

# THE REALITY OF (DAILY) FANTASY SPORTS

By Todd M. Weiss<sup>1</sup>

## INTRODUCTION

Throughout the past decade, a dozen close friends and I have assembled at the end of every summer to participate in one of our favorite pastimes: fantasy football. Many details have changed over the years, but the two things that have not are the social and friendly atmosphere and, of course, the cash prize for the winner at the end of the season. The cash prize is never extravagant; the spoils are perhaps \$200-\$300 at most. Like many fantasy leagues, the purpose of the prize money is mainly just to add a bit more interest and competition.<sup>2</sup>

Even if a cash prize is not the primary consideration, does the presence of a prize mean my friends and I have been engaging in illegal gambling activity all these years? The question is not as settled as it might appear. The issue of whether fantasy sports constitutes gambling has very rarely been discussed, likely because of high participation in fantasy sports in the U.S.<sup>3</sup> This article examines and explores how fantasy sports would fare if put under traditional gambling “tests,” and how they are viewed differently in various jurisdictions. As will be seen, there are many good arguments that fantasy sports are largely games of skill and chance. However, these arguments comparatively have implications for various other games that have been declared gambling in the past.

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<sup>1</sup> A special thanks to Greg Gemignani and Jennifer Roberts, my gaming law professors at William S. Boyd School of Law, and to Chris Soriano and Melissa Blau for all their help and guidance.

<sup>2</sup> Anyone who has participated in a fantasy league will testify that winning bragging rights certainly is more valued than the cash prize.

<sup>3</sup> The Fantasy Sports Trade Association estimates 56.8 million people play fantasy sports in the U.S. and Canada. Fantasy Sports Trade Ass’n, INDUSTRY DEMOGRAPHICS, <http://www.fsta.org/?page=demographics> (last visited July 12, 2015).

Over the past 30 years, two important federal laws have been passed that have a direct impact on the fantasy sports industry – the Professional and Amateur Sports Protection Act (PASPA) and the Unlawful Internet Gambling Enforcement Act (UIGEA). It would be impossible to examine the legality of fantasy sports, now and in the future, without understanding the purpose and function of these laws. With respect to fantasy sports, the plain language of these two laws appears to be in conflict. This article will also examine congressional intent in passing these laws in an attempt to explain why this discrepancy exists and how it has been reconciled in practice.

As a direct result of language in the UIGEA, a new and different form of fantasy sports has risen and become big business here in the United States. Daily or one-day fantasy sports websites such as FanDuel and DraftKings have attracted significant investor money and have even partnered with some of the professional sports leagues. Daily fantasy sports games operate very differently from traditional fantasy sports games, and this iteration of fantasy sports significantly alters the analysis of whether fantasy sports should be considered gambling. As will be seen, daily fantasy sports games bear some of the indicia of other “gambling” games such as poker and even horseracing. Because daily fantasy sports are so different, it begs the question: “Is this really the type of activity that Congress intended to protect?”

The discrepancies surrounding fantasy sports and daily fantasy sports are fairly new in terms of the law, and little is established to date. States and professional sports leagues alike are scrambling to figure out where exactly these games fall under the law and within different morality viewpoints. It now appears likely, given the amount of money and attention daily fantasy sports businesses have attracted, that Congress or the courts will have to reexamine the games again sometime in the near future. The importance of these determinations reaches far

beyond just fantasy sports themselves. The daily fantasy sports debate implicates other “gambling” industries and has even become a basis of argument for states fighting back against the restrictions of PASPA. In addition, the involvement of the professional sports leagues calls into question the leagues’ respective motivations, possibly signaling their changing stance towards sports betting overall. This article will examine the most current events and explore opinions from gaming industry experts in order to assess and determine the current and future legal state of fantasy sports games.

### **I. IS FANTASY SPORTS GAMBLING?**

Answering the question of whether fantasy sports can be considered gambling requires a basic understanding of how fantasy sports are played. To begin, players assemble a virtual or “fantasy” team comprised of real-world athletes from various teams in a particular professional sports league. Each fantasy team in a league must consist of different athletes. For example, Player A may select Peyton Manning as her fantasy quarterback in a fantasy football league; other players in the league may not also chose Peyton Manning, but could select Tom Brady. Athlete acquisition is usually done via a “fantasy draft” or “fantasy auction” that can be held in person or online. The fantasy teams compete against each other through a point system based on the statistical results of the individual athletes comprising each fantasy team. Returning to the previous example, if Peyton Manning throws more touchdowns than Tom Brady in a season, then Player A’s fantasy team will get more points in the touchdowns category. The point systems and statistical categories vary by league, but the fantasy team whose individual athletes perform better over the course of a season will win.

