Life Lesson: If You Place a Wager on April Fool's Day, You Cannot Be Surprised When the Final Outcome is a Joke

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LIFE LESSON: IF YOU PLACE A WAGER ON APRIL FOOL’S DAY, YOU CANNOT BE SURPRISED WHEN THE FINAL OUTCOME IS A JOKE

I. INTRODUCTION: “THERE’S A SUCKER BORN EVERY MINUTE . . .”¹

The Illinois case Dew-Becker v. Wu² is the latest example showing that court cases provide color commentary for the time’s prevailing social issues.³ In Dew-Becker, the timely social issue before the court involved a type of online sports gaming, daily fantasy sports (“DFS”).⁴ In addition to providing an issue-spotting sign-


post, the *Dew-Becker* case also highlights a challenge faced by states eager to capitalize on new revenue created by citizens’ newly discovered recreational activities: dealing with inconvenient, outdated statutes initially established to protect citizens from harm.  

Reliant on real-life sports data for its contests, DFS gaming is an outgrowth of the sports construct called fantasy sports. This activity took hold with the advent of widespread Internet use and the resulting ease of access to sports statistics. In fantasy sports, individuals draft fantasy teams informed by statistical data from live professional and amateur sports competitions. The gamers’ fortunes rise and fall over a traditional-length sports season in lockstep with real-time events impacting performance, such as injuries. Participants learn the results of their teams’ performances—and their winnings—at the end of the season. Before the 1990s, enthusiasts had to invest significant time to gather data and then analyze internet addresses approaching twenty thousand). In *Phillips*, the plaintiff tried to bring a class action lawsuit under the Loss Recovery Act against an online casino-styled game that did not provide cash winnings. See id. at 533–74 (describing Double Down Interactive LLC online casino games, amended complaint).  


7. See Heitner, supra note 6 (discussing how internet lessened time required to compile, evaluate statistics that form basis of fantasy sports competitions).  


10. See id. at 852 (“[DFS] players know the outcome by the time they go to sleep that night.”).
lyze data by hand.\textsuperscript{11} However, new gamers wanted a quicker timetable for results and rewards; thus, DFS gambling was born.\textsuperscript{12} The DFS model capitalizes on the market for wagers based on a single sporting event instead of the entirety of a season.\textsuperscript{13}

By 2010, DFS companies such as FanDuel offered online platforms to connect daily gamers and facilitate their wagers.\textsuperscript{14} By 2013, the market for DFS gambling was well-established.\textsuperscript{15} By 2014, DFS play was generating more than $370 million in entry fees annually for FanDuel alone, and there were projections the industry could reach $1 billion by 2020.\textsuperscript{16} Then, in 2020, the U.S. Supreme Court’s \textit{Murphy v. National Collegiate Athletic Association} decision declared that the Professional and Amateur Sports Protection Act (“PASPA”) was unconstitutional due to its resulting interference with state sports gambling legislation.\textsuperscript{17} Previously, the lack of certainty surrounding the Act’s applicability to DFS contests had served to temper DFS play in the United States.\textsuperscript{18}
Meanwhile, the evolution of sports gambling in Illinois followed the national trend. By 2015, DraftKings, the competitor chasing FanDuel for the market share, claimed to have more than 250,000 customers in Illinois and realized more than $90 million that year in entry fees, such as the nine dollar fees Dew-Becker and Wu each paid to place a wager against each other’s teams. The size of the steadily growing DFS revenues should have served as a call to timely action by state legislators.

Although Dew-Becker presented the first time an Illinois citizen sought to recover losses directly from the winner of a DFS competition, the issue of which party should bear the fallout of such contests was decades in the making. Since its advent, states, corporations, and citizens have tried to capitalize on the moneymaking potential of DFS. Even the professionals whose statistics

[T]here is debate about whether DFS, as presently offered to consumers, falls within the law’s fantasy sports “exemption.” It is also possible that courts could determine that DFS is subject to a 1992 law, the Professional and Amateur Sports Protection Act (PASPA; P.L. 102–559), which bans sports betting in most states, and to various other federal and state gambling laws. This uncertainty has drawn the attention of Congress, with some Members proposing to reexamine the legal status of the industry.

[19. See Grove, supra note 16 (providing national DFS market data); see also Hustad, supra note 4 (providing customer statistics for DFS operator DraftKings in Illinois).


22. See John T. Holden & Marc Edelman, Commentary, A Short Treatise on Sports Gambling and the Law: How America Regulates Its Most Lucrative Vice, 2020 WIS. L. REV. 907, 919 (2020) [hereinafter Sports Gambling] (“Beginning in 1990, major American professional sports leagues began pressuring Congress to pass a law banning sports wagering throughout the country.”); see also Thomas Paschalis, The Legal Attack on Fantasy Sports, ILL. BUS. L.J. (Nov. 9, 2007) (referencing 2007 case, Humphrey v. Viacom, Inc., where “Colorado attorney sued the proprietors of three pay-to-play fantasy sports sites, invoking several state qui tam statutes that allow for ‘private attorney generals’ to seek the recovery of losses incurred by gamblers”). In Humphrey, the issue was whether attorney generals could recover season-long fantasy sports fees from fantasy sports site operators as gambling losses, but the court held that the fees were management fees for the costs of running the season-long league and would not hold that the fees were gambling losses or in the alternative that the games were illegal gambling under federal law. See Humphrey v. Viacom, Inc., No. 06 2768, 2007 WL 1797648, *10–11 (D.N.J. June 20, 2007) (explaining motion to dismiss); see also Wilson v. Conlin, 3 Ill. App. 517, 518 (Ill. App. Ct. 1878) (showing court deference to practice of organizations facilitating prizes, requiring entry fees).

23. See Sports Gambling, supra note 22, at 921 (showing congressional attempts to regulate online sports gaming dated to late 1990s when report identified market
underlie DFS wanted their fair share of the business model.24 Largely left out of the discussion of divvying up the spoils was the legality of its construct.25 Along with driving regulatory schemes for new revenue opportunities, legislatures bear responsibility for considering whether there should be legislation to ameliorate the harm and ensuing fallout from the money-making activities their citizens pursue.26

Numerous states have loss recovery statutes.27 In Illinois, legislators give constituents two primary tools to combat loss of money through illegal gambling: the Loss Recovery Act and the Dram Shop Act.28 The Loss Recovery Act, at play in Dew-Becker, allows an


25. For further discussion of the beginning of congressional interest in legislating the fantasy sports market, see supra note 23 and accompanying text.

26. See Dowd, supra note 5, at 442 (discussing state’s use of gambling revenue to help economy, noting state neglecting responsibility to its most vulnerable citizens); see also Sports Gambling, supra note 22, at 968 (noting social, actual costs associated with pathological gambling); Giri Nathan, Audacious Clown Tries To Win Back $100 In Daily Fantasy Losses, By Going To Court Twice, DEADSPIN (Dec. 17, 2018, 9:57 AM), https://deadspin.com/audacious-clown-tries-to-win-back-100-in-daily-fantasy-1831134985 [https://perma.cc/SM0E-PU88] (characterizing DFS player by saying Dew-Becker “joined degenerates nationwide in a nightly ritual: blowing money on daily fantasy sports”). For further discussion regarding tension created when courts need to evaluate statutes, see infra notes 167–170.


28. See 720 ILL. COMP. STAT. ANN. 5/28-8 (West 2013) [hereinafter Loss Recovery Act] (excluding gambling on video games but allowing “[a]ny person who by gambling shall lose to any other person, any sum of money or thing of value, amounting to the sum of $50 or more and shall pay or deliver the same or any part
individual to claim recovery of money lost to the winner of illegal gambling between the two parties.\textsuperscript{29} The Dram Shop Act allows family members to recover losses from the business that served the losing gambler alcoholic beverages that may have contributed to the gambling.\textsuperscript{30} A review of gambling recovery case law in Illinois shows that gambling crosses the business and recreational planes.\textsuperscript{31}

When Dew-Becker came before the courts, they had three tests for gaming activities to determine whether they fell within illegal gambling’s realm.\textsuperscript{32} The predominate purpose text, the any chance test, and the materiality test offered three angles from which to approach the analysis of disputed activities.\textsuperscript{33} First, the predominate purpose test relies on identifying whether the element of chance or skill dominates the contest.\textsuperscript{34} Next, the any chance test considers whether chance plays any role at all to find gambling.\textsuperscript{35}
Finally, the materiality test considers how heavily chance weighs on the contest’s final outcome.\(^{36}\)

In *Dew-Becker*, the Illinois supreme court elected to use the predominant purpose test to determine whether DFS constituted gambling and thereby resolved a legislative gap.\(^{37}\) However, the *Dew-Becker* case history highlights the legal abyss created when innovation outpaces legislation.\(^{38}\) Afterall, the state legislature is responsible for drawing the lines where gambling crosses from legalized to illegal activity.\(^{39}\)

This Note addresses the holding in the *Dew-Becker* case’s final iteration.\(^{40}\) In Part II, this Note shows that the court’s holding was the product of the lower court rulings.\(^{41}\) Part III examines the evolving attitudes toward gambling in Illinois, the legislature’s approach to dealing with the issue, and how the legislative process formed a backdrop as *Dew-Becker* moved through the court system.\(^{42}\) Part IV argues that flexing statutory interpretation to its outermost limit was the only remedy available to the court to address clear

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36. *See id.* (“The material element test looks at whether the outcome depends on chance to a material degree.”).

