we do note that fantasy sports games, as we have described them in the background discussion above, are likely not decided predominantly by chance. As we explained above, participants in a fantasy sports league “simulate being a sports team owner or manager.”²⁵ Participants select a lineup of real athletes from sports leagues within the limits of either a draft or a fictional salary cap, and then win points for their fantasy sports teams based on the accumulated statistical performance by their team of athletes in real-world games.

In these fantasy sports games, outcomes are influenced by the skill of the real-world athletes and other knowable information. Outcomes are based on points calculated from the performance of the athletes. And those performances result from some combination of skill (which can be somewhat discerned from past performances), other knowable factors (such as venue, the opposing team, weather), and chance. As a previous West Virginia attorney general has said, sports performances are “in part determined by the skill of the participants” as well as “a variety of other factors that are controlled to some degree by the players.” 64 W. Va. Op. Att’y Gen. No. 8, 1991 WL 628003, at *4 (Jan. 8, 1991).

Fantasy players have access to and can make predictions based on this knowable information. For example, in daily fantasy sports leagues, the salary cap method of drafting players “introduces economic analysis and requires players to strategize how to value players and allocate their roster funds.”²⁶ Numerous factors can come into play, including specific match-ups between players and teams at particular venues, hour-to-hour weather conditions, and

²⁵ Tex. Op. Att’y Gen. No. KP-0057, 2016 WL 281742 at *1 (2016).

²⁶ Nathaniel J. Ehrman, *Out of Bounds? A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law J. 79, 87 (2015)

athletes' day-to-day injuries.²⁷ Participants can and do frequently consult “information, metrics and data about particular games and players,”²⁸ spending in 2012 as much as “\$1.6 billion on extra fantasy items like fantasy magazines, draft kits, online services, and premium television channels.”²⁹

And that sort of analysis is, in our view, best described as skill. As one professor has noted, playing fantasy sports is not like playing poker in a casino: you are not “just accepting the cards that you are dealt”—instead, you “pick your cards.”³⁰ While poker players can bluff and strategically choose their bets, they have no control over cards they are given to make up their hands. But in the fantasy sports games we have described, the participants exercise significant control over their teams. Thus, one federal district court judge has concluded that 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.” *Humphrey v. Viacom, Inc.*, No. 06-2768 DMC, 2007 WL 1797648, at *2 (D.N.J. June 20, 2007).

Indeed, at least one publicly available study shows that there are “better” and “worse” fantasy players. A study by McKinsey & Company Consulting suggests that amateurs often are unable to compete with experienced fantasy managers in daily fantasy games, finding in one sample that 91 percent of the prizes were won by just 1.3 percent of repeat players.³¹ As the study notes, “[f]inding underpriced players among 800 active MLB options can be overwhelming to the novice,” but professional players can identify the best options in real time using sophisticated computer models.³²

We thus echo a previous attorney general, who opined that betting on sports is not something predominantly determined by chance, but rather by skill. He wrote:

Those who bet on sports, just as those who bet on horse and dog racing, usually take into consideration past records, who has the home field advantage, and a myriad of other factors that may influence the outcome of the event. Just as horses

²⁷ Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports Are Games of Skill Under the Dominant Factor Test*, 26 Marq. Sports L. Rev. 5, 29–31 (2015).

²⁸ Frazier, *supra* note 2 at *1.

²⁹ Ehrman, *supra* note 26, at *82.

³⁰ *Skill Or Chance? Question Looms Over Fantasy Sports Industry*, NPR (Nov. 25, 2015) <http://www.npr.org/2015/11/25/457279313/skill-or-chance-question-looms-over-fantasy-sports-industry> [<https://perma.cc/TP6U-VNUJ>] (quoting San Diego State University lawyer and professor Dan Eaton).

³¹ Ed Miller & Daniel Singer, *For daily fantasy-sports operators, the curse of too much skill*, McKinsey & Co. (Sept. 2015), <http://www.mckinsey.com/industries/media-and-entertainment/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill> [<https://perma.cc/64T3-VAUA>].