With that background in mind, it is also necessary to look at how traditional (season-long) fantasy sports games have been received. As with many games, the determination of

whether something is gambling comes down to whether the game is predominantly a game of skill or chance. When it comes to fantasy sports, there is no universal consensus and the opinions vary wildly depending on the jurisdiction. While fantasy sports maybe implicated in federal laws such as PASPA, they are specifically exempted from prohibition in the UIGEA. The UIGEA specifically defines fantasy sports as games of skill rather than chance.<sup>4</sup> One of the conditions that a fantasy game must exhibit to be considered exempt from UIGEA enforcement is that “all winning outcomes *reflect the relative knowledge and skill of the participants* and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.”<sup>5</sup> The UIGEA is examined in much more detail in the next section; for now, it is only important to note that while fantasy sports have been exempted in federal law, nothing prohibits the states from defining fantasy sports differently and prohibiting them.<sup>6</sup>

Many states still define gambling with broad “card and dice” statutes. For example, in Minnesota, a gambling game is defined as

...any game played with cards, dice, equipment, or any mechanical or electronic device or machine for money or other value, whether or not approved by law, and includes, but is not limited to: card and dice games of chance, slot machines, banking or percentage games, video games of chance, sports pools, pari-mutuel betting, and race book.<sup>7</sup>

While state statutes such as this are very common, these broad categories of defined gaming have never been viewed as inclusive of traditional fantasy sports. For instance, in Nevada, all gambling games are illegal unless approved by the Nevada Gaming Commission. As

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<sup>4</sup> 31 U.S.C.A. § 5362 (West).

<sup>5</sup> 31 U.S.C.A. § 5362 (West) (emphasis added).

<sup>6</sup> 31 U.S.C.A. § 5361 (West).

<sup>7</sup> Minn. Stat. Ann. § 609.75 (West).

of March 2015, there are over 800 specific gambling games approved by the Nevada Gaming Commission, but none of them involve fantasy sports.<sup>8</sup>

Thus, it appears the federal exemption in the UIGEA, combined with fantasy sports' inability to fit neatly within traditional categories of gambling games, have left the legal status of fantasy sports unclear in many jurisdictions. Currently, only a few states have laws referencing the status of fantasy sports. Maryland is an example of one state that has legislatively cleared up this ambiguity by defining fantasy sports as games of skill and exempting them from the prohibitions against "betting, wagering, and gambling."<sup>9</sup>

The state of Montana, however, sees fantasy sports games very differently. Unlike Maryland, Montana specifically defines a "fantasy sports league" as a gambling activity when certain conditions are present.<sup>10</sup> These conditions include paying a fee for membership; trading and acquiring fantasy players after initial teams are selected; and giving payouts to winning league members.<sup>11</sup> Somewhat surprisingly though, Montana's classification of fantasy sports as gambling does not mean participation is outright prohibited. To the contrary, state law explicitly authorizes participation in the "gambling activity" known as fantasy sports; the only caveat is that "[i]t is unlawful to wager on a fantasy sports league by telephone or by the Internet."<sup>12</sup>

The Montana statute has two interesting components – first, that there must be some form of paid membership or league entrance fee, and second, that fantasy league "wagers" are only

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<sup>8</sup> Nevada Gaming Commission Approved Gambling Games, <http://gaming.nv.gov/Modules/ShowDocument.aspx?documentid=7097> (last updated March 1, 2015).

<sup>9</sup> Md. Crim. Law Code Ann. § 12-114. The statute, which became effective in 2012, is almost identical to the relevant UIGEA provision with similar conditions on what constitutes a legal fantasy game.

<sup>10</sup> Mont. Code Ann. § 23-5-801.

<sup>11</sup> Mont. Code Ann. § 23-5-801.

<sup>12</sup> Mont. Code Ann. § 23-5-802.

prohibited telephonically and online. Under these conditions, free fantasy sports games – such as the ones popular on espn.com and yahoo.com as well as my own fantasy football league with friends – are not prohibited. These specific conditions appear to be aimed at preventing citizens of Montana from participating in *daily* fantasy sports games, which rely on entrance fees and the Internet to operate. As will be discussed in greater detail below, Montana is one of five states whose residents are not offered paid entry fee games by daily fantasy websites FanDuel and DraftKings due to the questionable legality of the games.<sup>13</sup>

While only a limited number of states currently have fantasy sports laws on the books, high-ranking officials in a few states have given opinions that make the legality of fantasy sports games questionable. In 1991, the Louisiana State Attorney General issued an opinion on the legality of a fantasy game that included prizes for winners; participants had to dial a “1-900 telephone number” to pick a fantasy football team.<sup>14</sup> The Attorney General ruled that based on the state’s very broad definition of gambling, “the league did indeed violate Louisiana law because players had to risk money to join the game to potentially win the offered prizes.”<sup>15</sup> It is important to note that this opinion was given long before the appearance of daily fantasy sports games. The league at issue in the opinion, however, was one of the first examples of commercial, non-traditional fantasy sports. Louisiana’s broad definition of gambling is one reason why daily fantasy websites also do not offer paid entry fee games to residents of that state.<sup>16</sup> In Florida, conversely, the Florida State Attorney General was asked to give an opinion about the legality of more traditional fantasy sports league where each participant paid a \$100 entry fee to manage a

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<sup>13</sup> “Legal”. FanDuel, Inc. <https://www.fanduel.com/legal>.

