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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

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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. Wu*² 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-

1. See Michael Stewart, *There Is a Sucker Born Ev’ry Minute*, GENIUS, <https://genius.com/Cy-coleman-there-is-a-sucker-born-evry-minute-lyrics> [<https://perma.cc/37HJ-UZFE>] (last visited Jan. 17, 2021) (providing lyrics from 1980 musical about P.T. Barnum). See generally Drew Harwell, *All the Reasons You (Probably) Won’t Win Money Playing Daily Fantasy Sports*, WASH. POST (Oct. 12, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/> [<https://perma.cc/9EL5-JHUS>] (providing overview of daily fantasy sports model). “The top 1 percent of players, they found, paid 40 percent of the entry fees but reaped 91 percent of the profits. Meanwhile, the ‘minnows’ in the bottom 80 percent paid an average of \$49 in entry fees and lost half that cash.” *Id.*

2. *Dew-Becker v. Wu*, 2020 IL 124472 (Ill. 2020) [hereinafter *Dew-Becker I*].

3. See *The Evolution of the Daily Fantasy Sports Industry*, ROTOGRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> [<https://perma.cc/Q2A3-RQMh>] (last visited Feb. 9, 2021) [hereinafter *Evolution*] (chronicling “first gaming sites being founded in 2007” on timeline pertaining to daily fantasy sports play); see also Tribune News Services, *Daily Fantasy Sports Sites Support Illinois Regulation Plan*, CHI. TRIB. (Feb. 25, 2016, 4:48 PM), <https://www.chicagotribune.com/sports/breaking/ct-illinois-daily-fantasy-sports-spt-20160225-story.html> [<https://perma.cc/23H4-ZEEU>] (showing DFS expanding rapidly in Illinois, noting interest by public interest groups, operators to see regulation developed). See generally *Dew-Becker I*, 2020 IL, at *¶¶ 4–6 (Karmeier, J., dissenting) (detailing basic structure of daily fantasy sports contests, which are events allowing individuals to make online wagers regarding success of teams they create using players from multiple professional teams, used to compete against other wage-makers using statistical data).

4. See *Dew-Becker v. Wu*, 123 N.E.3d 86, 87-88 (Ill. App. Ct. 2018) [hereinafter *Dew-Becker II*] (describing April 1 wager generating claim as “bet placed between plaintiff and defendant through the fantasy sports website FanDuel”); see also *Dew-Becker v. Wu*, 2017 IL App (1st) 161383-U, at *¶ 6 (Ill. App. Ct. 2017) [hereinafter *Dew-Becker III*] (noting at time of original complaint Illinois courts had not yet ruled whether DFS constituted gambling); Karis Hustad, *Wait, Can I Still Play Daily Fantasy Sports In Illinois?*, CHICAGOINNO (Dec. 30, 2015, 2:53 PM), <https://www.bizjournals.com/chicago/inno/stories/news/2015/12/30/wait-can-i-still-play-daily-fantasy-sports-in.html> [<https://perma.cc/R7EZ-SMZW>] (showing two major DFS operators filed lawsuit in 2015 to force court to make ruling about legality of DFS play in Illinois). See generally *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 Illi-

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.⁵

Reliant on real-life sports data for its contests, DFS gaming is an outgrowth of the sports construct called fantasy sports.⁶ This activity took hold with the advent of widespread Internet use and the resulting ease of access to sports statistics.⁷ In fantasy sports, individuals draft fantasy teams informed by statistical data from live professional and amateur sports competitions.⁸ The gamers' fortunes rise and fall over a traditional-length sports season in lock-step with real-time events impacting performance, such as injuries.⁹ Participants learn the results of their teams' performances—and their winnings—at the end of the season.¹⁰ Before the 1990s, enthusiasts had to invest significant time to gather data and then ana-

nois 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 733–74 (describing Double Down Interactive LLC online casino games, amended complaint).

5. *See* Kimberly Saginario, Note, *Regulation Is Crucial for Daily Fantasy Sports: Why Illinois's Proposed Bill Is One the States Should Follow*, 69 RUTGERS U.L. REV. 843, 848–49 (2017) (citing *Numbers at a Glance*, FANT. SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> [<https://perma.cc/4FE5-8U62>] (last visited Dec. 2, 2016)) (reporting in 2016, 57.4 million fantasy-sports-playing individuals across United States, Canada spent average of \$556 annually); *see also* Matthew J. Dowd, Comment, *A New Leader in the World of Legalized Gambling: What the Illinois General Assembly Should Do to Protect Pathological Gamblers from the Rapidly Expanding Industry*, 31 N. ILL. U.L. REV. 439, 448 (2011) (highlighting diluting effects on statutes designed to protect citizens from fallout of illegal gambling activities resulting from efforts to reap revenues from gambling).

6. *See* Dustin Gouker, *New Official Data: Daily Fantasy Sports Generated \$335 Million In Revenue in a Year*, LEGAL SPORTS REP. (June 28, 2018), <https://www.legalsportsreport.com/21627/ny-dfs/> [<https://perma.cc/9TNH-R7LV>] (explaining DFS market almost at capacity, need for legal sports betting market to achieve earnings expectations); *see also* Darren Heitner, *An Abbreviated History of FanDuel and DraftKings*, FORBES (Sept. 20, 2015), <https://www.forbes.com/sites/darrenheitner/2015/09/20/an-abbreviated-history-of-fanduel-and-draftkings/> [<https://perma.cc/ED8M-QQMN>] (quoting press release for launch of FanDuel in 2009 describing DFS as innovation of fantasy sports). *See generally* Ciciora, *infra* note 99 (explaining relationship of DFS to sports gambling).

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

8. *See* Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates Its New National Pastime*, 3 HARV. J. SPORTS & ENT. L. 1, 10–14 (2012) (reviewing how players develop their fantasy sports teams).

9. *See* Saginario, *supra* note 5, at 851–52 (describing typical fantasy sport-season length).