³² *Id.*

and dogs have trainers who are employed to enhance the animals' performance, a sports team or a sports participant has a coach who is given the task of increasing the team's or participant's chances of winning. Furthermore, statistics and other materials pertinent to sporting events are readily available for those who wish to study them and then place an informed bet using reason and judgment. The person making the bet is utilizing his knowledge about the sporting activity in order to enhance his chances of winning. This is the employment of skill.

64 W. Va. Op. Att'y Gen. No. 8, 1991 WL 628003, at *4 (Jan. 8, 1991). Betting on fantasy sports games, at least as we have described the games in the background discussion above, appears to be similar.

II. This Opinion Is Consistent With The Opinions Of State Attorneys General That Have Addressed The Legality Of Fantasy Sports Games.

Although a number of state attorneys general have addressed the legality of fantasy sports games in their own states and reached different conclusions, the opinions (including this one) fall almost entirely into two broad categories. The first category includes those who have concluded that their state law only prohibits wagering on games in which chance predominantly decides the outcome (as we have found), and have in turn concluded that pay-to-play fantasy sports games are lawful. The second category includes those who have found fantasy sports leagues to be unlawful because, in contrast to the first category, their state laws either: (1) expressly prohibit betting on games of skill or sport, or (2) prohibit wagers on games where chance plays even a subordinate factor in the outcome.³³

A. Attorneys general who have found that their state law only bans betting on games decided predominantly by chance have also found fantasy sports leagues to be lawful.

In states where an attorney general has found that state law prohibits only betting on games decided predominantly by chance, the attorney general has also found fantasy sports games to be lawful. In Rhode Island, for example, the attorney general has opined that the predominance standard under state law "is an especially high burden," and that daily fantasy sports are lawful because they involve a mixture of chance and skill that does not clear that threshold. R.I. Op. Att'y Gen. at *2 (Feb. 4, 2016), *supra* n.4 (citing R.I. Gen. Laws § 11-19-1; *In re Advisory Opinion to Governor*, 856 A.2d 320, 328 (R.I. 2004)). In Kansas, the attorney general has similarly determined that fantasy sports leagues are lawful "games of skill" under the predominance standard so long as "all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events." Kan. Op. Att'y Gen. No. 2015-9, 2015 WL 1923114, at *2 (Apr. 24, 2015) (citing Kan. HB 2155, codified at Kan.

³³ In a few states, the attorneys general have merely noted uncertainty but have not opined specifically on whether fantasy sports games are legal, or could be legalized, in their states. *E.g.*, Conn. Op. Att'y Gen., 2016 WL 1610641, at *1 (Apr. 18, 2016). Md. Op. Att'y Gen. at 18 (Jan. 15, 2016), *available at* <http://www.legalsportsreport.com/wp-content/uploads/2016/01/Miller-01-15-16.pdf> [<https://perma.cc/G4KY-Q9GV>].

Stat. § 21-6403). And finally, the Massachusetts attorney general has also opined that fantasy sports leagues are legal in that state under a predominance standard.³⁴

B. Attorneys general who have found fantasy sports leagues to be unlawful have found that their state laws ban betting on many more games than simply those where chance predominates.

In contrast, the state-law prohibitions on gaming are farther-reaching in states where attorneys general have found fantasy sports games to be unlawful.

In many of these states, the laws prohibit betting on any game with *any* element of chance. For example, the Georgia attorney general has found fantasy sports to be unlawful because state law prohibits betting on “any game or contest,” Ga. Code Ann. §16-12-21, which includes any “agreement that, dependent upon chance even though accompanied by some skill, one stands to win or lose something of value,” *id.* § 16-12-20. *See* Ga. Op. Att’y Gen. (Feb. 26, 2016), http://www.legalsportsreport.com/wp-content/uploads/2016/03/advice-to-kim_20160226101748.pdf [<https://perma.cc/BZW9-LCBT>]. Similarly, in Mississippi, the attorney general found fantasy sports leagues to be illegal under a state law that prohibited all wagers on “any game, play, amusement . . . or upon the result of any . . . event or contingency whatever,” including “the outcome of any athletic event” as well as “any matter to be determined during an athletic event,” Miss. Code Ann. §§ 75-76-33(3)(a), 97-33-1. Miss. Op. Att’y Gen., No. 2015-00445, 2016 WL 695680, at *1–*4 (Jan. 29, 2016). That law has since been amended. *See supra* note 9. In Tennessee, the attorney general found fantasy sports leagues unlawful under a since-amended state law that prohibited “risking anything of value for a profit whose return is to any degree contingent on chance.” Tenn. Code Ann. § 39-17-501(1); Tenn. Op. Att’y Gen. No. 16-13, 2016 WL 1533277, at *2 (Apr. 5, 2016). Fantasy sports games played for money have been found unlawful by the attorneys general in Alabama³⁵ and Idaho³⁶ under similar standards.