<sup>14</sup> Michael J. Thompson, Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?, 8 Sports Law. J. 21, 38 (2001).

<sup>15</sup> *Id.*

<sup>16</sup> “Legal”. FanDuel, Inc. <https://www.fanduel.com/legal>.

team with cash prizes for the winner.<sup>17</sup> Florida's gambling laws reflect a more common scheme in that the determination of chance versus skill is the major factor. The Florida Attorney General acknowledged that there might be a great deal of skill in fantasy sports in choosing players for a team. However, even if fantasy sports are a game of skill, Florida statute prohibits the wagering of money on “. . . any contest of skill, power, or endurance between humans or animals.”<sup>18</sup> Despite this opinion, no fantasy sports participants or providers have ever faced a challenge in the state.<sup>19</sup>

While some states have special statutes that dictate whether or not something constitutes gambling, the vast majority of jurisdictions still use the “dominant factor test” to make that determination. The dominant factor test, simply stated, dictates that if a game is to be considered gambling, the chance element of the game must predominate over the game's skill element. If the skill element predominates, then the game is not considered a gambling game.<sup>20</sup>

Because mainstream fantasy sports are a relatively new phenomenon, the courts have heretofore been asked on only one occasion to make a skill versus chance determination. In the New Jersey District Court case of *Humphrey v. Viacom, Inc.*, the legal issue was whether the entry fees paid by participants in fantasy leagues constituted gambling “wagers.”<sup>21</sup> The plaintiff, Humphrey, was seeking to recover losses incurred by fantasy game participants in a number of states with gambling-loss recovery laws acting as a *qui tam* plaintiff. Humphrey argued that

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<sup>17</sup> Michael J. Thompson, Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?, 8 Sports Law. J. 21, 38 (2001).

<sup>18</sup> *Id.*

<sup>19</sup> Edelman, Marc. “Is it Legal to Play Fantasy Football for Money?” Forbes. Sep. 3, 2013. <http://www.forbes.com/sites/marcedelman/2013/09/03/is-it-legal-to-play-fantasy-football-for-money/>.

<sup>20</sup> Com. v. Dent, 992 A.2d 190, 193 (Pa. Super. 2010).

<sup>21</sup> Humphrey v. Viacom, Inc., 06 2768 DMC, 2007 WL 1797648, at \*2 (D.N.J. June 20, 2007).

. . . [t]he Defendants' fantasy sports operations constitute gambling because the participant [‘wagers’] the entry fee for the chance to win a prize and the winner is determined predominantly by chance due to potential injuries to players and the vicissitudes of sporting events in general.<sup>22</sup>

The defendants (including fantasy league providers espn.com and cbssportsline.com) and the court did not agree with Humphrey. As the court stated,

The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench.<sup>23</sup>

The court went on to emphasize that fantasy sports leagues allow fans to use their knowledge of the players, statistics, and strategies to succeed. Additionally, the court made a very interesting distinction between legitimate entry fees and “wagers.”

. . . The entry fees for Defendants' fantasy sports leagues are not [‘bets’] or [‘wagers’] because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) Defendants do not compete for the prizes.”<sup>24</sup>

Overall, there were two important considerations that led the court to conclude that these fantasy sports activities were not gambling. First, the fantasy sports league providers were not participants in the leagues and had no financial stake in the outcomes. Second, the fantasy league participants did not suffer a “loss” because they received “administrative, statistical, and analytical services” in return for their entry fee.<sup>25</sup> Because the fantasy sports leagues at issue were in compliance with the UIGEA, the court held that federal law mandated the dismissal of the case. Because a “bet” was never made, the court never reached a separate conclusion on whether fantasy sports are a game of chance or skill (though their language indicated that they were strongly leaning towards skill).

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> Humphrey v. Viacom, Inc., 06 2768 DMC, 2007 WL 1797648, at \*9 (D.N.J. June 20, 2007).

<sup>25</sup> *Id.*



Nobody would disagree with the *Humphrey* court's conclusion that there is considerable skill involved in playing fantasy sports games. According to Michael J. Thompson, there are hundreds, if not thousands, of skilled decisions that a fantasy sports participant will make over the course of a season.<sup>26</sup> For the initial fantasy player draft, the participant must examine statistical data and athlete rankings as well as make split second decisions about an athlete's "value." Then, during the fantasy season, the "skillful" participant must make calculated decisions concerning player trades and acquisitions.<sup>27</sup> Another argument that skill predominates in fantasy sports stems from the fact that each fantasy participant has a unique team; therefore, the best-assembled team will win.<sup>28</sup> In addition, a fantasy participant's ability to make last-minute roster changes and substitutions significantly reduces the chance element.<sup>29</sup>

That being said, others who have explored the subject have not discounted the clear chance elements in fantasy games. In fact, attorney Jon Boswell has noted that predicting the future production of professional athletes involves a degree of guessing, and there are hosts of other factors outside the fantasy participant's control that can significantly alter the athlete's performance (i.e. injuries, weather, suspensions, benchings, physical/psychological conditions, etc.).<sup>30</sup> However, Boswell correctly perceived that how fantasy participants react to these chance elements is where they really demonstrate their skill. The skilled fantasy player must have superior knowledge about the athlete's potential to perform, keep abreast of all outside factors

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<sup>26</sup> Michael J. Thompson, Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?, 8 Sports Law. J. 21, 34 (2001).

