



State of West Virginia

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August 6, 2025

The Honorable Roger Hanshaw
Speaker of the House
West Virginia House of Delegates
State Capitol, Room M-228
Charleston, WV 25305

Dear Speaker Hanshaw:

Your office has asked for an Opinion of the Attorney General about online daily fantasy sports games. This Opinion is being issued under West Virginia Code § 5-3-1, which provides that the Attorney General has the duty “to render to the ... Speaker of the House of Delegates a written opinion or advice upon any questions submitted to the Attorney General ... in writing.” When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

You provide a letter submitted to your office by PrizePicks, which describes itself as a “daily fantasy sports operator ... [that] began offering its single-player daily fantasy sports (“DFS”) game in West Virginia in 2019.” In January 2022, however, the West Virginia Lottery issued a cease-and-desist letter to PrizePicks stating that the company was running a sports betting operation “in violation of” West Virginia Code § 29-22D-20(a). PrizePicks says it then stopped offering the single-player game in West Virginia.

In January 2024, PrizePicks began offering its “Arena”-branded multiplayer DFS game in West Virginia. PrizePicks explains that “Arena is a contest that was specifically designed to comply with the fantasy sports exemption contained in federal law ... and DFS definitions in states that have stricter requirements for DFS contests.” PrizePicks explains that Iowa law, for example, “requires that DFS participants compete against each other.” And PrizePicks suggests that West Virginia law lacks that requirement but also lacks a definition for “fantasy sports.”

PrizePicks notes that this Office issued an Opinion Letter in 2016 addressing fantasy sports as defined in Senate Bill 529, a proposed law introduced during the 2016 Regular Session that was never enacted. *See* W. Va. Op. Att’y Gen., Opinion Letter on the Legality of Fantasy Sports Games (July 7, 2016), 2016 WL 3857081. The 2016 Opinion Letter addressed a different legal question: “Whether West Virginia prohibits or criminally sanctions the offering of or participation in fantasy sports games, as defined in Senate Bill 529.” That opinion thus limited itself to the definitions

contained in SB 529. PrizePicks points out that SB 529 defined “fantasy sports,” while the current West Virginia Lottery Sports Wagering Act does not.

PrizePicks argues that its single-player game complies with the 2016 Opinion Letter. To illustrate its argument, PrizePicks provides a screenshot of its “single-player game taken on September 30, 2024 by an individual located in Indiana.” According to PrizePicks, the “image shows the participant’s roster before he has entered it into the contest,” the “prizes he is eligible to win,” and “the actual dollar amount of his highest eligible prize.” The screenshot provided shows the participant’s “roster,” which includes Simone Scuffet (goalkeeper for Italian soccer club Cagliari) and Devon Achane (running back for the National Football League’s Miami Dolphins). For Scuffet, the participant has selected “more” than 3 goalie saves. For Achane, the participant has selected “less” than 26.5 receiving yards. The screenshot shows that the participant has selected “Flex Play,” which says they “must hit 2 out of 3 in the lineup” to win. It’s unclear from the screenshot whether the participant has selected a third player or if the participant is choosing to only select two players for the “roster.” The screenshot also gives the participant the option to select “Power Play,” which requires the participant to “hit 3 out of 3 in the lineup” to win. Doing so allows the participant to collect “5X” of the “entry fee,” which is higher than the multipliers applied to “Flex Play.” The prize multipliers appear to be set by house oddsmakers in contrast to fixed prizes based on the number of entries in a given contest.

With these facts in mind, your letter raises the following question:

Whether a game of the kind described in PrizePicks’ letter is or is not a violation of West Virginia Code § 29-22D-20(a) or other provisions of the West Virginia Code pertaining to gambling.

We conclude that, under the facts described in the letter attached to your opinion request, the single-player game described in the letter meets the initial definition of “sports wagering” in the West Virginia Lottery Sports Wagering Act (the Act). The single-player game “accept[s] wagers” on “the individual performance statistics of athletes in a sporting event” by means of “parlays” comprised of player “over-under[s].” W. VA. CODE § 29-22D-3. PrizePicks calls a “wager” an “entry fee,” a “parlay” a “Flex Play” or “Power Play,” and uses “more” or “less” rather than “over” or “under.” But we find these substitute terms are immaterial; the single-player game described in the letter and a parlay (or round-robin parlay) of players’ statistical propositions are substantively the same.