In other states, the laws prohibit betting on games where chance plays more than a nominal role but need not be a predominant factor in the outcome. In New York, for example, the attorney general found fantasy sports unlawful because state law prohibits risking anything of value on any game in which “the outcome depends *in a material degree* upon an element of

³⁴ Steve Anmer, *Maura Healey says DraftKings operation is legal* (Oct. 7, 2015), <http://www.bostonglobe.com/metro/2015/10/07/healey-says-draftkings-operation-legal-but-she-concerned-about-insider-trading/O0gcbQF3c6JuvFz2SCHHfO/story.html?event=event25?event=event25> [<https://perma.cc/F6BC-BAAB>]; *see* Mass. Gen. Laws ch. 271, § 7 (prohibiting private lotteries); *Com. v. Lake*, 317 Mass. 264, 267 (Mass. 1944) (A “game is . . . considered a lottery if the element of chance predominates.”).

³⁵ *Attorney General Determines Paid Daily Fantasy Sports Contests Are Illegal Gambling* (Apr. 5, 2016) <http://www.ago.state.al.us/News-810#sthash.DU64TkL3.dpuf> [<https://perma.cc/76BY-U9JG>] (It is “illegal gambling if a person stakes something of value on a contest of chance, even when skill is involved.”).

³⁶ *Attorney General Reaches Agreement to Terminate Paid Daily Fantasy Sports Contests in Idaho* (May 2, 2016), http://www.ag.idaho.gov/media/newsReleases/2016/nr_05022016.html [<https://perma.cc/M9W9-K8XQ>] (Gambling is “risking money or other thing of value for gain that is contingent in whole or part upon chance or the outcome of an event, including a sporting event.”).

chance, notwithstanding the skill of the contestants may also be a factor therein.” N.Y. Penal Law § 225.00 [1] (emphasis added).³⁷ Daily fantasy sports games are unlawful under this statute because they depend “substantially on chance and factors not within the [fantasy sports game] player’s control, including whether the athletes chosen are injured, or the game is ‘rained out.’” *State ex rel. Schneiderman v. Draftkings, Inc.*, No. 453054/2015, at 6–7 (N.Y. Sup. Ct. Dec. 11, 2015), <https://www.nycourts.gov/press/Draftkings%20Inc%20and%20Fanduel%20Inc.pdf> [<https://perma.cc/8QTU-3HFY>]. In Hawaii, the attorney general found fantasy sports games to be unlawful “contests of chance” for the same reason: state law prohibits wagering on any game “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,” Haw. Rev. Stat. § 712-1220 (emphasis added). Haw. Op. Att’y Gen., 16-1, 2016 WL 609722, at *1 (Jan. 27, 2016). And in Texas, the attorney general pointed to a state law that prohibits wagering on a game involving at least “a *partial chance*.” Tex. Op. Att’y Gen. No. KP-0057, 2016 WL 281742 at *2-*4 (2016) (emphasis added).