10. *See id.* at 852 (“[DFS] players know the outcome by the time they go to sleep that night.”).

lyze data by hand.¹¹ However, new gamers wanted a quicker timetable for results and rewards; thus, DFS gambling was born.¹² The DFS model capitalizes on the market for wagers based on a single sporting event instead of the entirety of a season.¹³

By 2010, DFS companies such as FanDuel offered online platforms to connect daily gamers and facilitate their wagers.¹⁴ By 2013, the market for DFS gambling was well-established.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 2020.¹⁶ Then, in 2020, the U.S. Supreme Court's *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.¹⁷ Previously, the lack of certainty surrounding the Act's applicability to DFS contests had served to temper DFS play in the United States.¹⁸

11. See Edelman, *supra* note 8, at 10 (explaining how previously DFS players "needed pads of paper and calculators").

12. See Heitner, *supra* note 6 ("[O]ne of the major problems with fantasy sports is the huge time-commitment involved . . . [I]n this era of Facebook and Twitter, people want instant gratification.").

13. See, e.g., Overview, DRAFTKINGS, <https://www.draftkings.com/about/daily-fantasy-sports/> [<https://perma.cc/XU52-ZT5F>] (last visited June 11, 2021) ("Daily Fantasy Sports (DFS) mirrors season-long fantasy sports but condenses it into a shorter, more sweat-inducing format.").

14. See *Evolution*, *supra* note 3 (showing original founding DFS companies, as well as dates of acquisitions and mergers of major DFS operators).

15. See *id.* (showing growth of business investment since 2006, year DFS became legal possibility for states, as "Unlawful Internet Gambling Enforcement Act (UIGEA) was signed into law"). The RotoGrinders site provides a timeline of the industry's growth and shows that FanDuel entered the DFS market in 2009. See *id.* ("[Fan Duel] would pivot to DFS offerings in July 2009.").

16. See Chris Grove, *FanDuel Breaks 1 Million Paid Actives in Q4, Claims 80% Market Share*, LEGAL SPORTS REP. (Jan. 13, 2015), <https://www.legalsportsreport.com/313/inside-fanduel-q4-revenue-user-numbers/> [<https://perma.cc/5FKS-FVGU>] (showing growth of FanDuel during 2014 with links to additional growth calculations).

17. See *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018) (citation omitted) (holding PASPA "'regulate[s] state governments' regulation' of their citizens. . . . The Constitution gives Congress no such power.").

18. See *id.* at 1470 (footnote omitted) ("PASPA's most important provision . . . makes it 'unlawful' for a State or any of its subdivisions 'to sponsor, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on' competitive sporting events."); see also CONG. RSCH. SERV., R44398, DAILY FANTASY SPORTS: INDUSTRY TRENDS, LEGAL AND REGULATORY ISSUES, AND POLICY OPTIONS I (2016) (explaining PASPA relationship to DFS play since daily events were not exempted from definition of gambling unlike season-long fantasy sports contests, which were exempted by Unlawful Internet Gambling Enforcement Act).

Meanwhile, the evolution of sports gambling in Illinois followed the national trend.¹⁹ 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.²⁰ The size of the steadily growing DFS revenues should have served as a call to timely action by state legislators.²¹

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.²² Since its advent, states, corporations, and citizens have tried to capitalize on the money-making potential of DFS.²³ 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.

CONG. RSCH. SERV., R44398. For further discussion of PASPA, see *infra* notes 95–96 and accompanying text.

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).

20. See Hustad, *supra* note 4 (reporting Illinois market for DFS contests).

21. See Nicole Davidson, Comment, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 SAN DIEGO L. REV. 201, 208–09 (2002) (showing growth of sports betting industry in early 2000s); see also Gouker, *supra* note 6 (explaining legalization critical to achieving growth forecast).

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

for activity at value of up to \$380 billion annually) (referencing *Nat'l Gambling Impact Study Comm'n, Final Rep.*, at 2–14 (1999)); see also Darren Heitner, *The Hyper Growth Of Daily Fantasy Sports Is Going To Change Our Culture And Our Laws*, FORBES (Sept. 16, 2015), <https://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/?sh=1770f3b5aca1> [<https://perma.cc/ZV4N-V3KP>] (discussing rate of growth in contrast to age of DFS industry, potential legislative challenges plus legislator interests).

24. See Marc S. Tabolsky & Richard B. Farrer, *One League to Rule Them All? Fantasy-Sports Leagues and Intellectual Property Rights*, 45 *ADVOC.* 69, 70 (2008) (discussing intellectual property rights of sports leagues, teams, as well as publicity rights); see also *DFS Bill Tabled in Illinois*, YOGONET (May 30, 2016), <https://www.yogonet.com/international/noticias/2016/05/30/39259-dfs-bill-tabled-in-illinois> [<https://perma.cc/QBY7-NUP4>] (discussing casino industry's interest in blocking legalization of DFS internet-based operators).

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/3M9E-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.

27. See Stan Fox, *State Laws on Ability to Recover Gambling Losses*, LETS GAMBLE USA (Jan. 13, 2019), <https://www.letsgambleusa.com/state-laws-on-ability-to-recover-gambling-losses/> [<https://perma.cc/7CML-UDWF>] (providing overview of states' loss recovery statutes); see also *Proctor v. Whitlark & Whitlark, Inc.*, 778 S.E.2d 888, 895-96 (S.C. 2015) (providing analysis under South Carolina statutes for whether individuals could sue for loss recovery after engaging in either legalized or illegal gambling); Cassie Bible, *Blurred Lines: A Future Where Social Gaming Is the Newest Form of Gambling*, 10 *UNLV GAMING L.J.* 143, 149–57 (2020) (providing examples of recent cases in Illinois, Washington, Maryland implicating loss recovery statutes).

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

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individual to claim recovery of money lost to the winner of illegal gambling between the two parties.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.³⁰ A review of gambling recovery case law in Illinois shows that gambling crosses the business and recreational planes.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.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.³³ First, the predominant purpose test relies on identifying whether the element of chance or skill dominates the contest.³⁴ Next, the any chance test considers whether chance plays any role at all to find gambling.³⁵

thereof, [to] sue for and recover the money or other thing of value, so lost and paid or delivered, in a civil action against the winner thereof, with costs, in the circuit court"); *see also* 235 ILL. COMP. STAT. ANN. 5/6-21(a) (West 2006) [hereinafter *Dram Shop Act*] (allowing family members of overserved patrons to bring suit against server for losses sustained as result of patron's intoxicated status).