That said, the Act’s definition of “sports wagering” specifically excludes “Daily Fantasy Sports (DFS).” W. VA. CODE § 29-22D-3. But DFS is an undefined term in the Act. And the usual tools of statutory construction provide us no obvious definition, either. So without legislative guidance on what is included in DFS, we can’t say whether the unlicensed operation of the game described in the PrizePicks letter violates West Virginia Code § 29-22D-20(a).

We also can’t say whether PrizePicks’ single-player game violates West Virginia law prohibiting “games of chance.” We simply do not have enough evidence to determine whether PrizePicks’ game is decided wholly or predominantly by chance.

Discussion

I. West Virginia Statutes Governing Private Lotteries.

Article VI, Section 36 of the West Virginia Constitution specifically forbids private lotteries. W. VA. CONST. art. VI, § 36. Thus, several provisions of the West Virginia Code ban private lotteries. *See, e.g.*, W. VA. CODE §§ 61-10-1 to -14 (crimes against public policy).

But the Constitution does not bar state-facilitated lotteries, and the Legislature “has not deemed it necessary to prohibit all forms of gaming,” either. *State v. Gaughan*, 55 W. Va. 692, 48 S.E. 210, 212 (1904). The Constitution’s express public exception to its ban on lotteries allows for certain “lotteries which are regulated, controlled, owned, and operated by the State of West Virginia.” W. VA. CONST. art. VI, § 36. Consistent with that provision, the Legislature has enacted laws permitting state-operated lotteries and state-regulated bingos and raffles by charitable organizations. *See* W. VA. CODE § 29-22-1, *et seq.* (State Lottery Act); W. VA. CODE § 29-22A-1, *et seq.* (Racetrack Video Lottery Act); W. VA. CODE § 29-22B-101, *et seq.* (Limited Video Lottery Act); W. VA. CODE § 29-22C-1, *et seq.* (Lottery Racetrack Table Games Act); W. VA. CODE § 29-22D-1, *et seq.* (Lottery Sports Wagering Act); W. VA. CODE § 47-20-1, *et seq.* (Charitable Bingo Act); W. VA. CODE § 47-23-1, *et seq.* (Charitable Raffle Boards and Games Act).

II. The West Virginia Lottery Sports Wagering Act.

The Lottery Sports Wagering Act, W. VA. CODE § 29-22D-1, *et seq.*, provides another exception to the general lottery ban. The Act is intended to authorize the State of West Virginia “to operate a lottery in the form of sports wagering.” *Id.* § 29-22D-2(3). It’s also intended to “create[e] civil and criminal penalties to prosecute illegal operators” of “sports wagering channels.” *Id.* § 29-22D-2(4). At the time the Act was enacted in March 2018, federal law restricted state regulation of sports wagering, but the Legislature wanted the state to be ready “to regulate this activity ... when the federal ban on sports wagering is lifted.” *Id.* § 29-22D-2(5).

And the federal ban was lifted. In May 2018, the Supreme Court of the United States struck down the Professional and Amateur Sports Protection Act, which made it unlawful for a State “to sponsor, operate, advertise, promote, license, or authorize by law ... a lottery, sweepstakes, or other betting, gambling, or wagering scheme” based on competitive sporting events. 28 U.S.C. § 3702(1). The Court held that the federal law violated the anti-commandeering principle of the Tenth Amendment and, therefore, invalidated it. *Murphy v. NCAA*, 584 U.S. 453, 474 (2018).

With federal law out of the way, the Act took effect. Sports wagering operators are required to obtain “all necessary licenses” before “engag[ing] in any activity in connection with West Virginia Lottery sports wagering.” W. VA. CODE § 29-22D-5(b). That licensing requirement covers already-existing “gaming facilit[ies].” *Id.* § 29-22D-6(a). If an operator obtains a license, then the Lottery grants it “lawful authority to conduct West Virginia Lottery sports wagering within the terms and conditions of the license.” *Id.* § 29-22D-6(b). But the Lottery Commission may only “issue up to five licenses ... to operate a gaming facility ... in this state.” *Id.* § 29-22D-6(c).