<sup>27</sup> *Id.*

<sup>28</sup> Jon Boswell, Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law, 25 Cardozo Arts & Ent. L.J. 1257, 1266-267 (2008).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 1268-1269.

that may hinder the athlete's performance, and be able adjust the roster to compensate for "chance" events.<sup>31</sup>

Out of all the different elements Boswell mentions that go into playing fantasy sports, the team roster management is perhaps the most skill-intensive aspect of the game. Coming from an experienced fantasy participant, things like athlete injuries happen without warning and cannot be predicted, but the most skilled fantasy players have the ability to manipulate their fantasy roster through trades and dropping and adding players in free agency to compensate for these uncertain events. Deciding which players to start or bench on game day, while taking into account things like weather, injuries, and individual matchups, is a highly skill-intensive endeavor. As discussed later, many of the most skill-intensive aspects of the game are simply not present in daily fantasy sports, which is why those games need separate analysis. But as far as traditional fantasy sports go, the vast consensus is that skill predominates over the course of a full fantasy season.

According to the Fantasy Sports Trade Association (FTSA), fantasy sports leagues are games of skill because participants must "take into account a myriad of statistics, facts, and game theory in order to be competitive."<sup>32</sup> The FTSA also employs a very familiar anti-gambling argument – according to the FTSA, "[t]he (more) highly skilled fantasy player wins more often."<sup>33</sup> This is a familiar argument because it has been used time and again by proponents of other gambling games (such as poker) to claim those games are predominantly skill-based. According to an opinion given by the Alabama Supreme Court regarding video poker,

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<sup>31</sup> *Id.* at 1270-1271.

<sup>32</sup> "Why Fantasy Sports is NOT Gambling". Fantasy Sports Trade Association. <http://www.fsta.org/?page=FSandGambling>.

<sup>33</sup> *Id.*

. . . The skill of the player may increase the player's odds of winning but ultimately the player's skill cannot determine the outcome, regardless of the degree of skill involved. Chance, being the nature or outcome-determining factor of the game, dominates over skill.<sup>34</sup>

A very similar argument could easily be made about fantasy sports. Ample research and understanding of the game and strategy can certainly increase a participant's odds of winning a fantasy sports game but, just as with video poker, no amount of skill can determine the final outcome. In the end, it is the performance of professional athletes (outside of the participant's control) that decides whether a fantasy sports player wins or loses.

In the case of *Joker Club v. Hardin*, the North Carolina Appellate Court spent considerable time analyzing chance versus skill in the game of poker. The *Joker Club* court recognized that there are significant aspects of skill in the game of poker, including a player's ability to bluff, calculate and analyze odds, and even know about human psychology.<sup>35</sup> The defendants in the case, arguing that poker is predominantly a game of skill, asserted that a poker player can improve his skills and strategies over time and the skilled and experienced player is overwhelmingly likely to prevail when multiple hands are played.<sup>36</sup> The court, however, was not convinced by these arguments. The court reasoned that while poker has elements of both chance and skill, "the instrumentality for victory is not entirely in the players' hands (unlike golf, bowling, or billiards)."<sup>37</sup> The court reasoned that in poker, even novices can win games based solely on the luck of the draw, and no amount of player skill can transform a "deuce into an ace."<sup>38</sup>

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<sup>34</sup> *Op. Of The JJ.*, 795 So. 2d 630, 643 (Ala. 2001).

<sup>35</sup> *Joker Club, L.L.C. v. Hardin*, 643 S.E.2d 626, 630 (N.C. App. 2007).

<sup>36</sup> *Id.* at 629.

<sup>37</sup> *Id.* at 630.

<sup>38</sup> *Id.*

Poker as a game has been pretty universally held to be predominantly more chance than skill based on the argument that a poker player is “always subject to defeat at the turn of a card.”<sup>39</sup> While this analysis appears sound, it is important to note that the fundamental differences between poker and fantasy sports are not as pronounced as some would make it seem. As the court acknowledged in *Joker Club*, the more skilled poker player has a statistical advantage and has a higher likelihood of winning the game. The same can be said for fantasy sports – a skilled fantasy sports player can only use their skills and knowledge to *increase* the likelihood of victory. Just as with poker, the final “instrumentality for victory” is not in a fantasy sports player’s hand. Courts could distinguish fantasy sports from games like golf, bowling, and chess in many of the same ways as they have previously done with poker. It is also true that complete novices can win in fantasy sports based almost entirely on luck. In my own fantasy football league, we had a streak of several years where a fantasy football newcomer actually won the entire league. Provided with nothing more than easy-to-obtain player rankings, a player with no other fantasy sports knowledge or skills still has a legitimate chance of winning.