29. For further discussion regarding language of the Loss Recovery Act, see *supra* note 28 and accompanying text.

30. For further discussion regarding language of the Dram Shop Act, see *supra* note 28 and accompanying text.

31. *See, e.g.*, *State Mut. Life Ins. Co. v. Newton*, 89 Ill. App. 353, 356 (1899) (providing early example of someone trying to recover for life insurance policies as lotteries when policies were new to market); *see also* *Salzman v. Boeing*, 26 N.E.2d 696, 697 (Ill. App. Ct. 1940) (showing mid-nineteenth century wheat futures, puts addressed by gambling laws); *Phillips v. Double Down Interactive LLC*, 173 F. Supp. 3d 731, 733 (N.D. Ill. 2016) (introducing technology in modern era with online casinos).

32. *See Dew-Becker I*, 2020 IL 124472, at *¶ 25 (Ill. 2020) (noting court had not previously selected test but now decided predominate factor test would be most appropriate one for court to use because state legislature was already using test in other legislation).

33. *See id.* (citing Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and A Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 663-65 (2017) ("To address these difficulties and determine whether a contest is one of skill and, hence, exempt from gambling laws, courts have applied three general tests.")).

34. *See Dew-Becker I*, 2020 IL 124472, at *¶ 22 ("Under this test, contests in which the outcome is mathematically more likely to be determined by skill than chance are not considered gambling."); *see also* Andrew Tottenham, *Skill or Chance – Is It Legal?* CDC GAMING REPS. (Mar. 6, 2019, 3:00 AM), <https://www.cdcgamingreports.com/commentaries/skill-or-chance-is-it-legal/> [<https://perma.cc/5AYU-6HKH>] ("This test uses the extent to which superior skill overcomes the random element.").

35. *See Dew-Becker I*, 2020 IL 124472, at *¶ 22 ("If there are any elements of chance that can affect the outcome, regardless of the level of skill involved, it is determined to be gambling.").

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 After all, 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

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.”).

39. *See* *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1484–85 (2018) (framing gambling laws as policy choices relegated to states). *See generally Phillips*, 173 F. Supp. 3d at 739 (explaining legislators craft language broadly enough to cover unanticipated technological advances involving activities legislation sought to outlaw).

40. *See Dew-Becker v. Wu*, No. 124472, 2020 Ill. LEXIS 565 (Sept. 28, 2020) [hereinafter *Dew-Becker, Petition Denied*] (denying rehearing from series of appeals, remands following initial trial). For further discussion of the final holding, see *infra* notes 73–78 and accompanying text.

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.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.⁴⁴

II. FACTS: ESTABLISHING THE ELEMENTS

The *Dew-Becker v. Wu* story began on April 1, 2016, when Colin Dew-Becker and Andrew Wu challenged each other to a DFS “contest.”⁴⁵ The contest was over a basketball game via the DFS platform FanDuel.⁴⁶ They each placed a \$100 wager on the outcome for a total prize of \$200 to the winner.⁴⁷ In addition to the individual wagers, each man paid FanDuel an entry fee of \$9.⁴⁸ 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.⁴⁹ Therefore, per the terms of the contest, Wu collected the prize purse.⁵⁰

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

44. See Laura R. Dove, *Absurdity in Disguise: How Courts Create Statutory Ambiguity to Conceal Their Application of the Absurdity Doctrine*, 19 NEV. L.J. 741, 743 (2019) (footnote omitted) (citation omitted) (“The absurdity doctrine is a canon of statutory interpretation holding that a statute’s apparent ordinary meaning may be disregarded if the results of its application are (in some sense) absurd.”); see, e.g., John Brennan, *Online Poker Now Legal in Illinois? One Judge Ruling on DFS Case Claims It Is*, USBETS (Apr. 20, 2020), <https://www.usbets.com/online-poker-legal-illinois-judge-claims/> [<https://perma.cc/5RSC-AMXD>] (discussing impact of *Dew-Becker* finding DFS games of skill on issue of poker). For further discussion of the consequences of the decision, see *infra* notes 216–225 and accompanying text.

45. See *Dew-Becker III*, 2017 IL App (1st) 161383-U, at *¶ 4 (Ill. App. Ct. 2017) (“[Dew-Becker] and Wu engaged in a head-to-head Daily Fantasy Sports (DFS) contest through FanDuel’s website.”).

46. See *id.* at *¶ 5 (“Dew-Becker and Wu each chose their DFS roster by selecting various NBA players.”).

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”).

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

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

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 *Humphrey*, where the court dismissed a claim for winnings. 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 subsequent case distinguished this holding by finding it inapplicable to Kentucky law, which allows the Commonwealth to bring loss recovery actions on behalf of others. See *Commonwealth ex rel. Brown v. Stars Interactive Holdings (IOM) Ltd.*, 617 S.W.3d 792, 807 (Ky. 2020) (discussing lack of precedential value of unpublished N.J. opinion when plaintiff tried to use *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*, BARSTOOL SPORTS (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).

52. See *Dew-Becker*, Petition Denied, No. 124472, 2020 Ill. LEXIS 565 (Sep. 28, 2020) (denying plaintiff's petition for rehearing of case that began in May 2016 with lack of due process at circuit court, lowest level in Illinois court system).

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.

55. See *Court Docket, Dev [sic] Becker v. Wu, No. 2016-M1-011598 (Ill. Cir. Ct. Apr 04, 2016)*, [https://courtlink.lexisnexis.com/cookcounty/FindDock.aspx?NCase=2016-M1-011598&SearchType=0&Database=1&case_no=&PLtype=1&sname=&CDate=\[https://perma.cc/2XEB-2T9M\]](https://courtlink.lexisnexis.com/cookcounty/FindDock.aspx?NCase=2016-M1-011598&SearchType=0&Database=1&case_no=&PLtype=1&sname=&CDate=[https://perma.cc/2XEB-2T9M]) (showing pro se representation by plaintiff for initial bench trial, attorney representation on subsequent appeals).

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.”). The judge

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In short order, Dew-Becker filed an appeal.⁵⁹ 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.”⁶⁰ 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.⁶¹ Therefore, the appellate court remanded the case for trial.⁶²

When Dew-Becker returned to the circuit court, he was represented by counsel.⁶³ 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.⁶⁴ His description of the

may have had the issue of whether the sports betting hosts could be sued at the forefront of his mind due to the *Langone v. Kaiser* case. See *Langone v. Kaiser*, 12 C 2073, 2013 WL 5567587, at *8 (N.D. Ill. Oct. 9, 2013) (holding complaint would be dismissed because defendant not liable under Loss Recovery Act as website operators did not participate in risk). There, the plaintiff sought to analogize DFS operators to brokers. See *Langone*, 2013 WL 5567587, at *6 (citing *Pearce v. Foote*, 113 Ill. 228, 238 (1885)) (“The court in *Pearce* held that even though the brokers derived profit from the commissions as opposed to the gain from the illegal trades or ‘wagers,’ the brokers were nonetheless ‘actively participating [as] principals’ in the illegal gambling activity.”).