37. For further discussion regarding available tests, see *supra* note 33 and accompanying text.

38. *See Dew-Becker II*, 123 N.E.3d 86, 90 (Ill. Ct. App. 2018) (noting gap in state law for regulating “gambling . . . facilitated through a third-party website”). At least one congressional legislator did not consider that DFS would share the same federal law treatment as season-long fantasy sports, which were exempted from gambling under UIGEA. *See Dustin Gouker, UIGEA Author: “No One Ever Conceived” That Law Would Allow Daily Fantasy Sports*, LEGAL SPORTS REP. (May 8, 2015), https://www.legalsportsreport.com/1369/uigea-author-did-not-intend-daily-fantasy-sports-carveout/ [https://perma.cc/W9NR-6JCW] (“The assumption was that while unconstrained Internet gambling could change the nature of America’s savings and investment patterns, fantasy sports would be a ‘de minimis’ footnote. No one ever conceived of it becoming a large scale activity or that it could transition into one-day contests.”).


41. *See Dew-Becker I*, 2020 IL 124472, at ¶ 28 (interpreting Illinois Loss Recovery Act to apply only to gambling, finding DFS contests are games of skill, not chance, not properly classified as gambling).

42. *See Dew-Becker II*, 123 N.E.3d at 92 (noting legislature is contemplating various bills to allow regulated online sports gambling).
errors created by the lower courts.\footnote{43} Finally, this Note argues that
given the interstate nature of fantasy sports, the Illinois courts’ use
of statutory interpretation ultimately yielded an absurd result and
did not consider the national consequence to states reconciling
 Gambling laws and the federal government considering whether it
should intervene.\footnote{44}

\section{FACTS: ESTABLISHING THE ELEMENTS}

The \textit{Dew-Becker v. Wu} story began on April 1, 2016, when Colin
Dew-Becker and Andrew Wu challenged each other to a DFS “con-
test.”\footnote{45} The contest was over a basketball game via the DFS platform FanDuel.\footnote{46} They each placed a $100 wager on the outcome
for a total prize of $200 to the winner.\footnote{47} In addition to the individ-
ual wagers, each man paid FanDuel an entry fee of $9.\footnote{48} When the
score was tallied at the end of the contest, Wu’s team had scored a
point total of more than double Dew-Becker’s team.\footnote{49} Therefore,
per the terms of the contest, Wu collected the prize purse.\footnote{50}

\footnote{43. For further discussion of the impact of the Supreme Court of Illinois’s
holding, see \textit{infra} notes 216–225 and accompanying text.}

\footnote{44. See Laura R. Dove, \textit{Absurdity in Disguise: How Courts Create Statutory
(footnote omitted) (citation omitted) (“The absurdity doctrine is a canon of statu-
tory interpretation holding that a statute’s apparent ordinary meaning may be dis-
regarded if the results of its application are (in some sense) absurd.”); see, e.g.,
John Brennan, \textit{Online Poker Now Legal in Illinois? One Judge Ruling on DFS Case Claims
finding DFS games of skill on issue of poker). For further discussion of the conse-
quences of the decision, see \textit{infra} notes 216–225 and accompanying text.}

2017) (“[Dew-Becker] and Wu engaged in a head-to-head Daily Fantasy Sports
(DFS) contest through FanDuel’s website.”).}

\footnote{46. See id. at ¶ 5 (“Dew-Becker and Wu each chose their DFS roster by select-
ing various NBA players.”).}

\footnote{47. See id. at ¶ 4 (explaining each man wagered “$100 on the outcome of the
contest for the opportunity to win $100 from the other”).}

\footnote{48. See id. at ¶ 5 (“[E]ach paid $109 to FanDuel, for a total of $218.”).}

\footnote{49. See id. (“At the conclusion of the contest, Dew-Becker . . . scored 96.30
points, and Wu . . . scored 221.10.”).}

\footnote{50. See id. (“As a result of scoring the highest total points, Wu won the $200
prize.”). The language selected by the court is noteworthy because language such
as “prize purse” was used in \textit{Humphrey}, where the court dismissed a claim for win-
nings. \textit{See Humphrey v. Viacom, Inc.}, No. 06 2768 DMC, 2007 WL 1797648, at ¶2
(D.N.J. June 20, 2007) (holding winnings were better understood as prize). A sub-
sequent case distinguished this holding by finding it inapplicable to Kentucky law,
which allows the Commonwealth to bring loss recovery actions on behalf of others.
S.W.3d 792, 807 (Ky. 2020) (discussing lack of precedential value of unpublished
N.J. opinion when plaintiff tried to use \textit{Humphrey} as support for its motion to
dismiss).}
Three days later, Dew-Becker filed a claim against Wu under the Illinois Loss Recovery Act to recover his alleged gambling losses.51 Three years later, the Illinois court system’s convoluted attempt to provide housekeeping for its state legislature’s outdated gambling statutes ended finally.52 The case’s pathway up and down the court levels highlights that the court’s effort at each stage focused on finding a justifiable way to reject recovery for Dew-Becker.53 This section of the Note provides an overview of the facts and distinguishing comments of each iteration of judicial review.54

A. Trying Out Material

Dew-Becker began his saga in the court system by representing himself.55 Within ten minutes of the trial’s start, the judge rendered a verdict in favor of the defendant.56 He asked only a total of two questions from Dew-Becker.57 Then, when issuing his judgment in favor of the defendant, the judge gave his reasoning as Dew-Becker had brought the claim for recovery against the wrong party, stating that FanDuel would have been the proper defendant.58

51. See Dew-Becker III, 2017 IL App (1st), at ¶ 4 (citing Loss Recovery Act) ("[H]e brought a statutory cause of action pursuant to section 28–8 of the Criminal Code . . . after he sustained a monetary loss of $100 as a result of a wager with Wu that was placed just three days earlier on April 1, 2016."); see also Kmarko, Dude Sues FanDuel After Losing a Head to Head NBA Matchup By 124.8 Points, BARTOOLSPORTS (Dec. 17, 2018, 3:30 PM), https://www.barstoolsports.com/blog/1173356/dude-sues-fanduel-after-losing-a-head-to-head-nba-matchup-by-124-8-points [https://perma.cc/9V2L-CBCL] (questioning how Dew-Becker lost so badly, speculating he lost on purpose).


53. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 7 (showing judge asked two questions of plaintiff, three of defendant, before delivering not guilty verdict in favor of defendant).

54. For further discussion of the procedural history, see supra notes 45–52 and accompanying text; see also infra notes 55–81 and accompanying text.


56. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 7 (documenting length of trial).

57. See id. (showing judge asked plaintiff two questions: “And are you employed by FanDuel?” and “What is your general theory of this case?”)

58. See id. ("It seems to me that in order to make this claim, you would need to bring an action against FanDuel."). The only reason there is a record of what transpired is that the parties “filed a stipulated bystander’s report.” See id. ("The record does not contain a transcript or report of the proceedings.").
In short order, Dew-Becker filed an appeal. He offered the appellate court three arguments for his appeal: "[T]he trial court failed to conduct a trial, the court’s judgment was contrary to the manifest weight of the evidence, and the trial court’s basis for dismissal was erroneous." The appellate court found that Dew-Becker’s claim merited a trial, that the circuit court had denied him due process, and that the constitution required the circuit court to provide an actual trial. Therefore, the appellate court remanded the case for trial.

When Dew-Becker returned to the circuit court, he was represented by counsel. While testifying, Dew-Becker said that he tried to put together a winning team, but that the competition at the wager’s heart involved both luck and skill.

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59. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶¶ 7–8 (showing two-week turnaround from initial judgment to Dew-Becker’s notice of appeal).
60. See id. at ¶ 10 (noting appellate court only considered Dew-Becker’s argument that "trial court failed to conduct a trial").
61. See id. at ¶¶ 11–14 (showing court took time to explain constitutional concerns of circuit court having denied Dew-Becker due process).
62. See id. at ¶ 10 (noting court did not need to address Dew-Becker’s two additional arguments since circuit court judge had ruled without ever holding trial).
64. See Dew-Becker II, 123 N.E.3d 86, 88 (Ill. App. Ct. 2018) (describing spread between performance of plaintiff’s, defendant’s teams while comparing DFS contest to “betting on a horse in a horse race"). But see Kmarko, supra note 51 (implying Dew-Becker must have intentionally lost, reasoning lineup he selected for contest lacked logic if goal was to win).
contest matched the Illinois statute defining gambling. Unfortu-
nately for Dew-Becker, the holding remained unchanged.