Moreover, one of the arguments made by the *Humphrey* court was that fantasy sports players must use their knowledge of the players, statistics, and strategies to succeed. However, there is very little difference between these skills and the skills of a poker player. A top poker player must be able to analyze odds and probabilities; likewise, a fantasy sports player analyzes past statistics and other available information to come up with a “probability” that a particular athlete will continue to perform.<sup>40</sup> The strategy aspect to fantasy sports games is just as important

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<sup>39</sup> *Id.*

<sup>40</sup> For example, I will normally design a pre-fantasy draft player rankings list using a two- or three-year moving average of their statistics while also taking into consideration factors such as the athlete’s age and team status. Through this process I rank and select fantasy players according to pre-determined probabilities.

to success as the strategy in a poker game. One thing the *Humphrey* court failed to do was equally consider the chance aspects of fantasy sports. This is significant because, as the *Seattle Times Co. v. Tielsch* court described, a number of different elements give football games a significant chance aspect:

The [*Seattle Times Co. v. Tielsch*] court recognized that many different elements of chance, including the weather, the physical and psychological condition of the players on a given day, and even sociological problems between members of the team, may seriously affect the possibility of a correct prediction.<sup>41</sup>

In reality, when playing fantasy sports, a participant is not doing much more than making an educated guess that a professional athlete will continue to accrue statistics similar to what they have done in the past.

Overall, there are a number of different facets to the skill versus chance debate when it comes to fantasy sports. It is clear that the line is very close, and much closer than most people would lead one to believe. However, the above analysis appears to weigh in favor of traditional (season-long) fantasy sports being predominantly skill-based, and therefore should not be considered gambling. Granted, there are a number of similarities between fantasy sports and a “gambling” game like poker, and many of the arguments used in favor of poker in the past that were not accepted have been used in support of fantasy sports (though for fantasy sports, those arguments have been accepted).

For all the similarities though, the difference lies between the chances of getting a particular card on a flop versus the chances of a sudden, drastic change in a professional athlete’s playing ability or statistics. Every single game of poker has card flops that are entirely conducive to chance. Nothing a poker player does can change the odds of getting a particular card on a flop. In contrast, in fantasy sports it is rare for a once-productive professional athlete to stop producing

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<sup>41</sup> Michael J. Thompson, Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?, 8 Sports Law. J. 21, 39 (2001).

overnight (barring rare contingencies such as suspensions). A card flop in poker is a one-shot chance that almost singlehandedly determines the outcome of a game. However, in traditional fantasy sports, if a single professional athlete's statistical production begins to decline, the participant uses knowledge and skill to make roster changes to compensate for that decline. While fantasy sports are most definitely games of both skill and chance, the skill element predominantly dictates the outcome of a game over the course of a full season.

## II. PASPA AND THE UIGEA

As noted above, there are two main federal laws that have a substantial impact on the legality of fantasy sports in general: PASPA and the UIGEA. As will be seen, the plain language of these laws seem to conflict in regards to fantasy sports, and we must examine the intent of the laws in order to understand and reconcile this conflict. The relevant provision at issue of the UIGEA, passed in 2006, defines fantasy sports as a game of skill and states that fantasy sports are not gambling if they meet certain conditions. Those conditions are: 1) all winnings from fantasy sports are established and made known to the participants in advance and is not determined by the amount of fees paid by participants; 2) winning outcomes reflect the relative *knowledge and skill* of the participants based on the accumulated statistics of individual athletes in real-world sporting events; and 3) no winning outcome is based on scores, point-spreads, or the performance of any real-world teams (traditional sports wagering) or solely on single performance of any individual athlete in a real-world sporting event.<sup>42</sup>

From these conditions, it is clear a UIGEA safe fantasy league cannot resemble any traditional sports wagering (scoring lines, point spreads, etc.), be part of a sports pool where the total number of entrants or winnings is unknown, or include wagers on individual athlete

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<sup>42</sup> 31 U.S.C.A. § 5362 (West).

performances. For example, a popular Super Bowl proposition bet might be “over/under the total number of touchdowns Tom Brady will throw in the game.” Even though the bet involves the individual statistics of a real-world professional athlete, games like this would not be in compliance with the conditions of the UIGEA.

PASPA, passed in 1992, is a much older law than the UIGEA. What PASPA generally says overall is that, minus a few exceptions, it is unlawful for any governmental agency or person to “sponsor, operate, promote, or advertise” any kind of sports based gambling or lottery scheme.<sup>43</sup> The most relevant language to fantasy sports however is that an unlawful sports-based gambling scheme includes those directly or indirectly based on “one or more performances of such athletes in such games.”<sup>44</sup> If one just looks at this line of the statute, it appears to be a direct reference to fantasy sports. The reason PASPA is not in direct conflict with the UIGEA is because of the PASPA language limiting it to a “lottery, sweepstakes, or other betting, gambling, or wagering scheme.” The UIGEA expressly declared that fantasy sports games meeting the prescribed conditions are not gambling games.