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).

63. See *Court Docket, Dew [sic] Becker Colin v. Wu Andrew, No. 2016-M1-011598 (Ill. Cir. Ct. Apr. 4, 2016)*, https://courtlink.lexisnexis.com/cookcounty/Find-Dock.aspx?NCase=2016-M1-011598&Search-Type=0&Database=1&case_no=&PLtype=1&sname=&CDate= [https://perma.cc/P2GK-36WD] (showing representation by attorney began with his initial notice of appeal of first decision).

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.⁶⁵ Unfortunately for Dew-Becker, the holding remained unchanged.⁶⁶

Seemingly undaunted, Dew-Becker appealed again.⁶⁷ The appellate court agreed to hear the case to review statutory interpretation.⁶⁸ On his new appeal, Dew-Becker argued that the circuit court incorrectly interpreted the Loss Recovery Act's language.⁶⁹ The appellate court found that the DFS contest "qualified as gambling."⁷⁰ The court then provided a lengthy explanation regarding

65. See 720 ILL. COMP. STAT. ANN. 5/28-1(a)(1) (West 2016) ("A person commits gambling when he or she: knowingly plays a game of chance or skill for money or other thing of value, unless excepted [sic] in subsection (b) of this Section . . ."). The statute further covers when an individual "knowingly makes a wager upon the result of any game, contest, or any political nomination, appointment or election." See *id.* at 5/28-1(a)(2). Meanwhile, legislators exempted some activities from gambling. See *e.g., id.* at 5/28-1(b)("(2) Offers of prizes, award or compensation to the *actual contestants* in any bona fide contest for the determination of skill, speed, strength or endurance . . .") (emphasis added); *id.* ("(13) Games of skill or chance where money or other things of value can be won but no payment or purchase is required to participate.").

66. See *Dew-Becker II*, 123 N.E.3d at 87 (showing agreement with trial court's opinion finding in favor of Wu after case was remanded); see also *Dew-Becker I*, 2020 IL 124472, at *¶ 4 (Ill. 2020) (showing trial was bench trial). During the second trial, defendant Wu made the case that the wager was not a head-to-head contest. See *Dew-Becker II*, 123 N.E.3d at 88-89 (arguing role of FanDuel as "mediator of their wager" prevented parties from having gambled directly with each other as required to be in violation of statute). He also said that the gambling activity was not an illegal activity. See *id.* at 89 (citing to fact participants did not need to know each other, in which case it could not be described as head-to-head wager). Lastly, he argued that the Illinois Loss Recovery Act was inapplicable to the activity. See *id.* ("[T]he act was not meant to apply.").

67. See *Dew-Becker II*, 123 N.E.3d at 87 ("Plaintiff, Colin Dew-Becker, appeals the trial court's decision in favor of defendant, Andrew Wu, after a bench trial.").

68. For further discussion of statutory review, see *infra* note 118 and accompanying text.

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 "Illinois Loss Recovery Act").

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 combination thereof and that none of the exceptions enumerated in section 28-1(b) apply.").

how the statute should be interpreted.⁷¹ Still, in the end, Dew-Becker lost again.⁷²

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.⁷³ There, the court agreed with the appellate court's ruling, finding in favor of the defendant.⁷⁴ Nonetheless, the affirmed ruling covered the fact that the highest court made some corrections to the appellate court's analysis.⁷⁵

Pursuing a different tack, the state's highest court first held that the appellate court incorrectly identified DFS contests as gambling.⁷⁶ 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/9PJ8-RUP3>] (“[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.”).

75. *See id.* at *¶ 13 (explaining court agreed with outcome but disagreed with basis for appellate court’s finding); *see also* John Holden, *Finally an End to Years of Madness in the Illinois DFS Saga*, LEGAL SPORTS REP. (Apr. 23, 2020), <https://www.legalsportsreport.com/40106/illinois-dfs-case-draftkings-fanduel/> [<https://perma.cc/UY8W-PHT3>] (“Instead of creating legal fictions and ruling on a technicality, [the ruling] cut to the heart of [the] issue . . . whether these [DFS] contests constituted legal games of skill.”). *See Dew-Becker I*, 2020 IL 124472, at *¶ 13 (explaining disagreement with reasoning). For further discussion of the court’s rationale, *see* Anzel, *infra* note 77 and accompanying text.

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-aaa2-76616f7cfb4a> [<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”).

apply.⁷⁷ Thus, the majority opinion held that Dew-Becker could not win his lawsuit because DFS contests did not qualify as gambling.⁷⁸

The holding of the Illinois supreme court lacked unanimity, however.⁷⁹ In the dissenting opinion, Justice Karmeier observed the recent passage of the Illinois Sports Wagering Act.⁸⁰ 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.⁸¹

III. BACKGROUND: THE SETUP

By the time Colin Dew-Becker headed to court in 2016, DFS had become a significant income generator.⁸² 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).

80. *See id.* at *¶ 47 (Karmeier, J., dissenting) (referencing “Pub. Act 101-31 (eff. June 28, 2019) (adding 230 ILCS 45/25-1 et seq.)” in dissenting opinion).

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.’”).

82. *See* Heitner, *supra* note 6 (projecting as early as 2013 DFS would constitute majority of fantasy sports play, recognizing DFS role in television advertising, investing); *see also* Daniel Roberts, *The Daily Fantasy Sports Market Has a Demographic Problem*, YAHOO FIN. (Jan. 10, 2017), <https://finance.yahoo.com/news/the-daily-fantasy-sports-market-has-a-demographic-problem-133011359.html?guccounter=>

tinued 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

1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAABVVcGJf20kendkY6e_gP2eZeTHHcSWRe5S2arwOamVeBxNydZUgxRSb8CgncZBFY1Pv8ZbJBBqsexe1AosLqr_RcD7FP41y3tZ9F147Or9VRs-o80UmXmc9nG4zOU8B9TDMfq2GaNxykVx2ldPKrHIL5mhV6FGn5BFd1FTfww8w [https://perma.cc/B3HT-Q2W7] (showing DFS entry fees in 2016 of \$3.26 billion).