Seemingly undaunted, Dew-Becker appealed again. The ap-
pellate court agreed to hear the case to review statutory interpreta-
tion. On his new appeal, Dew-Becker argued that the circuit
court incorrectly interpreted the Loss Recovery Act’s language.
The appellate court found that the DFS contest “qualified as gam-
bling.” The court then provided a lengthy explanation regarding

65. See 720 ILL. COMP. STAT. ANN. 5/28-1(a)(1) (West 2016) (“A person com-

66. See Dew-Becker II, 123 N.E.3d at 87 (showing agreement with trial court’s

67. See Dew-Becker II, 123 N.E.3d at 87 (“Plaintiff, Colin Dew-Becker, appeals

68. For further discussion of statutory review, see infra note 118 and accompa-

69. See Dew-Becker II, 123 N.E.3d at 87 (“Plaintiff argues that in reaching its
decision, the trial court erroneously interpreted section 28-8 of the Criminal Code
of 2012 . . . which provides a cause of action for damages to the loser of certain
illegal bets against the winner of the bets.”); see also id. at 87 n.1 (noting statute 720
ILL. COMP. STAT. 5/28-8 did not have short title but would be referred to as “Illi-

70. See id. at 90 (citing 720 ILL. COMP. STAT. ANN. 5/28-1(b) (West 2019))
describing DFS contest as “a game of chance, a game of skill, or some combina-
tion thereof and that none of the exceptions enumerated in section 28-1(b)
apply.”).
how the statute should be interpreted.  

Still, in the end, Dew-Becker lost again.  

B. Final Disposition: Clawed Off the Stage  

Undaunted by the lecture on the legislative process, Dew-Becker next appealed his case to the Supreme Court of Illinois.  

There, the court agreed with the appellate court’s ruling, finding in favor of the defendant. Nonetheless, the affirmed ruling covered the fact that the highest court made some corrections to the appellate court’s analysis.  

Pursuing a different tack, the state’s highest court first held that the appellate court incorrectly identified DFS contests as gambling. Then the court declared that the Loss Recovery Act did not  

71. See id. at 90–92 (exploring results of application if only plain reading was used, ignoring legislative intent); see also Andrew M. Sachs, You Can’t Win for Losing, ROBBINS, SALOMON & PATT, LTD., https://rsplaw.com/wp-content/uploads/2019/10/you-cant-win-for-losing.pdf [https://perma.cc/6N9N-9SMR] (last visited Feb. 8, 2021) (describing appellate court outcome, characterizing appellate court reasoning as “somewhat tortured”).  

72. See Dew-Becker II, 123 N.E.3d at 92 (“We decline to interpret the Illinois Loss Recovery Act in a manner that would frustrate its purpose and yield an absurd result, and affirm the trial court’s decision in favor of defendant.”); see also Douglas Charles, Guy tries To Get the $100 He Lost Playing Daily Fantasy Back By Going to Court . . . Twice, BroBible (Dec. 18, 2019), https://brobible.com/sports/article/100-lost-daily-fantasy-going-court/ [https://perma.cc/9P8R-RU3Y] (“[T]he Appellate Court of Illinois, First District, Sixth division, (yes, his case made it that far), agreed with the small claims court’s initial decision that Dew-Becker was simply S.O.L.”).  

73. See Dew-Becker I, 2020 IL 124472, at *¶¶ 6–9 (Ill. 2020) (reviewing case’s path to Supreme Court).  

74. See id. at *¶ 1 (“[W]e hold that recovery is unavailable.”).  


76. See id. at *¶ 21 (“Although we do not find the appellate court’s reasoning persuasive, we nevertheless agree that the judgment of the appellate court should be affirmed because the DFS contest at issue here was not gambling.”); see also William M. Gantz, Illinois Supreme Court Finds Daily Fantasy Sports to Be Legal, Rejects DFS Loser’s Gambling Loss Recovery Act Claim, LEXOLOGY (May 1, 2020), https://www.lexology.com/library/detail.aspx?g=D0d33b6c-4436-4d7c-aaa2-76616f7cf84a [https://perma.cc/S28Y-NH83] (highlighting Supreme Court of Illinois elected to evaluate “whether Dew-Becker and Wu were engaged in a bona fide contest for the determination of skill in order to fit under the exception presented by 720 ILCS 5/28-1(b)(2), a question of first impression in Illinois”).
Thus, the majority opinion held that Dew-Becker could not win his lawsuit because DFS contests did not qualify as gambling. The holding of the Illinois supreme court lacked unanimity, however. In the dissenting opinion, Justice Karmeier observed the recent passage of the Illinois Sports Wagering Act. Despite his disagreement with the majority, he noted that the law’s enactment would end individuals’ abilities to use the Loss Recovery Act to recover losses.

III. BACKGROUND: THE SETUP

By the time Colin Dew-Becker headed to court in 2016, DFS had become a significant income generator. As the market con-

77. See Dew-Becker I, 2020 IL 124472, at ¶ 28 (“Because the outcomes of head-to-head DFS contests are predominately skill based, we conclude that plaintiff was not engaged in ‘gambling’ with defendant as required under section 28-8(a).”); see also Rebecca Anzel, Centuries-Old Law Cannot Be Used to Reclaim Lost Wager, State Supreme Court Rules, CAPITOL NEWS ILL. (Apr. 16, 2020), https://capitolnewsillinois.com/NEWS/centuries-old-law-cannot-be-used-to-reclaim-lost-wager-state-supreme-court-rules [https://perma.cc/PN8Y-WF2H] (discussing Illinois Loss Recovery Act history, summarizing court “ruled that while nothing in the act’s language omits internet contests from its purview, daily fantasy sports bets do not fit the definition of gambling as dictated by law”).

78. See Dew-Becker I, 2020 IL 124472, at ¶ 21 (“[T]he DFS contest at issue here was not gambling.”).

79. See id. at ¶ 32 (providing dissent by Justice Karmeier, anchoring his opinion on proposition majority disregarded its own reasoning). “[T]he majority oddly ignores its own statement of the test and finds DFS is a contest of skill based on the results of statistical studies.” See id. at ¶ 34 (Karmeier, J., dissenting).


81. See id. (“While the Act has no bearing on this case, the ability to recover losses from DFS contests, when played in accordance with the Act, has now come to an end.”) (citing 720 ILL. COMP. STAT. ANN. 5/28-1(b)(15) (West 2019)). The Sports Wagering Act defined “sports wagering” to include a non-exhaustive list of bets based on portions of events and various types of bets. See 230 ILL. COMP. STAT. ANN. 45/25-10 (West 2019) [hereinafter Sports Wagering Act] (providing list of examples to include “single-game bets, teaser bets, parlays, over-under, moneyline, pools, exchange wagering, in-game wagering, in-play bets, proposition bets, and straight bets”); see also Dew-Becker I, 2020 IL 124472, at ¶ 47 (Karmeier, J., dissenting) (citation omitted) (“Although the Act does not explicitly reference [DFS], it defines ‘sports wagering’ as ‘accepting wagers on sports events or portions of sports events, or on the individual performance statistics of athletes in a sports event or combination of sports events, by any system or method of wagering, including, but not limited to, in person or over the Internet through websites and on mobile devices.’”).


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continued to grow for DFS, the major companies involved saw staggering revenues.83 Meanwhile, the legislature was attempting to harness the potential income of online sports play and regulate it.84 Furthermore, the 2018 *Murphy v. National Collegiate Athletic Association* Supreme Court ruling invalidating the federal government’s ability to dictate state participation in the online gaming scene led to an increased market for online fantasy sports play.85 These concerns were at the forefront of the minds of the justices hearing Dew-Becker’s final appeal.86

Although this Case Note focuses on the Supreme Court of Illinois’s statutory interpretation of its gambling statutes, following its exposition requires a basic understanding of evolving attitudes about gambling and the interstate nature of online gambling to provide context for the final holding.87 Therefore, Subsection A of

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83. *See, e.g.*, Brad Allen, *FanDuel Group Adds Nearly Half a Million Users in Q3, on Track for $1.1 Billion In Annual Revenue*, LEGAL SPORTS REP. (Nov. 12, 2020), https://www.legalsportsreport.com/45669/fanduel-q3-results/ [https://perma.cc/Z8VU-EX3Z] (“We have enhanced the customer experience, secured further strategic media partnerships and acquired more new customers than anticipated. And we are on track to generate more than $1.1 billion of GGR (gross gaming revenue) in the [United States] this year.”).

84. *See* [YOGONET, supra note 24 (discussing eagerness of legislators to move enact regulation); *see also* ILL. ATT’Y GEN., supra note 97 (discussing 2015 opinion by Illinois attorney general saying current law precluded DFS wagers).]

85. *See* Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1482 (2018) (“Just as Congress lacks the power to order a state legislature not to enact a law authorizing sports gambling, it may not order a state legislature to refrain from enacting a law licensing sports gambling.”). *See generally* Sports Gambling, supra note 22, at 909 (“[T]he emergence of legalized, regulated sports gambling has transformed a lucrative black market into an open market.”).

86. *See* Dew-Becker II, 123 N.E.3d 86, 92 (III. App. Ct. 2018) (“At this time, there are a number of bills before the Illinois legislature that propose the legalization and regulation of sports gambling.”).