So, an operator must be licensed to engage in the business of sports wagering—any person who does so without a license is guilty of a misdemeanor. *See* W. Va. Code § 29-22D-20(a). “[S]ports wagering” is defined as “accepting wagers on sporting events, and other events, the individual performance statistics of athletes in a sporting event or other events, or a combination of any of the same by any system or method of wagering approved by the commission.” *Id.* § 29-22D-3. This definition includes accepting wagers on “mobile applications and other digital platforms that utilize communications technology.” *Id.* And “sports wagering” includes, “but is not limited to, exchange wagering, parlays, over-under, moneyline, pools, fixed odds wagering on horse races, fixed odds wagering on dog racing, and straight bets.” *Id.*

The Legislature specifically excludes “Daily Fantasy Sports (DFS)” from the definition of “sports wagering.” *Id.* Because “[t]he primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature,” syl. pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953), we must assume the Legislature intended to exclude DFS from the regulation of “sports wagering” even if it would otherwise meet the “sport wagering” statutory definition. *See W. Va. Consol. Pub. Ret. Bd. v. Clark*, 245 W. Va. 510, 519, 859 S.E.2d 453, 462 (2021) (explaining that certain payments to State employees are specifically excluded from “compensation” under Public Employees Retirement System by statute).

III. Lottery Commission’s Regulations.

Like similar entities that are “creatures of statute,” the Lottery Commission is a “delegate[] of the Legislature” whose “power is dependent upon statutes,” such that it “must find within the statute warrant for the exercise of any authority which” it claims. *Div. of Justice & Cmty. Servs. v. Fairmont State Univ.*, 242 W. Va. 489, 498, 836 S.E.2d 456, 465 (2019). The Act authorizes the Lottery Commission to “promulgate or otherwise enact any legislative, interpretive, and procedural rules the commission considers necessary for the successful implementation, administration, and enforcement” of the Act. W. VA. CODE § 29-22D-4(c). The Legislature’s grant of authority includes, among other things, rules “governing the acceptance of wagers,” “type of wagering tickets,” and accounting and systems methodologies. *Id.* § 29-22D-4(c)(1). It also grants the Lottery Commission the authority to “exercise any other powers necessary to effectuate the provisions” of the Act. *Id.* § 29-22D-4(j).

Under its statutory grant, the Lottery Commission promulgated the Lottery Sports Wagering Rule, W. VA. CODE ST. R. § 179-9-1, *et seq.* The Rule is intended to “clarify and provide regulations that the Commission considers necessary for the successful implementation, administration, and enforcement of the West Virginia Lottery Sports Wagering Act.” *Id.* § 179-9-1.

Of specific importance here, the Lottery Commission’s rule defines “Daily Fantasy Sports.” W. VA. CODE ST. R. § 179-9-2.8. According to the Lottery Commission, DFS “means a fantasy or simulation sports game, educational game, contest, or competition” meeting four definitional requirements. *Id.* *First*, DFS participants must “own, manage, or coach imaginary teams in competitions against other participants, and not against the individual or entity responsible for creating, administering or operating such contest, for a prize and/or award.” *Id.* § 179-9-2.8.1. *Second*, “[t]he value of all prizes and awards offered to winning participants is

established and made known to the participants in advance of the fantasy game, contest, or competition.” *Id.* § 179-9-2.8.2. *Third*, “[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 the sporting events.” *Id.* § 179-9-2.8.3. *Finally*, “[a] winning outcome is not based on the score, point spread, performance of a single team, combination of such teams, or any single performance of an individual athlete or player in a single event.” *Id.* § 179-9-2.8.4.

Based on the facts in PrizePicks’ letter, its single-player game wouldn’t meet the Lottery Commission’s definition of DFS. The participants do not compete against other participants (hence “single-player”). They effectively compete against PrizePicks (through house-set odds). And a winning outcome is based on single-player performance. For example, in a “Power Play,” one player’s statistical total being “more” than the house-set line would result in a loss and no payout if the participant selected “less.”