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. OP., *infra* 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 (Ill. 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.⁸⁸ Subsection B addresses some of the reasons states regulate gambling.⁸⁹ In addition, Subsection C examines the statutes and policies in play while Dew-Becker pursued his claim.⁹⁰ Finally, this Section reviews policy considerations for characterizing online gaming opportunities, such as DFS.⁹¹

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.⁹² Together, the statutes provided the boundaries for what constituted legal recreational activity.⁹³ When

now conclude that the statutory prohibitions are not uniformly limited to gambling on sporting events or contests.”). *Contra* Anthony R. Holtzman, *Sports and Only Sports: 1st Circuit Addresses Scope of the Wire Act*, 9 NAT'L L. REV. 27 (2021), <https://www.natlawreview.com/article/sports-and-only-sports-1st-circuit-addresses-scope-wire-act> [<https://perma.cc/N7LD-ZTFK>] (“Aligning itself with the 5th Circuit, the 1st Circuit concluded that, in *all* of its applications, the Wire Act covers *only* bets and wagers that are placed on sporting events and not bets and wagers that are placed on things like lottery, poker, and casino games.”).

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> [<https://perma.cc/3CZ6-92M3>] (presenting overview of types of online gaming including popular online activities).

92. *See* 230 ILL. COMP. STAT. ANN. 10/1 (West 2019) [hereinafter *Gambling Act*] (providing broad definition of gambling activity); *see also* 230 ILL. COMP. STAT. ANN. 45/25-1 (West 2019) (exempting online sports betting from gambling prohibition); 230 ILL. COMP. STAT. ANN. 40/70 (West 2009) [hereinafter *Video Gaming Act*] (exempting certain devices from characterization as gambling devices); 815 ILL. COMP. STAT. ANN. 505/1 (West 2007) [hereinafter *Consumer Fraud and Deceptive Business Practices Act*] (allowing recovery of losses when casinos overserve patrons); *see also* 720 ILL. COMP. STAT. ANN. 5/28-8 (West 2013) (allowing third-party recovery of gambling losses under certain time constraints, over certain dollar amounts, when gamblers were known to each other).

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 . . . [I]icensed gaming is a privilege conferred by the state.”).

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the *Dew-Becker* case began in 2017, the Illinois Sports Wagering Act was not yet law.⁹⁴

In addition, the court conducted its review of the Illinois statutes against the backdrop of the *Murphy* case, which was underway.⁹⁵ The law at issue in *Murphy* had effectively prohibited states from legalizing sports gambling⁹⁶ In fact, just one year before Dew-Becker brought his claim, the Illinois State Attorney General declared that DFS contests were illegal.⁹⁷

B. Federal Landscape

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

94. For further discussion of the Sports Wagering Act, see *infra* note 106 and accompanying text.

95. See generally *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018) (conducting review of constitutionality of PASPA in relation to state sovereignty). For additional discussion of PASPA, see *infra* note 100 and accompanying text.

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”).

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”).

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

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#:~:text=%E2%80%94The%20recent%20U.S.%20Supreme%20Court,a%20leading%20national%20gambling%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”).

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.”).

101. See *Sports Gambling*, *supra* note 22, at 960 (citing *The Attorney General’s Program to Curb Organized Crime and Racketeering: Hearing on S. 1653, S. 1654, S. 1656, S. 1657, S. 1658 & S. 1665 Before the S. Comm. On the Judiciary*, 87th Cong. 6 (1961) (statement of Robert F. Kennedy, Att’y Gen. of the United States)) (discussing

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

comments by attorney general). For further discussion of the Wire Act, see *supra* note 87 and accompanying text.

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.*

103. See Jake Lestock, *Tackling Daily Fantasy Sports in the States*, NAT’L CONF. STATE LEGISLATURES (Jan. 2018), <https://www.ncsl.org/research/civil-and-criminal-justice/tackling-daily-fantasy-sports-in-the-states.aspx> [<https://perma.cc/88X5-EYZZ>] (“Since 2015, 43 states have introduced legislation relating to fantasy sports. Nineteen states have enacted laws to legalize paid-entry fantasy sports, generally with two goals in mind: first, to create legal clarity, regulations and safeguards for their residents, and second, to raise revenue.”).

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/SH8P-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.”).

106. See *The Essentials About Illinois Sports Betting*, ON TAP SPORTS NET (Sept. 10, 2020), <https://ontapsportsnet.com/2020/09/10/the-essentials-about-illinois-sports-betting/> [<https://perma.cc/Q7EB-QSAM>] (providing overview of legalization of sports betting in Illinois). “The first legal sports wager was made at Rivers Casino Des Plaines on March 9 [2020].” *Id.* In June 2019, the legislature finally passed a sports gambling bill. See Andy Faust, *Illinois Passes Omnibus Gaming Bill, Includes Legal Sports Betting*, LEGAL SPORTS BETTING (June 3, 2019, 11:53 AM), <https://www.legalsportsbetting.com/news/illinois-passes-omnibus-gaming-bill-includes-legal-sports-betting/> [<https://perma.cc/X7UK-AL5G>] (“State budgeters expect a first-year windfall of between \$500 million and \$700 million from the licenses associated with the state’s gambling expansion.”). For further discussion of the Sports Wagering Act, see *supra* note 80 and accompanying text; see also *infra* note 165 and accompanying text.

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

The exception the *Dew-Becker* court carved out for DFS is not problematic on its face.¹⁰⁹ At the state and federal levels, other legislatures were making similar determinations, and courts were interpreting their statutes.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.¹¹¹ The developing case law showed that legislatures needed to create more explicit regulations for both operators and players.¹¹²

107. See Ben Kovach, *Looking Back at Illinois' First Year of Sports Betting*, US BETTING (Jan. 9, 2021), <https://usbettingreport.com/sports-betting/looking-back-at-illinois-first-year-of-sports-betting/> [<https://perma.cc/JZD7-SXZT>] (highlighting revenue generated by sports betting in time since its legalization in state).

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.

See *id.* (noting extent of revenue earned during seven-month period which excluded first three months of year captured by other states in comparison).