87. *See, e.g.*, 18 U.S.C.S. § 1084 (LexisNexis 2021) (providing for imprisonment for transferring wages by wire from state where gambling is illegal into state where gambling is legal); *see also Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*, 42 Op. O.L.C. 1 (2018) [hereinafter O.L.C.] (reviewing Wire Act in connection to Illinois state lottery, opining section 1084(a) of Wire Act “criminalizes transmitting ‘information assisting in the placing of bets or wagers on any sporting event or contest’ . . . . The 2006 enactment of the Unlawful Internet Gambling Enforcement Act did not alter the scope of section 1084(a).”). This was a reversal of a 2011 opinion by the United States Department of Justice Office for Legal Counsel that said the Wire Act only prohibited sports gambling. *See O.L.C.* (“This Office concluded in 2011 that the prohibitions of the Wire Act in 18 U.S.C. § 1084(a) are limited to sports gambling. Having been asked to reconsider, we
this Section of the Note offers the historical background of online fantasy sports gambling. Subsection B addresses some of the reasons states regulate gambling. In addition, Subsection C examines the statutes and policies in play while Dew-Becker pursued his claim. Finally, this Section reviews policy considerations for characterizing online gaming opportunities, such as DFS.

A. Illinois Law Before the Murphy Decision

Over time, Illinois created rules, carve-outs, and recovery mechanisms for gambling via the Illinois Gambling Act, the Video Gaming Act, the Consumer Fraud and Deceptive Practices Act, and the Loss Recovery Act. Together, the statutes provided the boundaries for what constituted legal recreational activity. When now conclude that the statutory prohibitions are not uniformly limited to gambling on sporting events or contests."

88. See Edelman, supra note 8, at 9–10 (presenting overview of online fantasy sports play).

89. See, e.g., Michael Mayerck, Gambling Granny: The Elderly’s Propensity for Gambling Addiction and the Need for Effective Legal and Legislative Remedies to Prevent It, 27 Elder L.J. 187, 195 (2019) (highlighting, e.g., dangers of gambling associated with elderly individuals but noting “state without gambling may suffer the adverse consequences that are caused by gambling, without receiving the benefit of increased revenue”).

90. For further discussion of the statutes, see infra notes 92–93 and accompanying text.

91. See James G. Gatto & Mark A. Patrick, How the Evolution of Games Has Led to a Rise in Gambling Concerns: All Bets are On! Gambling and Video Games, 8 Nat’l L.R. 259 (Sept. 16, 2018), https://www.natlawreview.com/article/how-evolution-games-has-led-to-rise-gambling-concerns-all-bets-are-gambling-and (presenting overview of types of online gaming including popular online activities).


93. See Kimberly C. Simmons, 38 C.J.S. Gaming § 27 (2021) (“[T]he right to gamble legally is provided inasmuch as the legislature allows ... [l]icensed gaming is a privilege conferred by the state.”).
the *Dew-Becker* case began in 2017, the Illinois Sports Wagering Act was not yet law.\textsuperscript{94}

In addition, the court conducted its review of the Illinois statutes against the backdrop of the *Murphy* case, which was underway.\textsuperscript{95} The law at issue in *Murphy* had effectively prohibited states from legalizing sports gambling\textsuperscript{96} In fact, just one year before Dew-Becker brought his claim, the Illinois State Attorney General declared that DFS contests were illegal.\textsuperscript{97}

### B. Federal Landscape

At the federal level, legislators began working on regulating social sports gambling activity in the 1990s.\textsuperscript{98} Research showed that legalizing sports gambling would have adverse socio-economic impacts.\textsuperscript{99} Therefore, in 1992, federal legislators enacted the Professional and Amateur Sports Protection Act (PASPA).\textsuperscript{100} Although the Wire Act, enacted in 1961, also addressed sports gambling, its focus was on disrupting organized crime.\textsuperscript{101} The 2006 Unlawful In-

\textsuperscript{94} For further discussion of the Sports Wagering Act, see infra note 106 and accompanying text.


\textsuperscript{96} See id. at 1470 (citing 28 U.S.C. § 3702(1)) (PASPA “generally makes it unlawful for a State to ‘authorize’ sports gambling schemes”).

\textsuperscript{97} See ILL. ATT’Y GEN., OP. NO. 15-006, SPORTS AND GAMING: DAILY FANTASY SPORTS CONTESTS AND GAMBLING (2015) (writing to Illinois Judiciary Criminal Committee chairperson, “You have inquired whether daily fantasy sports contests offered by FanDuel and DraftKings (collectively Contest Organizers) constitute ‘gambling’ under Illinois law. For the reasons stated . . . it is my opinion that the contests in question constitute illegal gambling . . . and the exemption set forth . . . does not apply”).

\textsuperscript{98} See *Murphy*, 138 S. Ct. at 1470 (recognizing relaxation of laws related to gambling resulting in federal legislators trying to address issue).

\textsuperscript{99} See Phil Ciciora, Expert: Legal Sports Gambling Will Have a Destabilizing Effect on Economy, Sports, ILL. NEWS BUREAU (May 15, 2018, 12:00 PM), https://news.illinois.edu/view/6367/650811/#:%20leading%20national%20gaming%20critic [https://perma.cc/2GBX-S5MH] (quoting Illinois business professor regarding impact of *Murphy* decision stating, “there are ‘$3 to $7 in taxpayer costs for every $1 in tax revenues from casinos’ — and . . . sports gambling and internet gambling carry even higher socio-economic costs”).

\textsuperscript{100} See *Murphy*, 138 S. Ct. at 1470 (“PASPA’s proponents argued that it would protect young people, and one of the bill’s sponsors, Senator Bill Bradley of New Jersey, a former college and professional basketball star, stressed that the law was needed to safeguard the integrity of sports.”).

ternet Gambling Enforcement Act ("UIGEA") prohibited individuals and businesses from accepting payment for illegal internet-based betting for the express purpose of consumer protection.102

Across the nation, state governments were eager to harness a share of DFS revenue.103  Then, Murphy invalidated the PASPA.104 That change opened the path to legalizing sports betting on a state-by-state basis.105

C. Illinois Law Post Murphy

The Illinois legislature finally passed sports betting law in Illinois in June 2019.106  The legalization of sports betting immediately

102. See 31 U.S.C. §§ 5361–67 (2006) (defining purpose of Unlawful Internet Gambling Enforcement Act); see id. §5361 (providing history of 1999 governmental study plus rationale for legislation). "Internet gambling is a growing cause of debt collection problems for insured depository institutions and the consumer credit industry. New mechanisms for enforcing gambling laws on the Internet are necessary because traditional law enforcement mechanisms are often inadequate for enforcing gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders." Id.


104. For further discussion of the Murphy holding, see supra note 85 and accompanying text.

105. See Patrick Moran, Anyone’s Game: Sports-Betting Regulations After Murphy v. NCAA, CATO INST. (Mar. 11, 2019), https://www.cato.org/legal-policy-bulletin/anyones-game-sports-betting-regulations-after-murphy-v-ncaa#changes-at-the-state-level [https://perma.cc/S18P-5HRE] ("In sum, an overwhelming majority of states have changed or are working to change their policies in response to Murphy. Only 12 states have not introduced legislation on sports betting since Murphy and 4 were already exempt from PASPA, although they may expand their existing operations. The remaining states have either passed a bill, amended their constitution, made a tribal compact, or are attempting to do one of the three.").

impacted consumer spending in the state.\textsuperscript{107} At the time, Illinois predicted its legalization would generate $700 million in tax revenue in its first year.\textsuperscript{108}

The exception the Dew-Becker court carved out for DFS is not problematic on its face.\textsuperscript{109} At the state and federal levels, other legislatures were making similar determinations, and courts were interpreting their statutes.\textsuperscript{110} Furthermore, as Dew-Becker emphasized during his trial, the Illinois legislature had an existing practice of carving out exceptions for gambling activities, such as bingo and the state lottery.\textsuperscript{111} The developing case law showed that legislatures needed to create more explicit regulations for both operators and players.\textsuperscript{112}

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In 2020 . . . Illinois’ total sports betting handle was $941.7 million. $68 million of those wagers were placed in person while the vast majority, $873.7 million, was placed online. That nearly $1 billion total sports betting handle immediately places Illinois amongst the top sports betting states in the country.
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\textsuperscript{110.} See Edelman, supra note 8, at 29–34 (providing examples of how states vary in regulatory approach).
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\textsuperscript{111.} See Dew-Becker II, 123 N.E.3d 86, 90 (Ill. App. Ct. 2018) (using lack of carve-out for DFS in state code to indicate legislature would have specifically exempted DFS from gambling if it intended to do so). The state had recently revised the criminal code, which included carveouts for bingo, lotteries, raffles, pull tabs and jar games. See id. at 92 (citing 720 Ill. Comp. Stat. Ann. 5/28-1(b) (West 2014)).
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\textsuperscript{112.} See Dew-Becker I, 2020 IL 12472, at ¶ 26 (Ill. 2020) (“At this time there are a number of bills before the Illinois legislature that propose . . . the regulation of sports gambling.”). For further discussion of applicable state laws, see supra notes 92–94 and accompanying text. Additionally, other laws, such as those re-
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IV. NARRATIVE ANALYSIS: THE PREMISE

The courts’ analyses of the Dew-Becker saga anchored itself in the statutory realm from the beginning.\(^{113}\) The circuit court judge reasoned that Dew-Becker had brought the claim for recovery against the wrong party.\(^{114}\) By the time the case concluded, the analysis had traversed plain language, legislative intent, and outside, scientific research that had not even been entered into evidence.\(^{115}\)

This Section of the Case Note illustrates how the holdings that emerged from each court review contributed to the final holding: DFS contests are predominantly games of skill and, therefore, not gambling.\(^{116}\) First, Subsection A presents the trial court errors that led to remand.\(^{117}\) Next, Subsection B discusses how the appellate court tailored its reasoning to uphold the trial court judgment.\(^{118}\) Finally, Subsection C shows how the state supreme court was backed into a corner by the contradictory analysis of the lower court rulings and the slow-moving legislature.\(^{119}\)

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\(^{113}\) For further discussion of claim elements as understood by the lower court, see supra note 58 and accompanying text.