It is important to note that the UIGEA defines “unlawful internet gambling” as any gambling that is unlawful under any applicable federal or state law.<sup>45</sup> Therefore, if a state defines fantasy sports as unlawful gambling, then it is also unlawful under the UIGEA. Nevertheless, this dichotomy between the two statutes is a bit odd. Was the legislature that enacted PASPA concerned with the possibility of fantasy sports type gambling activities? Did the legislature change its opinion on the nature of fantasy sports between the passing of PASPA and the

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<sup>43</sup> 28 U.S.C.A. § 3702 (West).

<sup>44</sup> *Id.*

<sup>45</sup> 152 Cong. Rec. H. 8026 (2006).

UIGEA? These questions can only be answered by examining the legislative record and intent of these two statutes.

First, it is important to note that these two statutes are very different in their design and purpose. The purpose of PASPA was clearly to prohibit sports gambling, in all forms, but especially that conducted or authorized under state law.<sup>46</sup> PASPA then can fairly be regarded as an anti-gambling statute. The UIGEA, on the other hand, is more appropriately characterized as a financial statute, and the statute's main purpose is to prevent the use of certain payment instruments (credit cards, fund transfers, etc.) for unlawful Internet gambling.<sup>47</sup> In fact, the UIGEA is commonly referred to as a modernization of the Federal Wire Act. These two statutes operate quite differently in their enforcement. PASPA is designed to be a preventative statute, to stop what Congress at that time saw as the rising tide of state sponsored sports betting that would threaten the integrity of the games. "In the broader sports gambling area, States are considering a wide variety of State-sponsored gambling schemes."<sup>48</sup> "Sports are national institutions, and Congress has recognized a distinct federal interest in protecting sports from corruption."<sup>49</sup>

Conversely, the UIGEA was intended to punish providers of *illegal* gambling services ("engaged in a gambling business") who conduct financial transactions with gamblers. The UIGEA's stated purpose is to "[p]revent the use of certain payment instruments, credit cards, and fund transfers for unlawful Internet gaming."<sup>50</sup> An onus is put on financial institutions to initiate procedures to identify and block potential gambling transactions.<sup>51</sup> The legislature that passed the UIGEA was concerned with updating the Federal Wire Act's language to include online

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<sup>46</sup> S. REP. 102-248, 3, 1992 U.S.C.C.A.N. 3553, 0.

<sup>47</sup> 152 Cong. Rec. H. 4969 (2006).

<sup>48</sup> S. REP. 102-248, 5, 1992 U.S.C.C.A.N. 3553, 3556.

<sup>49</sup> *Id.* at 3557.

<sup>50</sup> 152 Cong. Rec. H. 4969 (2006).

<sup>51</sup> 31 U.S.C.A. § 5364 (West).



gambling games such as poker, blackjack, and roulette.<sup>52</sup> Specifically, the legislature stated “[t]his (Internet gambling) is a scourge on our society. It causes innumerable problems...Internet gambling ignores the laws of the 50 states, which vary...”<sup>53</sup>

Given the massive impact these laws could have on fantasy sports, there is surprisingly very little direct reference to these types of games in the legislative record. Sports betting was not the main focus of the UIGEA, and it seems the main targets of the law were large offshore Internet poker operations that had become very prominent. Congress did appear to be very concerned with the effect online gambling has on young people. During the legislature’s debate, Alabama Congressman Bachus noted,

...In the last year we have gotten another 150,000 young compulsive gamblers. It (gambling) is already illegal. What we are doing is stopping it. You have got the criminals on one side, and you have got young people on the other side; and we must protect the young people from these criminals.<sup>54</sup>

Furthermore, there was considerable debate regarding certain exclusions from the UIGEA, namely for horseracing and state lotteries. Some members of Congress were concerned that special interests were influencing which industries would be provided special exceptions. After noting that all of the major sports leagues supported the bill to protect the “integrity of the games”, one Congressman quipped that “both measures also contain exemptions for fantasy sports leagues that offer cash prizes at the behest of Major League Baseball and grass-roots fan organizations such as the Fantasy Sports Association.”<sup>55</sup> As will be seen in later sections, perceived hypocrisy by the professional sports leagues regarding their stance towards gambling activities is a major theme for proponents of sports wagering.

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<sup>52</sup> 152 Cong. Rec. H. 4969 (2006).

<sup>53</sup> *Id.*

<sup>54</sup> 152 Cong Rec H 4978 (2006).

<sup>55</sup> 152 Cong. Rec. H. 8026 (2006).