108. See Rob Goldberg, *Illinois State Legislature Passes Bill Legalizing Sports Gambling*, TURNER SPORTS NETWORK BLEACHER REP. (June 2, 2019), <https://bleacherreport.com/articles/2839153-illinois-state-legislature-passes-bill-legalizing-sports-gambling> [<https://perma.cc/C3TY-UWHS>] (explaining in addition to tax revenue, state will require \$10 million licensing fee option for sports venues such as Wrigley Field). In addition to increasing state revenue, DFS play could help fill federal coffers via an excise tax. See Tony Nitti, *In Recent Ruling, IRS Again Concludes that Daily Fantasy Sports Are Gambling*, FORBES (Oct. 19, 2020), <https://www.forbes.com/sites/anthonymitti/2020/10/19/in-recent-ruling-irs-again-concludes-that-daily-fantasy-sports-are-gambling/?sh=53d67a3f437f> [<https://perma.cc/YR4L-LPX2>] (“Most importantly, whether DFS is a game of skill for state gambling statute purposes is not relevant for determining whether DFS is wagering for federal excise tax purposes.”).

109. See Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Feb. 18, 2016), https://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legal-your-state-state-state-look [<https://perma.cc/R4GM-FRAL>] (providing overview of states creating carve-outs for DFS play, including sports betting).

110. See Edelman, *supra* note 8, at 29–34 (providing examples of how states vary in regulatory approach).

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)).

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-

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

garding federal taxation, interface with state gambling laws. *See, e.g.*, Nitti, *supra* note 108 (explaining reasoning for how Internal Revenue Service justified allowing entry fees for DFS contests to offset winnings from competitions). Intellectual property rights are another factor that has been considered more recently. *See* Tabolsky, *supra* note 24 (offering discussion surrounding intellectual property rights implicated by DFS business model, such as publicity rights).

113. For further discussion of claim elements as understood by the lower court, see *supra* note 58 and accompanying text.

114. *See Dew-Becker III*, 2017 IL App (1st) 161383-U, at *¶ 7 (Ill. App. Ct. 2017) (showing question from judge indicating judge thought Dew-Becker had sued wrong party under Loss Recovery Act).

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, Ferrazzono, Kirschbaum & 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.”).

119. *See generally* Steve Berkowitz & Tom Schad, *Your State-By-State Guide to Sports Betting in Light of Supreme Court Ruling*, U.S.A. TODAY (May 14, 2018, 7:47 PM), <https://www.usatoday.com/story/sports/2018/05/14/sports-gambling-status-every-state-after-supreme-court-ruling/607334002/> [<https://perma.cc/P7U3-YZ4L>] (explaining timing of legislative action by states in response to *Murphy v. Nat’l Collegiate Athletic Ass’n* decision). “‘The largest group of states will wait until 2019 because they are out of session or almost out of session,’ Grave said. ‘. . . That

A. NO ONE WANTS TO BE FIRST¹²⁰

The record capturing the first trial's events shows the judge issued a ruling without conducting a trial.¹²¹ Documentation of the court's analysis emerged from a bystander's report.¹²² When the judge issued his ruling in favor of the defendant, he commented that the target of Dew-Becker's claim was misplaced.¹²³ In the moment, Dew-Becker challenged the reasoning.¹²⁴

The lack of due process earned Dew-Becker a return trip to the circuit court.¹²⁵ 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.¹²⁶ The court pinned its denial of recovery on the Loss Recovery Act's inapplicability to the facts of Dew-Becker's claim.¹²⁷ 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.'" *Id.*

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.").

123. For further discussion of the lower court's comments, see *supra* note 58 and accompanying text. In 2019, an Illinois case explored comprehensively the idea of "winner" per the state's Loss Recovery Act. *See Anderson v. Naperville Rotary Charities Inc.*, 2019 IL App (1st) 180312-U, at *¶ 14 (Ill. App. 2019) (analyzing issue of word winner in Loss Recovery Act while reviewing relevant cases at state, federal levels brought under Illinois Loss Recovery Act).

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").

126. *See Dew-Becker II*, 123 N.E.3d 86, 89 (Ill. App. Ct. 2018) (holding Dew-Becker could not recover loss of funds to Wu).

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.¹²⁸ 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.¹²⁹ Dew-Becker appealed again.¹³⁰

B. Missing the Mark

On Dew-Becker's second trip to the appellate court, he had counsel.¹³¹ The court accepted for the sake of argument that it would presume that the contest between Dew-Becker and Wu was a gambling contest.¹³² It then began considering the applicability of the Loss Recovery Act to DFS gambling.¹³³ 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."¹³⁴

Next, the court examined the statute's language, which provided that one party must lose to another person.¹³⁵ 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.").

134. See *Dew-Becker II*, 123 N.E.3d at 92 (documenting legislative expansion of legalized gambling in Illinois since 2012). See generally John I. Sharp, *The Political Geography of Gambling in the Midwest*, 37 MIDDLE STATES GEOGRAPHER 62, 64 (2004) (providing context for gambling attitudes while noting "declining economic condition in certain regions of the United States . . . along with changing moral standards in the United States, combined to make the moral arguments against gambling much weaker . . . during the late 1980s and early 1990s in particular").

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.").

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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.”¹³⁶ Therefore, the court held that the statute did not apply.¹³⁷

In its analysis, the court detailed the two prongs it explores when evaluating a statute.¹³⁸ 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.”¹³⁹ The court also noted that the Illinois legislature was working to catch its legislation up with changing times.¹⁴⁰ Finally, reasoning that allowing Dew-Becker’s recovery would “frustrate its purpose,” the court held that the Loss Recovery Act should not be applied.¹⁴¹

C. Masking a Botched Delivery

The Supreme Court of Illinois dismissed the lower court’s reasoning.¹⁴² First, it noted that “Courts are not free to read into statute exceptions, limitations, or conditions the legislature did not express.”¹⁴³ Then, the court provided three bases for finding an

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.¹⁴⁴ First, it stated that the difficulty of identifying DFS winners was not an impossibility.¹⁴⁵ Second, it noted that the concern for the efficiency of the courts was based on speculation.¹⁴⁶ Finally, it noted that whether the law was becoming outdated was immaterial.¹⁴⁷ Nonetheless, the court upheld the ruling in favor of Wu.¹⁴⁸

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.¹⁴⁹ 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.¹⁵⁰ "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]."¹⁵¹

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.¹⁵² 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).