\(^{115}\) For further discussion of studies cited by the majority, see infra note 157 and accompanying text.

\(^{116}\) See Dew-Becker I, 2020 IL 124472, at ¶ 28 (“Because the outcomes of head-to-head DFS contests are predominantly skill based we conclude that plaintiff was not engaged in ‘gambling’ with defendant as required under section 28-8(a).”).

\(^{117}\) For further discussion of trial court errors, see infra note 121 and accompanying text.

\(^{118}\) See Dew-Becker II, 123 N.E.3d 86, 89 (Ill. App. Ct. 2018) (citing to Goldfine v. Barack, Ferrazzano, Kirsbaum & Perlman, 12 N.E.3d 884 (Ill. 2014)) (“Although we typically determine whether a trial court’s decision after a bench trial was against the manifest weight of the evidence (Garden View, LLC v. Fletcher, 916 N.E.2d 554 (Ill. 2009)), we apply a de novo standard where, as here, we are faced with a question of statutory interpretation.”).

A. NO ONE WANTS TO BE FIRST

The record capturing the first trial’s events shows the judge issued a ruling without conducting a trial. Documentation of the court’s analysis emerged from a bystander’s report. When the judge issued his ruling in favor of the defendant, he commented that the target of Dew-Becker’s claim was misplaced. In the moment, Dew-Becker challenged the reasoning.

The lack of due process earned Dew-Becker a return trip to the circuit court. Although the judge afforded Dew-Becker the opportunity to present testimony on his second appearance, the outcome remained the same even with the opportunity to be heard. The court pinned its denial of recovery on the Loss Recovery Act’s inapplicability to the facts of Dew-Becker’s claim. In its analysis, the court held that the act was gambling but that Dew-Becker could not recover because not everyone who uses a third-party platform might seem strange because it’s so early in this year, but that’s how the political work calendar works.”

120. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 6 (Ill. App. Ct. 2017) (showing lack of Illinois DFS decisions on issue). Dew-Becker’s original complaint shows that when he filed his lawsuit, Illinois courts had not yet ruled on whether DFS play constituted gambling. See id. at ¶ 4 (“Dew–Becker’s complaint recognized that Illinois courts have yet to address whether participating in DFS contests is considered gambling, but argued that DFS should be considered as such.”). By the time the case finished three years later, Illinois’s legislature had finally enacted a statute to legalize sports gambling in the state. See Illinois Senate Gaming Expansion, Nat’l L. Rev. (Mar. 2019), https://www.natlawreview.com/article/illinois-senate-gaming-expansion [https://perma.cc/UM7L-6DLP] (providing details of roll out of Sports Wagering Act). For further discussion of the legislative landscape, see supra note 42 and accompanying text.

121. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 10 (“We agree with his contention that the trial court failed to conduct a trial.”).

122. See id. at ¶ 7 (“[T]he parties filed a stipulated bystander’s report.”).


124. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 7 (asking, “Even though Mr. Wu and I are the ones who risked the money?”).

125. See id. at ¶ 2 (listing three reasons Dew-Becker cited for appeal: “the court below erred in failing to conduct a trial, its judgment was against the manifest weight of the evidence, and the basis for dismissal was erroneous”).


127. See id. at 90 (720 ILL. COMP. STAT. ANN. 5/28-8(a) (West 2013)) (noting statute did not apply because of language stating, “[a]ny person who by gambling shall lose to any other person”).
knows their opponent by name. Since FanDuel facilitated the gambling activity, the court held that the Loss Recovery Act’s plain meaning precluded recovery because the wager was not directly between Dew-Becker and Wu. Dew-Becker appealed again.

B. Missing the Mark

On Dew-Becker’s second trip to the appellate court, he had counsel. The court accepted for the sake of argument that it would presume that the contest between Dew-Becker and Wu was a gambling contest. It then began considering the applicability of the Loss Recovery Act to DFS gambling. Without a finalized sports gaming statute, the appellate court said that the “dearth of decisions within the past six decades that analyze the [Loss Recovery] Act indicate that its relevance and applicability have dwindled since its inception in the late 1800s.”

Next, the court examined the statute’s language, which provided that one party must lose to another person. Acknowledging that the two parties in the lawsuit knew each other, the court

128. For further discussion of statutory language application by the circuit court, see supra note 118 and accompanying text.
129. See Dew-Becker II, 123 N.E.3d at 89 (“The plain meaning of the [s]tatute does not allow recovery when the gambling is not connected — conducted between one person and another person, in this case, because of FanDuel.”).
130. See id. at 87 (showing matter on appeal from circuit court level).
131. For further discussion of Dew-Becker’s transition from pro se representation to representation by attorney, see supra note 63 and accompanying text.
132. See Dew-Becker II, 123 N.E.3d at 90 (comparing DFS contest to description of gambling in state gambling statute, saying, “[w]e find that the DFS contest at issue was a game of chance, a game of skill, or some combination thereof and that none of the exceptions enumerated in section 28-1(b) apply. Therefore, we assume arguendo that plaintiff’s and defendant’s participation in the head-to-head DFS contest at issue qualified as gambling . . .” (citation omitted)).
133. See Dew Becker III, 2017 IL App (1st) 161383-U, at ¶ 4 (Ill. App. Ct. 2017) (showing Dew-Becker “brought a statutory cause of action pursuant to section 28–8 of the Criminal Code (Code) [Loss Recovery Act] (West 2014)) alleging “act of wagering was an act of gambling as defined in section 28–1 of the Code. See 720 ILCS 5/28–1 (West 2014)”); see also Dew-Becker II, 123 N.E.3d at 90 (“The question next becomes whether the [Loss Recovery] Act allows plaintiff to recover the gambling loss he incurred as a result of a DFS contest facilitated by a third-party website, such as FanDuel.”).
135. See Dew-Becker II, 123 N.E.3d at 90 (“We find that this language requires a direct connection between the two persons involved in the wager.”).
expressed that allowing every losing DFS contestant to press a claim would open relief via the courts to “the thousands of Illinois residents who engage in DFS contests.” Therefore, the court held that the statute did not apply.

In its analysis, the court detailed the two prongs it explores when evaluating a statute. Then, the court spent several pages explaining that federal case law was not binding on the issue because the matter concerned “interpretation of an Illinois state statute.” The court also noted that the Illinois legislature was working to catch its legislation up with changing times. Finally, reasoning that allowing Dew-Becker’s recovery would “frustrate its purpose,” the court held that the Loss Recovery Act should not be applied.

C. Masking a Botched Delivery

The Supreme Court of Illinois dismissed the lower court’s reasoning. First, it noted that “Courts are not free to read into statute exceptions, limitations, or conditions the legislature did not express.” Then, the court provided three bases for finding an

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136. See id. at 91 (reasoning recovery “would frustrate the statute’s purpose and yield absurd results”). In its review of the facts, the appellate court noted that Dew-Becker argued, “If the legislature had intended to draft carve-outs, they could have done so at any time, particularly given how recently the Criminal Code has been amended.” See id. at 89 (providing overview of Dew-Becker’s arguments in trial court). In 2016, the Illinois Gambling statute had more than ten specific carve-outs. See 720 ILL. COMP. STAT. ANN. 5/28-1(b) (West 2016) (showing listing of exemptions).

137. See Dew-Becker II, 123 N.E.3d at 90 (quoting Goldfine v. Barack, 18 N.E.3d 884, 890 (Ill. 2014) (“This court’s primary objective in interpreting a statute is to ascertain and give effect to the intention of the legislature.”)).

138. See id. at 90 (quoting Goldfine v. Barack, 18 N.E.3d 884, 890 (Ill. 2014)) (“The most reliable indication of the legislature’s intent is the language of the statute, given its plain and ordinary meaning.”). “Further, it is well-settled that when interpreting a statute, ‘we will avoid a construction that would defeat the state’s purpose or yield absurd or unjust results.’” Id. (quoting Bowman v. Ottney, 48 N.E.3d 1080, 1085 (Ill. 2015)).

139. See id. at 91 (quoting Combs v. Ins. Co. of Ill., 497 N.E.2d 503, 507 (Ill. App. Ct. 1986)) (“[D]ecisions by the [f]ederal courts, other than the United States Supreme Court, as to the law of Illinois are not binding on state courts.”).