Even though PASPA was enacted solely to prevent sports related gambling, fantasy sports are not directly referenced once in the statute's official Senate report. There is, however, considerable language and testimony aimed at protecting the "integrity" of sports and young people from the ills of gambling. The record is supported by testimony from respective former NFL and NBA commissioners Paul Tagliabue and David Stern. Mr. Tagliabue testified that sports' gambling threatens the integrity (public confidence) and character of professional and amateur team sports.<sup>56</sup> Mr. Stern testified that, "The interstate ramifications of sports betting are a compelling reason for federal legislation."<sup>57</sup> The NCAA supported passage for the UIGEA because they were "...concerned about the proliferation of sports betting on the Internet and the effect it is having on their ability to keep the games fair and honest."<sup>58</sup> The committee that authored the report was especially concerned about changing technologies and the draw sports betting has on young people.

The committee is especially concerned about the potential effect of legalized sports gambling on America's youth. Beyond impairing the values sports represent to our young people, new technologies are being considered that, while designed to make gambling more convenient for adults, also would make gambling more convenient for children...Youngsters inevitably would find sports gambling schemes that utilize these new technologies to be highly seductive.<sup>59</sup>

While PASPA became law well over a decade before the UIGEA was passed, it was clear that the Legislature was very concerned with a future where computer technology could make sports gambling easy and accessible to the general public, including children. While fantasy sports are not mentioned directly, there are a couple indirect references. The report states that the statute does not benefit the professional sport leagues and they are as restricted as anyone from

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<sup>56</sup> S. REP. 102-248, 5, 1992 U.S.C.C.A.N. 3553, 3556.

<sup>57</sup> *Id.* at 3557.

<sup>58</sup> 152 Cong. Rec. H. 4969 (2006).

<sup>59</sup> S. REP. 102-248, 5, 1992 U.S.C.C.A.N. 3553, 3556.

instituting their own betting schemes.<sup>60</sup> In explaining the relevant section of PASPA, the commission said,

The prohibition of section 3702 applies regardless of whether the scheme is based on chance or skill, or on a combination thereof. Moreover, the prohibition is intended to be broad enough to include all schemes involving an actual game or games, or an actual performance or performances therein.<sup>61</sup>

Unfortunately, there is very little given in the Congressional reports and debates to explain why the Legislature had a change of heart about the legality of fantasy sports games. The text of the UIGEA specifically states that it in no way violates or contradicts PASPA.<sup>62</sup> As previously mentioned, this is because under the UIGEA, fantasy sports meeting certain conditions are by statute not a gambling scheme. Given that PASPA was passed in 1992, it is likely that the legislature simply did not know how large (and mainstream) fantasy sports would become. They probably didn't foresee the arrival of fantasy sports games that have very close similarities to other forms of gambling. In 2006, when Congress was debating the UIGEA, fantasy sports games had already become a large and important part of many Americans lives (including many members of Congress). Maybe more importantly, the major professional sports leagues had realized the viewership potential created by the fantasy sports market and lobbied hard to ensure that fantasy sports games stayed legal, now and in the future. Recent studies show that fans consume 40% more sports content once they started playing daily fantasy sports.<sup>63</sup> It is important to remember that the daily fantasy sports rose to prominence as a direct result of the UIGEA exemption and its impact on other forms of Internet gambling.

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<sup>60</sup> *Id.* at 3559.

<sup>61</sup> *Id.* at 3560.

<sup>62</sup> 152 Cong Rec H 4978 (2006).

<sup>63</sup> Schrottenboer, Brent. "Leagues See Real Benefit in Daily Fantasy Sports Leagues". USA Today Sports. Jan. 1, 2015. <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

Before examining daily fantasy sports, it is worth analyzing whether fantasy sports games ought to be regulated. In testimony before a Senate subcommittee, Marianne McGettigan, counsel for Major League Baseball's Players Union (MLBPA), pointed out that the structure of fantasy sports is such that the integrity of the actual sports games is not threatened.<sup>64</sup> Fantasy teams are comprised of a collection of individual athletes from many different teams; therefore, there is little incentive for fantasy players to unduly influence one player or one team. In addition, Michael J. Thompson believes that many of the detrimental consequences of other forms of gambling, such as crime and obscene debt, do not occur with fantasy sports.<sup>65</sup> He points out that most fantasy sports league fees are nominal, and the large amount of time necessary to compete in the leagues makes it virtually impossible for someone to compete in a high number of games and accumulate an inordinate amount of debt.<sup>66</sup>

In his law journal article, Jon Boswell sees many reasons why regulation of fantasy sports is unwarranted. He notes that typical fantasy sports participants do not play in order to win money; the amount of money fantasy league winners receive is minimal and unlikely to corrupt a person's individual values or morals.<sup>67</sup> The combination of the minimal money amounts involved and the time requirements of fantasy sports participation make it logistically impossible for someone to become severely indebted by playing. While gambling generally has a negative effect on the economy and crime rate, fantasy sports have a generally positive overall effect by increasing sports viewership and fan-bases.<sup>68</sup> Mr. Boswell further argues that fantasy sports have

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<sup>64</sup> Michael J. Thompson, Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?, 8 Sports Law. J. 21, 30 (2001).