But the game’s failure to meet the Lottery Commission’s standard isn’t dispositive, as it’s unclear whether the Act’s grant of rulemaking authority extends to providing definitions to exclusionary terms. “It is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions.” Syl. pt. 3, *Rowe v. W. Va. Dep’t of Corr.*, 170 W. Va. 230, 292 S.E.2d 650 (1982). But “an administrative agency may not issue a regulation which is inconsistent with, or which alters or limits its statutory authority.” *Id.* “Procedures and rules properly promulgated by an administrative agency with authority to enforce a law will be upheld so long as they are reasonable and do not enlarge, amend or repeal substantive rights created by statute.” Syl. pt. 4, *State ex rel. Callaghan v. W. Va. Civil Serv. Comm’n*, 166 W. Va. 117, 273 S.E.2d 72 (1980).

Assuming that the regulations were validly promulgated, it’s not certain what effect they may ultimately have in defining “Daily Fantasy Sports.” The Supreme Court of Appeals of West Virginia had previously adopted the U.S. Supreme Court’s so-called *Chevron* test, which called for deference to reasonable agency constructions of ambiguous statutes. Syl. pt. 3, *Appalachian Power Co. v. State Tax Dep’t of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). But the *Chevron* test has been overruled. See *Loper Bright Enter. v. Raimondo*, 603 U.S. 369, 412 (2024) (“*Chevron* is overruled.”). The Supreme Court of Appeals hasn’t had the opportunity to address what deference (if any) is still owed to administrative agencies in the wake of *Loper Bright*, though it is set to address the question in a case to be argued in September 2025. See *St. Joseph’s Hosp. of Buckhannon, Inc. v. Stonewall Jackson Mem’l Hosp. Co.*, No. 24-347 (W. Va. S. Ct. App. filed June 24, 2024).

With that legal uncertainty in mind, it’s important that Daily Fantasy Sports are excluded from the definition of “sports wagering” in the Act. Because it’s excluded, the Legislature didn’t intend for DFS to be subject to the Lottery Sports Wagering Act and, by extension, the Lottery Commission’s rules and regulations for enforcement of the Act. So, by defining DFS, the Lottery Commission has determined what conduct it does and does not regulate. That definition likely “alters” the Lottery Commission’s “statutory authority.” Syl. pt. 3, *Rowe*, *supra*. And defining the Lottery Commission’s regulatory reach is not included in the Act’s express grant of authority.

See generally W. VA. CODE § 29-22D-4. Because the definition appears to be authority-altering, its enforceability is questionable—especially without post-*Loper Bright* guidance.

IV. The Lottery Commission’s Cease-and-Desist Letter.

Much of PrizePicks’ letter discusses the Attorney General’s 2016 Opinion Letter. That discussion is in turn based on the Lottery Commission’s 2022 Cease-and-Desist Letter (“C&D Letter”). The C&D Letter relied heavily on the 2016 Opinion Letter, primarily for its supposed “definition” of DFS. But the 2016 Opinion Letter didn’t define DFS. Instead, it interpreted SB529’s definition of “fantasy game.” 2016 Opinion Letter, 2016 WL 3857081 at *2. And it specifically stated that the opinion was confined to “whether West Virginia prohibits or criminally sanctions the offering of or participation in fantasy sports games, *as defined in Senate Bill 529.*” *Id.* Because SB529 was never enacted, its definition of DFS has no legal effect. The Lottery Commission’s reliance on this definition, therefore, was legally dubious. Any evaluation of whether PrizePicks’ single-player games meet that definition is beside the point.

V. Unresolved Ambiguities.

PrizePicks’ single-player game constitutes “sports wagering.” The single-player game “accept[s] wagers” on “the individual performance statistics of athletes in a sporting event” by means of “parlays” comprised of player “over-under[s].” W. VA. CODE § 29-22D-3. True, the single-player game calls a “wager” an “entry fee,” a “parlay” a “Flex Play” or “Power Play,” and uses “more” or “less” rather than “over” or “under.” But PrizePicks’ use of substitute terms doesn’t change the nature of its game. There are no substantive differences between the single-player game described in the letter and a parlay (or round-robin parlay) of players’ statistical propositions. *See, e.g.,* Barry M. Klein, *Removing Chance from the Litigation of Daily Fantasy Sports: The Need to Broaden the Scope of What Constitutes A Game of Skill*, 55 TEX. TECH L. REV. 779, 792 (2023) (“PrizePicks shares many similarities to traditional sports wagering despite its self-imposed DFS label.”); Robert L. Haig, 4G N.Y. Prac., *Commercial Litigation in New York State Courts* § 152:28 (5th ed. Oct. 2024 Supp.) (“According to the [New York Gaming] Commission, these pick’em contests, where players bet the ‘over’ or ‘under’ on certain individual athlete’s statistics, essentially meant that PrizePicks was offering mobile sports betting without being licensed to do so.”).