140. See id. at 92 (“It is, therefore, apparent that the trend in Illinois is toward more relaxed gambling laws, not stricter ones. As such, we decline to interpret the Illinois Loss Recovery Act in a manner that would frustrate its purpose and yield an absurd result . . . .”).

141. See id. (noting recently decided Supreme Court decision paving way for legalized sports gambling in states, including bills in play in Illinois).

142. See Dew-Becker I, 2020 IL 124472, at ¶ 21 (Ill. 2020) (rejecting reasoning but agreeing with holding).

143. See id. ¶ 14. (citing Ill. State Treasurer v. Ill. Workers’ Comp. Comm’n, 30 N.E.3d 288, 294 (Ill. 2015)).
error of interpretation. First, it stated that the difficulty of identifying DFS winners was not an impossibility. Second, it noted that the concern for the efficiency of the courts was based on speculation. Finally, it noted that whether the law was becoming outdated was immaterial. Nonetheless, the court upheld the ruling in favor of Wu.

After evaluating the language of the statute, the court concluded the statute only required a gambling loss to have the basis for a claim under the Loss Recovery Act. Noting that if a gambler’s use of a third-party facilitator to place the wager precluded recovery, the court observed that there would be too many opportunities for the Illinois Loss Recovery Act’s effect to be avoided. “The law is not required to be blind to, or ineffectual against, the ceaseless efforts and ingenuity of persons to circumvent the [Illinois Loss Recovery Act].”

In its analysis, the court referenced the three available tests for determining whether the DFS wager was gambling: the predominant purpose test, the material element test, and the any chance test. Of these, the material element test would have required the court to consider whether the outcome of the wager depended “in

144. For further discussion of the reasoning, see infra notes 145–48 and accompanying text.
145. For further discussion of the reasoning, see infra notes 146–151 and accompanying text.
146. See Dew-Becker I, 2020 IL 124472, at ¶ 21 (“The appellate court’s conclusion that applying section 28-8(a) to DFS contests would open the floodgates of litigation is speculative.”).
147. See id. at ¶ 20 (“It is not the role of the judiciary to declare the [Loss Recovery Act] may not be enforced.”). This was a point emphasized by Dew-Becker’s counsel in the Plaintiff’s Brief. See Brief of Plaintiff-Appellant at ¶ 11, Dew-Becker III, 2017 IL App (1st) 161383-U at ¶ 1 (Ill. App. Ct. 2017) (No. 1-17-1675) (citing Lawrence v. Regent Realty Grp., 197 Ill. 754 N.E.2d 334, 339 (2001)) (“The statute must be enforced as written, and a court may not depart from its plain language by reading into it exceptions, limitations, or conditions not expressed by the legislature.”).
148. See Dew-Becker I, 2020 IL 124472, at ¶ 1 (“We hold that recovery is unavailable.”).
149. See id. at ¶ 14 (citing Ill. State Treasurer v. Ill. Workers’ Comp. Comm’n, 30 N.E.3d 288, 294 (Ill. 2015)) (“Courts are not free to read into a statute exceptions, limitations, or conditions the legislature did not express.”).
150. See id. (noting point of Illinois Loss Recovery Act was to deter gambling activity by creating mechanism for action to recover against winning party).
151. See Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731, 739 (N.D. Ill. 2016) (refuting attempt to narrow description on gambling devices based on physical characteristics of games).
a material degree upon an element of chance, even if skill is otherwise dominant.” Claiming using the materiality test would yield a result too subjective; instead, the court opted for the predominant purpose test.

The Dew-Becker court said choosing the predominant purpose test aligned with the language and example used by the legislature. It then held that skill predominated the DFS contests and that the contests could not be considered gambling. At this point, the court introduced “several recent, peer-reviewed studies” to buttress its holding. The court even went so far as to say that the peer-reviewed studies should hold more weight than the Illinois Attorney General opinion letter issued in 2015 finding such contests illegal gambling acts. However, the court added a comment: “We note that nothing in this opinion should be read as

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154. See id. at ¶ 25 (claiming using predominant purpose test would provide for more consistent rulings). “The predominate factor test, in contrast, provides a workable rule that allows for greater consistency and reliability in determining what constitutes a contest of skill.” Id.

155. See id. (noting use of similar language in other Illinois statutes while carving out type of gambling device called “redemption machine” from gambling statute due to element of skill required for winning play). “[O]ur legislature has used the predominate factor test in other, similar contexts.” Id. (citing 720 ILL. COMP. STAT. ANN. 5/28-2(a)(4)(A) (West 2020)). “The outcome of the game is predominantly determined by the skill of the player.” See 720 ILL. COMP. STAT. ANN. 5/28-2(a)(4)(A) (West 2020) (providing justification for redemption machine carve-out).

156. See Dew-Becker I, 2020 IL 124472, at ¶ 26 (reviewing studies to support proposition industry experts consider DFS contests to be skill-based). A footnote in the opinion noted that under the material element test the Appeals Court of New York determined DFS contests were games of chance. See id. (citing White v. Cuomo, 118 N.Y.S.3d 775, 780-81 (N.Y. App. Div. 2020)) (acknowledging “role of skill in determining the outcome of DFS contests,” holding DFS “games of chance”). White v. Cuomo centered around the legality of provisions in a pari-mutuel betting statute to regulate fantasy sports contests. See id. at 777 (describing challenged legislation establishing contests would not constitute gambling due to “consumer safeguards, minimum standards and the registration, regulation and taxation of [interactive fantasy sports] providers.”).

157. See Dew-Becker I, 2020 IL 124472, at ¶ 26 (providing names of studies from 2018-2019). The dissenting justice specifically called out this point. See id. at ¶ 35 (Karmeier, J., dissenting) (“From the outset, I must highlight the impropriety of the majority’s reliance on scientific studies – that are not found in the record or in either party’s briefs – to make the factual determination that skill is the predominate factor in a contest.”). For further discussion of the absurdity doctrine and how it allows courts to consider external material not presented for consideration, see supra note 44.

158. See Dew Becher I, 2020 IL 124472, at ¶ 27 (“Arguing for a different result, plaintiff points to an Illinois Attorney General opinion letter . . . . However, that
Justice Karmeier dissented from the majority opinion. First, he characterized the use of the predominant purpose test as a misconception of the court’s “quantitative” focus instead of a “qualitative” review. Second, he distinguished the difference between the two approaches as setting aside the predominance of skill to consider whether chance controls. He said the determination of the character of DFS contests rested on the role chance played in the outcome. Third, he posited that the factor of skill could only dominate when skill could salvage the final results. Finally, in support of his proposition that DFS contests were gambling events, Judge Karmeier noted that the recently enacted Illinois Sports Wagering Act foreclosed loss recovery options specifically for DFS contests, seemingly implying recognition by the legislature that DFS contests were acts of gambling.

opinion did not have the benefit of the more recent research that has established the predominance of skill in DFS contests.

Id. at ¶ 28 (Karmeier, J., dissenting); see also Christopher Gerlacher, An Illinois Bettor Sued for the $100 He Lost on FanDuel, GAMING TODAY (Feb. 25, 2021), https://www.gamingtoday.com/news/illinois-bettor-sued-100-lost-fanduel-unsuccessfully/ [https://perma.cc/G7HP-WUVL] (providing review of analysis while agreeing with court’s reasoning).

See Dew-Becker I, 2020 IL 124472, ¶¶ 32-33 (Karmeier, J., dissenting) (footnote omitted) (“Due to its misconception of the predominate factor test, the ingenuity exerted in head-to-head DFS contests duped the majority into believing it is a game of skill when it truly is a game of chance. Therefore, I dissent.”).

See id. at ¶¶ 33, 43 (Karmeier, J., dissenting) (“The majority’s quantitative approach lacks the foresight to distinguish an activity tactfully camouflaged as a game of skill but whose outcome relies on a contingent event out of the participant’s control from an activity in which the participant can use his or her skill to overcome any impact chance may have on the outcome.”).

See id. at ¶ 36 (citing Ruben v. Keuper, 127 A.2d 906, 909-10 (N.J. Super. Ct. Ch. Div. 1956) (explaining recent Supreme Court decisions understood test to revolve around “whether the results predominantly depend on chance regardless if skill predominates in the process”). “Such analysis is considered a qualitative approach.” Id.

See id. at ¶ 43 (Karmeier, J., dissenting) (describing role of skill in game as critical to determination of its materiality). For further discussion of significance of qualitative vs. quantitative inquiry, see infra note 213 and accompanying text.

See Dew-Becker I, 2020 IL 124472, at ¶ 46 (Karmeier, J., dissenting) (describing how DFS nature makes it impossible for DFS player to change outcome once teams selected).

See id. at ¶ 47 (Karmeier, J., dissenting) (reviewing for court-defined elements of Sports Wagering Act as well as definition it gives to sports wagering). Sports wagering was defined as accepting wagers on sports events or portions of sports events, or on the individual performance statistics of athletes in a sports event or combination of sports events, by any system or method of wagering, including, but
V. Critical Analysis: “Jesting Our Limits”

At the heart of gambling legislation lies the need to draw the boundaries of permissible activity. The analysis of the Dew-Becker saga settled quickly into the statutory realm from the first non-trial. In the context of the overall gambling landscape at the time, it was not unreasonable that the judge looked for an out from establishing precedent in this new area. However, from that point forward, the Dew-Becker judges’ attempts to avoid creating law in the absence of timely statutes effectively forced the Dew-Becker courts into increasingly awkward analyses and holdings at each phase of judicial review.