In a third and final group of states, fantasy sports games have been found unlawful because state law has been extended to prohibit wagers on any games of skill or sport. For example, the Arizona attorney general found fantasy sports unlawful because Arizona law prohibits wagers not only on games of chance, but also on games of skill and on sporting events. Ariz. Op. Att’y Gen. No. I98-002, 1998 WL 48550, at *1–*4 (Jan. 21, 1998) (citing Ariz. Rev. Stat. §§ 13-3302, 13-3305). Likewise, the Illinois attorney general found fantasy sports unlawful because that state’s law broadly “prohibits the playing of either ‘games of chance or skill for money.’” Ill. Op. Att’y Gen., No. 15-006, 2015 WL 9694249, at *3–*4 (Dec. 23, 2015) (quoting 720 Il. Comp. Stat. Ann. 5/28-1). So, too, the Florida attorney general explained that state law prohibits betting on games of skill, making fantasy sports illegal. 1991 Fla. Op. Att’y Gen. 6, 1991 WL 528146, at *1–*3 (Fla. Stat. Ann. § 849.14); *see also* 1994 N.D. Op. Att’y Gen. L-298, 1994 WL 16004820 (1994) (finding fantasy sports unlawful because state law prohibits “risking any money . . . for gain, contingent, wholly or partially, upon . . . the . . . outcome of [a] sporting event, over which the person taking the risk has no control”) (quoting N.D. Cent. Code § 12.1-28-01); Scott Malone, *Fantasy sports illegal in Vermont, attorney general’s office says* (Jan. 15, 2016), <http://www.reuters.com/article/us-fantasysports-vermont-idUSKCN0UT2EN> [<https://perma.cc/86MG-E9BV>] (“Vermont law bans wagering on both games of chance and of skill.”).

C. Nevada is the sole outlier.

The lone exception to the consistent results among state attorneys general is the opinion of the Nevada attorney general, which suggests that the legality of a fantasy sports league can only be decided in court on “a case-by-case basis.” Nev. Op. Att’y Gen. at *16 (Oct. 16, 2015). Though he concluded that state law prohibits only betting on games predominantly decided by chance, *see* Nevada Const. art. IV, § 24, the attorney general determined that he could not offer any broad conclusions about the legality of fantasy sports. The law could only be applied on an

³⁷ Ltr. To DraftKings, Inc. from Eric T. Schneiderman (Nov. 10, 2015), <https://assets.documentcloud.org/documents/2511147/final-nyag-draftkings-letter-11-10-2015.pdf>.

individual case-by-case basis, he explained, depending on what a particular fantasy player actually did in playing a specific game on a specific occasion. *Id.* According to the attorney general, a court would have to determine whether a fantasy player actually used skill in playing a game, or whether he or she simply accepted “a random slate of players.” *Id.*

While we have declined to answer whether particular games are lawful, we do not believe the Nevada attorney general’s case-by-case approach is correct. It is *too* narrow and particularized. The lawfulness of fantasy sports games can certainly be determined on a game-by-game basis, without having to examine how an individual participant or group of participants played in a specific case. As explained by the entry in Black’s Law Dictionary for the term “game of chance,” it is “‘the character of the game, and not the skill or want of skill of the [individual] player,’ which determines whether a game is one of chance or skill.” *Game*, Black’s Law Dictionary (10th ed. 2014) (quoting 38 Am. Jur. 2d Gambling § 4, at 109–10 (1968)). How a particular individual plays the game does not change whether the game, as a whole, is one of chance or skill. “[G]ames of chance do not cease to be such merely because they call for the exercise of skill by the players, nor do games of skill cease to be so because at times . . . their result is determined by some unforeseen accident, usually called ‘luck.’” *Id.* The question is whether a game or type of game *generally* turns on the predominance of chance or skill.

CONCLUSION

In sum, we conclude that West Virginia law does not prohibit the offering of or participation in fantasy sports games, as they are defined in Senate Bill 529, because state law prohibits only betting upon games decided predominantly by chance.³⁸ This Opinion is based on what we believe to be the best reading of current state law, and is consistent with the decisions of most other state attorneys general regarding the legality of fantasy sports games. As with any novel question of law, though, the best course of action may be for the Legislature to pass a law that speaks directly to the lawfulness of fantasy sports games.

Sincerely,



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³⁸ Of course, all games played in West Virginia—whether legal or illegal—are subject to important consumer protection laws. It is a criminal offense to cheat or defraud anyone during a game, W. Va. Code § 61-10-9, and it is unlawful to engage in unfair or deceptive practices, *id.* § 46A-6-104.