But that doesn’t end the inquiry. Because “Daily Fantasy Sports” are specifically excluded from the definition of “sports wagering,” we must determine whether the single-player game meets the definition of DFS. That we can’t do. The statute does not define DFS. *Id.* No other West Virginia law refers to DFS, so we cannot apply a definition by analogy. We have not located any consistent understanding of the ordinary meaning of “daily fantasy sports,” and understandings vary within the laws of other States (as PrizePicks’ letter notes) and the Unlawful Internet Gambling Enforcement Act. *See* 31 U.S.C. § 5362(1)(E)(ix). For the reasons already explained, our 2016 Opinion Letter and the Lottery Commission’s rule also provide no help. Because the definition of DFS necessarily describes the Lottery Commission’s regulatory powers, only the Legislature may resolve the ambiguity.

VI. Chance/Skill Determinations.

Several statutes in Article 10 of Chapter 61 of the West Virginia Code prohibit private lotteries and other games of chance. Specifically, it is unlawful to play any private “lottery or raffle” that is won by “using dice, or by any other game of chance.” W. VA. CODE § 61-10-11. And under Section 61-10-5, it is unlawful to “bet or wage money or other thing of value on any game of chance.” Our 2016 Opinion Letter examined the predominance test in depth. We determined that the definition of fantasy sports games in SB 529 described a game in which chance does not predominate and, therefore, a game that is not unlawful under West Virginia law.

Again, that definition has no legal effect because SB 529 failed. But private lotteries permitting wagering on games of chance violate West Virginia law. The PrizePicks letter makes the case that its single-player game is predominantly skill-based. PrizePicks says it has hired expert statisticians. One has testified that “chance is immaterial to the likelihood of long-term competitive success” in the single-player game. Another has testified that the single-player game has more high-performing participants than could be explained by chance.

We lack sufficient information to give an opinion as to the PrizePicks game’s compliance with the other “private lottery” statutes. We were faced with this issue previously. We weren’t able to say whether “a particular fantasy sports game” was a game of skill or chance because the “answer to that question would turn on the specific rules” of the game “and possibly other factual information that you have not provided.” 2016 Opinion Letter, 2016 WL 3857081, at *6. The same is true here. We don’t have expert reports or testimony. We don’t have raw data. We don’t have the benefit of the adversarial process, “which depends both on the presentation of reliable evidence and the rejection of unreliable evidence.” *Taylor v. Illinois*, 484 U.S. 400, 414-15 (1988). “In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 n.9 (1993). We lack the scientific evidence and means to test scientific validity. So we cannot answer whether this particular game is based predominantly on skill or chance, especially when authorities have split over whether daily fantasy sports constitute games of skill or chance (in circumstances that are often heavily dependent on the fact-specific determinations). *Compare Dew-Becker v. Wu*, 178 N.E.3d 1034, 1040 (Ill. 2020) (relying on certain studies to hold that head-to-head daily fantasy sports are predominantly games of skill), *with id.* at 1043 (Karmeier, J., dissenting) (refusing to consider these studies as outside the record and concluding that the same head-to-head DFS games are games of chance). In turn, we cannot answer whether this particular game violates the general prohibition on private lotteries.

Conclusion

Daily Fantasy Sports are not subject to the penalties in West Virginia Code § 29-22D-20(a) because the Legislature excluded them from the definition of “sports wagering.” But in failing to define Daily Fantasy Sports in the West Virginia Lottery Sports Wagering Act, the Legislature left ambiguity that only it can resolve. Because of this ambiguity, we cannot say whether the unlicensed operation of the game described in the PrizePicks letter violates West Virginia Code § 29-22D-20(a). Likewise, lacking sufficient evidence of the game’s “chance” or “skill,” we

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cannot say whether the game constitutes a prohibited private lottery under other West Virginia statutes.

Sincerely,

A handwritten signature in black ink, reading "John B. McCuskey". The signature is fluid and cursive, with a long horizontal stroke at the end.

John B. McCuskey
Attorney General