152. See *Dew-Becker I*, 2020 IL 124472, at *¶¶ 22–25 (Karmeier, J., dissenting) (citing to Marc Edelman, *Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation*, 92 IND. L.J. 653, 663–65 (2017)) (explaining grounds for each test, objecting to majority reliance

a material degree upon an element of chance, even if skill is otherwise dominant.”¹⁵³ Claiming using the materiality test would yield a result too subjective; instead, the court opted for the predominant purpose test.¹⁵⁴

The *Dew-Becker* court said choosing the predominant purpose test aligned with the language and example used by the legislature.¹⁵⁵ It then held that skill predominated the DFS contests and that the contests could not be considered gambling.¹⁵⁶ At this point, the court introduced “several recent, peer-reviewed studies” to buttress its holding.¹⁵⁷ 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.¹⁵⁸ However, the court added a comment: “We note that nothing in this opinion should be read as

on academic article to summarize three tests). For further discussion on the three tests, see *supra* note 33 and accompanying text.

153. See *Dew-Becker I*, 2020 IL 124472, at *¶ 23 (majority opinion) (explaining subjectiveness of material element test).

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-Becker I*, 2020 IL 124472, at *¶ 27 (“Arguing for a different result, plaintiff points to an Illinois Attorney General opinion letter However, that

stating that regulation of DFS contests is unnecessary or inappropriate.”¹⁵⁹

Justice Karmeier dissented from the majority opinion.¹⁶⁰ First, he characterized the use of the predominant purpose test as a misconception of the court’s “quantitative” focus instead of a “qualitative” review.¹⁶¹ Second, he distinguished the difference between the two approaches as setting aside the predominance of skill to consider whether chance controls.¹⁶² He said the determination of the character of DFS contests rested on the role chance played in the outcome.¹⁶³ Third, he posited that the factor of skill could only dominate when skill could salvage the final results.¹⁶⁴ 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.¹⁶⁵

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

159. *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).

160. 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.”).

161. 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.”).

162. 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.*

163. 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.

164. 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).

165. 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”¹⁶⁶

At the heart of gambling legislation lies the need to draw the boundaries of permissible activity.¹⁶⁷ The analysis of the Dew-Becker saga settled quickly into the statutory realm from the first non-trial.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

In *Dew-Becker III*, by finding that DFS contests relied predominantly on skill, the justices could exempt DFS contests from the Loss Recovery Act.¹⁷¹ However, the majority relied on studies that were not introduced via either evidence or briefs.¹⁷² Nor did the

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

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

A 2015 South Carolina loss recovery case also evaluated legislative intent when loss recovery was at issue. See *Proctor v. Whitlark & Whitlark, Inc.*, 778 S.E.2d 888, 890 (S.C. 2015) (discussing legislature’s choice to allow loss recovery even when plaintiff participated in illegal gambling). The case overturned an earlier case, *Johnson v. Collins Ent. Co., Inc.*, which was cited to by the court for its explanation of loss recovery policy choices. See *Johnson v. Collins Ent. Co.*, 564 S.E.2d 653, 666 (S.C. 2002) (considering whether state’s endorsement of video gaming precluded cause of action), *overruled by* *Proctor v. Whitlark & Whitlark, Inc.*, 778 S.E.2d 888 (S.C. 2015).

166. See Carrie Arnold, *Jesting Our Limits: Do April Fools’ Day Pranks Alienate or Engage People?*, SCI. AM. (Mar. 31, 2011), <https://www.scientificamerican.com/article/do-april-fools-jokes-tests-limits-alienate-engage/> [<https://perma.cc/5A7E-2E7K>] (discussing using humor “to both test social bonds and bring groups together”).

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

168. See *Dew-Becker III*, 2017 IL App (1st) 16138-U, at *¶ 7 (Ill. App. Ct. 2017) (showing question from judge focused on whether Dew-Becker met statutory basis for bringing claim under Loss Recovery Act). For further discussion of this issue, see *supra* notes 127–129 and accompanying text.

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 predominate 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-

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Subsection A shows the trial court made its determination based on the language of the Loss Recovery Act.¹⁸¹ Subsection B then shows how the appellate court plainly announced it was doing the legislature’s work due to the absence of updated statutes.¹⁸² Finally, Subsection C addresses how the Illinois supreme court stretched the statute language to cover its exceptional reach.¹⁸³

A. Due Process: No Laughing Matter

In his complaint, Dew-Becker outlined a prima facie case for recovery under the Illinois Loss Recovery Act.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶

When the appellate court remanded the case to the trial court, the judge issued the same ruling.¹⁸⁷ The holding, however, showed a shift in the judge’s analysis from his first review of the facts.¹⁸⁸ 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

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.

184. See *Dew-Becker III*, 2017 IL App (1st) 161383-U, at *¶ 4 (showing Dew-Becker’s complaint outlined prima facie case for recovery under Illinois statute).

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.¹⁸⁹ However, the court is only supposed to evaluate legislative intent in the absence of an ability to discern the plain meaning of the language.¹⁹⁰ 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.¹⁹¹ In the end, the outcome of the first visit to the trial court foreshadowed the explanation for the finding in favor of the defendant.¹⁹²

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.¹⁹³ The court held that the contest was gambling activity, thereby opening the door to recovery, but affirmed the lower court's holding.¹⁹⁴ To arrive at that conclusion, the court collapsed two sequential prongs of statutory analysis into one.¹⁹⁵ Rather than beginning with the

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.

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first prong, plain meaning, and ending there because the plain meaning was evident, the court instead considered the second prong in tandem.¹⁹⁶

As the court observed, allowing recovery would create potentiality for a remarkable increase in claims given DFS's soaring popularity.¹⁹⁷ 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.¹⁹⁸ Nonetheless, the court exceeded its authority.¹⁹⁹ 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.²⁰⁰ Hedging its bets, the court emphasized the state did not need to follow federal decisions.²⁰¹ Ironically, the court used federal case law to justify its opinion.²⁰²

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.²⁰³ In fact, the state supreme court went as far as to address

196. See *Dew-Becker II*, 123 N.E.3d at 91 ((showing court considered plain meaning and current legislative intent together instead of sequentially).

197. For further discussion of growing popularity of DFS, see *supra* notes 8–11 and accompanying text.

198. For further discussion of the logistics of DFS wagers, see *supra* notes 45–50 and accompanying text.

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.