In Dew-Becker III, by finding that DFS contests relied predominantly on skill, the justices could exempt DFS contests from the Loss Recovery Act. However, the majority relied on studies that were not introduced via either evidence or briefs. Nor did the

not limited to, in person or over the Internet through websites and on mobile devices.

Id. (citing 230 I.L.L. COMP. STAT. ANN. 45/25-10 (West 2019)).


167. See Simmons, supra note 93, § 2 (providing definitions of games of chance plus citations for other cases around nation concerning issue).


169. For further discussion of the trial judge’s handling of Dew-Becker’s claim, see supra note 121 and accompanying text.

170. For further discussion of the appellate court holding, see supra notes 131–141 and accompanying text. For further discussion of the state supreme court’s holding, see supra notes 142–165 and accompanying text.

171. See Dew-Becker I, 2020 IL 124472, at ¶ 27 (Ill. 2020) (“Because the outcomes of head-to-head DFS contest are predominately skill based, we conclude that plaintiff was not engaged in ‘gambling’ with defendant as required under [the Loss Recovery Act].”).

172. See id. at ¶ 35 (citing People v. Givens, 934 N.E.2d 470, 478 (Ill. 2010)) (“The majority should not take the position of an advocate and defend against plaintiff’s suit by hastily accepting the validity of studies that it searched for outside
court evaluate the merits of the research studies it introduced.173 The fact that the court gave only limited consideration to the two alternate tests, the material element test and the any chance test, seemed to betray its intent to except DFS from the definition of gambling at all costs.174 After providing definitions for the tests, the court opted not to analyze the applicability of either of them.175

The approach used by the Illinois supreme court to review a statutory question under active legislative debate contradicted the social policy constraints regarding sports gambling questions placed on courts by the United States Supreme Court in its May 2018 Murphy decision.176 There, the Court acknowledged an interest in regulating gambling.177 However, it noted that it would be improper for the Court to act outside the scope of its authority to make a policy choice.178 In Dew-Becker, the court expressly used its position to advance a prospective legislative goal when the plain reading of the statute contradicted that outcome.179

This Note Section shows how each phase of the case ushered in new legal-reasoning gyrations from the reviewing judges.180 First, the record . . . .”). For further discussion of the basis for the majority’s determination that DFS contests were not gambling activity, see supra notes 152–158 and accompanying text.

173. See Dew-Becker I, 2020 IL 124472, at ¶ 35 (“[T]he majority failed to engage in its own analysis of the studies’ validity or credibility.”).

174. See id. at ¶ 25 (“[T]he any chance test is essentially no test at all, as every contest involves some degree of chance. The material element test depends too greatly on a subjective determination of what constitutes ‘materiality.’”).

175. See id. (“We find . . . that the predominating factor test is the most appropriate.”)

176. See Murphy v. Nat’l Collegiate Athletic Ass’n, 138 S. Ct. 1461, 1485 (2018) (limiting role to “interpret the law Congress has enacted and decide whether it is consistent with the Constitution”).

177. See id. at 1470 (“[P]roponents argued that it would protect young people . . . and the law was needed to safeguard the integrity of sports.”).

178. See id. at 1484 (“The legalization of sports gambling requires an important policy choice, but the choice is not ours to make.”).

179. See Proctor v. Whitlark & Whitlark, Inc., 778 S.E.2d 888, 890 (S.C. 2015) (Toal, C.J. dissenting in part) (discussing South Carolina court’s overreach by saying, “We find our Legislature has enacted specific gambling loss statutes as the exclusive remedy for a gambler seeking recovery of losses sustained by illegal gambling. Accordingly, we now overrule our decisions that have implicitly authorized recovery beyond these statutes.”); see also id. at 894 (“Although our decisions have effectuated the intent of the Legislature to permit recovery for illegal gambling losses . . . this Court has expanded recovery beyond these statutes. We take this opportunity to re-evaluate . . . .”). For further discussion of the plain reading discussion, see supra note 138 and accompanying text.

180. See Dew Becker III, 2017 IL App (1st) 161383-U, at ¶ 10 (Ill. App. Ct. 2017) (choosing to limit review of trial court decision by finding failure to conduct trial, thereby declining to address whether trial court judgment “was contrary to the manifest weight of the evidence . . . .”); see also Dew Becker II, 123 N.E.3d, 90-
Subsection A shows the trial court made its determination based on the language of the Loss Recovery Act. Subsection B then shows how the appellate court plainly announced it was doing the legislature’s work due to the absence of updated statutes. Finally, Subsection C addresses how the Illinois supreme court stretched the statute language to cover its exceptional reach.

A. Due Process: No Laughing Matter

In his complaint, Dew-Becker outlined a prima facie case for recovery under the Illinois Loss Recovery Act. The bystander’s report from his first trial documented that in real-time, Dew-Becker directed the judge’s attention to the lack of support for the ruling. However, even if the application was improperly reasoned, at least the judge framed his ruling around how he understood the language of the Loss Recovery Act.

When the appellate court remanded the case to the trial court, the judge issued the same ruling. The holding, however, showed a shift in the judge’s analysis from his first review of the facts. Rather than finding that Dew-Becker sued the wrong defendant for recovery as he had initially found, the judge reasoned and held that there was not enough of a direct connection between Dew-Becker and the defendant.

91 (Ill. App. Ct. 2018) (agreeing with lower court holding Loss Recovery Act “does not allow recovery when the gambling is conducted through a third party website” because court held intent of Act was “to apply to allow recovery when two people who know one another (or at least are familiar with one another’s identity) engage in illegal gambling” while acknowledging parties in this case knew each other); Dew-Becker I, 2020 IL 124472, at ¶ 21 (Ill. 2020) (explaining disagreement with appellate court’s reasoning but affirming its decision).

181. For further discussion of the trial court's misapplication of facts to the statute, see supra note 149 and accompanying text.

182. For further discussion of the appellate court’s bold proclamation, see supra notes 136–48 and accompanying text.

183. For further discussion of how the Illinois supreme court was left to remedy the perception of judicial overreach, see supra notes 142–48 and accompanying text.


185. For further discussion of Dew-Becker’s expressed disbelief at the reasoning, see supra note 124 and accompanying text.

186. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 4 (showing judge understood central issue to be inapplicability of claim to Loss Recovery Act statute).

187. For further discussion of the trial court’s decision on remand, see supra note 125 and accompanying text.

188. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶ 4 (showing judge realized FanDuel was not directly involved in wager).
and Wu to satisfy the Loss Recovery Act framework. However, the court is only supposed to evaluate legislative intent in the absence of an ability to discern the plain meaning of the language. The Loss Recovery Act language was plainly written to apply to gambling, and if the court concluded the contest was a gambling contest, Dew-Becker should have been awarded recovery under the statute. In the end, the outcome of the first visit to the trial court foreshadowed the explanation for the finding in favor of the defendant.

B. Appellate Review Sets the Mark

At the appellate court level, the court’s decision to bar recovery outside of supporting law became even more egregious. The court held that the contest was gambling activity, thereby opening the door to recovery, but affirmed the lower court’s holding. To arrive at that conclusion, the court collapsed two sequential prongs of statutory analysis into one. Rather than beginning with the

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189. See id. (reasoning third-party platform presented insurmountable problem to applicability of Loss Recovery Act).

190. See Dove, supra note 44, at 747-48 (outlining three approaches to discerning statutory plain meaning: "ordinary meaning," which considers current context, "intentionalism," which examines legislator intent at time of enactment, "purposivism," which considers policy goals). For further discussion of restraints regarding statutory review, see supra note 149 and accompanying text.

191. For further discussion of language in Loss Recovery Act, see supra note 28 and accompanying text.

192. See Dew-Becker II, 123 N.E.3d 86, 87 (Ill. App. Ct. 2018) (“The trial court determined that this section of the [Loss Recovery] Act does not allow for recovery when the gambling is conducted through a third-party.”). Contra Dew-Becker III, 2017 IL App. (1st) 161383-U, at ¶ 7 (indicating recovery could have been sought from FanDuel).

193. For further discussion of how the appellate court acknowledged the Loss Recovery Act language did not exclude Dew-Becker’s claim when rooting its denial in current legislative interests, see supra notes 139–141 and accompanying text.

194. See Dew-Becker II, 123 N.E.3d at 90–91 (noting its agreement with trial court statute was not meant to apply because “gambling at issue was not conducted directly between one person and another person” even though parties knew each other’s identities). The relevant language of the statute reads any “person who by gambling shall lose to any other person . . . .” See id. at 89. The defense hinged its argument upon the fact “that although the plaintiff sued him directly in this case” the presence of a third party-facilitator precluded application of the Loss Recovery Act. See id. (“Defendant testified that the contest at issue was ‘not an illegal gambling situation’ and that the Act was not meant to apply.”). In this way, DFS play is fundamentally different from video game betting, which is a named exclusion from the Act. See id. (highlighting video game gambling exclusion from Illinois Loss Recovery Act). For further discussion of the trial court’s holding, see supra notes 121–130 and accompanying text.

195. For further discussion of court’s analysis, see supra notes 138–141 and accompanying text. For further discussion of the prongs of statutory analysis the court used, see supra note 138 and accompanying text.
first prong, plain meaning, and ending there because the plain meaning was evident, the court instead considered the second prong in tandem.\footnote{196}{See Dew-Becker II, 123 N.E.3d at 91 ((showing court considered plain meaning and current legislative intent together instead of sequentially).}

As the court observed, allowing recovery would create potentiality for a remarkable increase in claims given DFS’s soaring popularity.\footnote{197}{For further discussion of growing popularity of DFS, see supra notes 8–11 and accompanying text.} Additionally, permitting recovery for plaintiffs like Dew-Becker could introduce inequity since not every DFS player would know or have the ability to determine the identity of the opposite gambler.\footnote{198}{For further discussion of the logistics of DFS wagers, see supra notes 45–50 and accompanying text.} Nonetheless, the court exceeded its authority.\footnote{199}{For further discussion of the Supreme Court’s guidance regarding statutory review in relevant gambling-statute case Murphy v. Nat’l Collegiate Athletic Ass’n, see supra note 176 and accompanying text. For further discussion of how another state supreme court overturned itself to correct its overreach, see supra note 179 and accompanying text.}

Furthermore, when the appellate court partly justified its decision on a lack of court cases, it ignored the cases it cited just pages earlier that referenced cases arising from within Illinois.\footnote{200}{See Dew-Becker II, 123 N.E.3d 86, 87 n.1 (citing Sonnenberg v. Amaya Grp. Holdings (IOM) Ltd., 810 F.3d 509, 510 (7th Cir. 2016); Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731, 737 (N.D. Ill. 2016); Langone v. Kaiser, No. 12 C 2073, 2013 WL 5567587, ¶ 3 (N.D. Ill. Oct. 9, 2013)) (chronicling cases involving statute 720 ILL. COMP. STAT. 5/28-8 and giving it short title of “Illinois Loss Recovery Act” for consistency with court terminology in those cases).} Hedging its bets, the court emphasized the state did not need to follow federal decisions.\footnote{201}{For further discussion of the question regarding contemporary Loss Recovery Act-based cases, see supra note 134 and accompanying text.} Ironically, the court used federal case law to justify its opinion.\footnote{202}{See Dew-Becker II, 123 N.E.3d at 91–92 (citing to Seventh Circuit opinion regarding Illinois statutory changes).}

C. Punchline

The Supreme Court of Illinois highlighted that some gamblers on DFS platforms do not know their opponents’ identities, so precluding recovery by those who know that information would be illogical.\footnote{203}{See Dew-Becker I, 2020 IL 124472, at ¶ 16 (Ill. 2020) (“Moreover, nothing in the language of section 28-8(a) is per se inapplicable to DFS contests conducted on websites such as FanDuel.”).} In fact, the state supreme court went as far as to address...
the absurdity in the appellate court reasoning. Furthermore, the Illinois supreme court acknowledged that it needed to apply the statute if it found it was constitutionally sound.

However, the court then created its own absurdity by holding that the DFS contest “was not gambling.” First, it selected the test that would provide the most favorable analytical structure for the desired answer to the gambling issue. It seems particularly noteworthy that the court did not evaluate the Dew-Becker facts through the analytical construct of the any chance test. After all, the any chance test formed the basis of the recent opinion letter from the state’s attorney general finding that DFS contests were acts of illegal gambling. Then, rather than provide its own analysis of the tests, the court relied on analysis supplied by academic scholars who never appeared in court to subject the theories to questioning.

In an attempt to support its test selection, the court cited a subsection of the Video Gaming Act and named a particular type of excepted gambling activity. However, that gambling activity – gambling at a redemption machine – relied on the gambling individual’s ability to throw an object at a target, not other players’ performance.
performances on a given day. Furthermore, the justices selected a test for their analysis that seemed at odds with its analytical approach, as noted by the dissenting judge. In its closing, however, the court left the legislature room to narrow the entryway for sports gambling by limiting its ruling to head-to-head DFS contests. Nonetheless, while making a show of knowing and respecting its bounds, the court seemed to ignore the plain text of recently enacted legislation, a real-time indicator of legislative intent.

VI. IMPACT: META HUMOR

As the Illinois courts narrowed their reasoning for disallowing recovery under the Loss Recovery Act, its supreme court ultimately held that DFS contests did not constitute gambling. This holding was a marked change in Illinois and a marked change to common practice among the states generally. Notably, the definitive ruling made Illinois more attractive to DFS operators because it reduced the business risks to the operators. Meanwhile, the definitive ruling left future courts and impacted individuals little recourse for recovery.

The court’s ruling also served as an invitation to current and future state legislators to leave the hard work of crafting the particu-
lar of legislation to the courts. In the absence of support from within the statute’s plain language, the case briefs, or legislative materials, the court introduced evidence that it thought suited the legislature’s purpose and thereby invited other future courts to do the same. Additionally, the South Carolina case Proctor v. Whitlark & Whitlark, Inc. shows that at least some justices could be eager to use Dew-Becker to support using statutory interpretation cases to ameliorate newly identified gaps in legislation. As highlighted in Dew-Becker, statutory claims cannot be resolved by conference. The ruling will also have repercussions on companies inside and outside of Illinois, communities, and individual DFS players.

The challenge faced by the Dew-Becker court of trying to prevent absurd outcomes springing from legislative gaps was neither novel nor unforeseeable. At this point, the move to online recreation was well underway. Preventing absurdities from gambling

220. See Dew-Becker I, 2020 IL 124472, at ¶¶ 17–19 (Ill. 2020) (providing rationale for characterizing gambling as non-gambling while subsequently quoting language of Criminal Code stating clearly “person commits gambling if he or she ‘knowingly plays a game of chance or skill for money or other thing of value,’ unless excepted”).

221. See id. at ¶ 44 (citing People v. Mitchell, 444 N.E.2d 1153, 1155 (Ill. 1983)) (“The majority opinion risks legalizing traditional concepts of gambling anytime a study concludes that it involves skill more than chance. One example is poker. Our courts, like many other courts, have determined poker and other card games to be games of chance despite statistical evidence that skill dominates.”).


223. See id. at 897 (“First, the General Assembly has not responded to Johnson and Gentry to indicate its intention that sections 32–1–10 and 32–1–20 of the South Carolina Code provide the exclusive remedy for losses sustained by illegal gambling.”).

224. See Dew-Becker III, 2017 IL App (1st) 161383-U, at ¶¶ 11–14 (noting while civil claims can be resolved via informal hearings, statutory claims require trial).

225. For further discussion of how the ruling will impact federal tax collection, for example, see supra note 108 and accompanying text.

226. See, e.g., Pearce v. Foote, 113 Ill. 228, 240 (1885) (evaluating statutory language, trade details to determine whether options that were brokered could escape gambling consequences under statutory language, ultimately holding, “no subtle finesse of construction ought to be adopted to defeat the end it is to be hoped may be ultimately accomplished”). For further discussion of bending statutory language to match desired outcome, see supra note 58 and accompanying text.

227. See Phillips v. Double Down Interactive LLC, 173 F. Supp. 3d 731, 733 n.1 (N.D. Ill. 2016) (showing trend of online gaming by reporting one company’s participation rate of players originating from Illinois internet addresses at nearly 20,000 citizens). In Phillips, the plaintiff tried to bring a class action lawsuit against an online casino-styled game that did not provide cash winnings. See id. at 736 (“Phillips filed a class-action complaint against Double Down in the Circuit Court
laws was not even a challenge that was particular to Illinois. Even though the Illinois state statutes were not keeping pace with shifting attitudes toward gambling, it seems difficult to justify denying a Loss Recovery Act claim by promulgating that DFS outcomes are determined primarily by skill.

Finally, the holding illustrated a concern raised by the Supreme Court in its Murphy opinion. There, the Court noted the importance of state legislatures taking responsibility for lawmaking and the resulting accountability provided by elections. In the end, the Dew-Becker case provides an example of the need for current, timely legislation to prevent the courts from trying to fill a void outside their role.

Katherine Smith*

of Cook County, Illinois, alleging that Double Down operates unlawful gambling device.

228. For further discussion of how the issue permeated the United States, see supra note 5 and accompanying text. For further discussion of states’ difficulties with balancing society’s changing gaming behaviors and legislative intent, see supra note 167 and accompanying text.

229. For further discussion of how the Internal Revenue Service methodically evaluates whether DFS contests constitute gambling activity, see supra note 108 and accompanying text. For further discussion of Dew-Becker’s motivation for bringing the lawsuit, see supra note 51 and accompanying text.

230. For further discussion of the limits on the role of the judiciary, see supra note 17 and accompanying text.


232. See generally Dove, supra note 44 at 760 n. 94 (citing Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 67 (2004) (Thomas, J., concurring)) (discussing Supreme Court precedent regarding statutory interpretation, limiting bringing in other sources to instances of actual ambiguity). “Whatever might be found . . . cannot be permitted to impact the interpretation of clear text.” Id.

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