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).

201. For further discussion of the question regarding contemporary Loss Recovery Act-based cases, see *supra* note 134 and accompanying text.

202. See *Dew-Becker II*, 123 N.E.3d at 91–92 (citing to Seventh Circuit opinion regarding Illinois statutory changes).

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.").

the absurdity in the appellate court reasoning.²⁰⁴ Furthermore, the Illinois supreme court acknowledged that it needed to apply the statute if it found it was constitutionally sound.²⁰⁵

However, the court then created its own absurdity by holding that the DFS contest “was not gambling.”²⁰⁶ First, it selected the test that would provide the most favorable analytical structure for the desired answer to the gambling issue.²⁰⁷ It seems particularly noteworthy that the court did not evaluate the *Dew-Becker* facts through the analytical construct of the any chance test.²⁰⁸ 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.²⁰⁹ 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.²¹⁰

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.²¹¹ 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’ per-

204. *See id.* (“To be sure, the use of screen names may, in some instances, make recovery more difficult for the loser of a DFS contest, but it does not make recovery impossible.”).

205. For further discussion of limits on statutory interpretation, see *supra* notes 147-148 and accompanying text.

206. *See Dew-Becker I*, 2020 IL 124472, at *¶ 21 (finding ambiguity in character of daily fantasy sports play to incorporate outside scholarly materials.). *See generally* Dove, *supra* note 44, at 758 (discussing doctrine of absurdity, noting “[w]hether a judge intentionally or unconsciously seeks to disguise a results-oriented interpretation, the results of particular interpretations have the potential to impact interpretive decisions.”).

207. *See Dew-Becker I*, 2020 IL 124472, at *¶ 22 (providing three tests for evaluating element of chance necessary for gambling).

208. *See id.* at *¶ 25 (giving any chance test only one sentence in its evaluation of which test it would use). For further discussion of qualitative approach’s significance, see *supra* notes 213 and accompanying text.

209. *See Dew-Becker I*, 2020 IL 124472, at *¶ 27 (noting any chance test underpinned Texas finding DFS contests were illegal gambling acts; any chance test also supported analysis adopted by Attorney General of Illinois in 2015 opinion letter on issue). The Edelman article cited by the court shows that some of the states determining DFS play was gambling also relied on the any chance test. *See* Mark Edelman, *Regulating Fantasy Sports*, 92 IND. L.J. 653, 664 n.53 (2017) (identifying “Arizona, Arkansas, Iowa, and Tennessee” as examples).

210. *See Dew-Becker I*, 2020 IL 124472, at *¶ 26 (naming studies used to demonstrate outcomes of random DFS team assignments versus selected teams).

211. For further discussion of skill-based play, see *supra* note 153 and accompanying text.

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formances on a given day.²¹² Furthermore, the justices selected a test for their analysis that seemed at odds with its analytical approach, as noted by the dissenting judge.²¹³ 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.²¹⁴ 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.²¹⁵

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.²¹⁶ This holding was a marked change in Illinois and a marked change to common practice among the states generally.²¹⁷ Notably, the definitive ruling made Illinois more attractive to DFS operators because it reduced the business risks to the operators.²¹⁸ Meanwhile, the definitive ruling left future courts and impacted individuals little recourse for recovery.²¹⁹

The court's ruling also served as an invitation to current and future state legislators to leave the hard work of crafting the particu-

212. See *Dew-Becker I*, 2020 IL 124472, at *¶ 25 (providing detail of gambling device).

213. See *id.* at *¶ 36 (explaining predominant factor test involves qualitative approach). For further discussion of how the studies entered the case, see *supra* note 172 and accompanying text.

214. See Carter Floyd, *DFS Decision in IL Could End Mobile Sports Betting Waiting Period*, LEGAL SPORTS BETTING (Apr 27, 2020, 10:10 AM), <https://www.legalsportsbetting.com/news/dfs-decision-in-il-could-end-mobile-sports-betting-waiting-period/> [<https://perma.cc/EY7Y-BFPS>] (“[I]t only specifies ‘head-to-head’ DFS contests as being games of skill, meaning that other types of contest might not be covered.”).

215. For further discussion of the Sports Wagering Act, which addresses DFS contests, see *supra* note 165 and accompanying text.

216. For further discussion of the court's reasoning, see *supra* notes 142–165 and accompanying text.

217. See Jeffrey Standen, *The Special Exemption for Fantasy Sports*, 42 N. KY. L. REV. 427, 428, 435 (2015) (discussing status of states' sports gambling laws in 2015, while noting fantasy sports as federal carve-out).

218. See Danny Lawhon, *Illinois Ruling Huge for Daily Fantasy Sports*, GAMING TODAY (Apr. 29, 2020), <https://www.gamingtoday.com/news/illinois-ruling-huge-for-daily-fantasy-sports/> [<https://perma.cc/KR96-ML9J>] (mentioning Madigan opinion's chilling effect on DFS operators, speculating ruling will increase investor confidence).

219. See *Dew-Becker III*, 2017 IL App (1st) 161383-U, at *¶ 11 (Ill. App. Ct. 2017) (explaining why case was statutory in nature rather than based in tort or contract law).

lars of legislation to the courts.²²⁰ 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.²²¹ Additionally, the South Carolina case *Proctor v. Whitlark & Whitlark, Inc.*²²² 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.²²³ As highlighted in *Dew-Becker*, statutory claims cannot be resolved by conference.²²⁴ The ruling will also have repercussions on companies inside and outside of Illinois, communities, and individual DFS players.²²⁵

The challenge faced by the *Dew-Becker* court of trying to prevent absurd outcomes springing from legislative gaps was neither novel nor unforeseeable.²²⁶ At this point, the move to online recreation was well underway.²²⁷ 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.”).

222. *Proctor v. Whitlark & Whitlark, Inc.*, 778 S.E.2d 888 (S.C. 2015).

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

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laws was not even a challenge that was particular to Illinois.²²⁸ 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.²²⁹

Finally, the holding illustrated a concern raised by the Supreme Court in its *Murphy* opinion.²³⁰ There, the Court noted the importance of state legislatures taking responsibility for lawmaking and the resulting accountability provided by elections.²³¹ 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.²³²

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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.

231. See *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1477 (2018) (discussing how “anti-commandeering rule promotes political accountability”).

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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