<sup>65</sup> *Id.* At 40.

<sup>66</sup> *Id.*

<sup>67</sup> Jon Boswell, Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law, 25 Cardozo Arts & Ent. L.J. 1257, 1272-1273 (2008).

<sup>68</sup> *Id.* at 1275.

become an enjoyable pastime with strong social value that fosters “intimate friendly competition between friends and family.”<sup>69</sup> These are all very compelling arguments for why fantasy sports games are different from gambling and should not be regulated as such. As explored further below, many of these differences are simply not applicable in the realm of daily fantasy sports.

### III. DAILY FANTASY SPORTS

As a preliminary matter, what are daily fantasy sports and how are they different from the traditional kind? In daily fantasy sports, the games resemble fantasy sports pools more than leagues in traditional fantasy sports. DraftKings calls them “contests.”<sup>70</sup> A daily fantasy sports player will go on a website such as FanDuel or DraftKings and create an account. Once an account is created, the player will be taken to a lobby where he or she can choose which fantasy game contests he or she would like to enter. For example, suppose Player A is a daily fantasy sports player and wants to play a fantasy basketball (NBA) game on DraftKings. If Player A decided to join a public “league” contest, she would have to pay whatever the posted entry fee is to join. The entry fee amounts for contests vary widely, from \$0 to several thousand dollars. The same goes for the number of entrants. The number of entrants can be as small as two or as high as several thousand for some of the larger contests. However, the entry fees and the prize amounts are always set at the creation of the contest and do not depend on the number of contestants who participate.

Once a particular contest has reached the maximum allowable players, nobody else can enter. After the entry fee is paid, Player A must then “draft” her fantasy basketball team. Player A is given a fake “salary cap” of \$50,000 to fill out her roster with real-life NBA players.<sup>71</sup>

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<sup>69</sup> *Id.* at 1277.

<sup>70</sup> “How to Play”. DraftKings Inc. <https://www.draftkings.com/help/how-to-play>.

<sup>71</sup> *Id.*

DraftKings assigns different salary values to each player based on their potential to produce on that day, with the best players having the highest values.<sup>72</sup> This system prevents a participant from being able to assemble a fantasy team of the five best players on any given night. A daily fantasy player has to carefully select his/her team based on these “salary cap” figures. Once Player A has selected her fantasy basketball team, the roster is finalized and she cannot alter it in any way. All she can do is sit back, watch the games, and hope for the best.

DraftKings has a number of different types of contests. In addition to the usual cash prize contests, there are a number of contests where the prizes are entry tickets for more high stakes contests and “DraftKings Dollars.”<sup>73</sup> There are several types of no entry fee games. Some are just for fun, while others one can win prizes such as entry tickets for other contests. DraftKings in particular offers “beginner” contests, so that contest participants can learn all the nuances of playing daily fantasy sports by playing against other beginners before they embark on any of the more high stakes contests.<sup>74</sup> If one is the winner of any of these contests, cash prizes are credited directly to the player’s account, where it can be put towards other contests or withdrawn.<sup>75</sup>

The biggest difference between the two types of fantasy games is the length of the “season.” Traditional fantasy sports take place throughout the course of an entire professional league’s season. So in fantasy football, a fantasy season will begin week one of the NFL season

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<sup>72</sup> *Id.*

<sup>73</sup> “Frequently Asked Questions”. DraftKings Inc. <https://www.draftkings.com/help/faq>.

<sup>74</sup> *Id.*

<sup>75</sup> “How to Play”. DraftKings Inc. <https://www.draftkings.com/help/how-to-play>. I do not and have never played daily fantasy sports myself, but I did create an account on DraftKings just so I could browse the website and get an understanding of how everything works. When I logged on one day in the middle of April, the entry fees for some contests were as high as \$1,060 and total prizes winnings for other contests reached as high as \$5,000. One contest that especially caught my eye was the “PGA \$2.5M Millionaire Maker.” This was a special contest for the PGA U.S. Open and, at the time I logged on, it already had over 4,000 participants who had each paid \$20 entry fees for the chance to win a \$1 million cash prize (\$2.5 million in total prizes).

and could go as long as week 17 of that season. By contrast, a daily fantasy football game would only occur during a single week in the NFL season. On a daily fantasy website, a fantasy football participant could theoretically pick a different fantasy team for every week of the NFL regular season. With other sports, such as professional basketball and baseball, where games take place daily, a daily fantasy sports participant can pick new teams almost continuously. Another difference between traditional and daily fantasy sports is how participants pick the players for their teams. In traditional fantasy sports games, players are usually selected via a “snake draft” where fantasy teams select players in a specified order until the rosters are filled. Daily fantasy games most often employ the “salary cap” system that was previously described. Unlike with traditional fantasy sports, in larger daily fantasy sports there is not a singular pool of real-world athletes from which teams in a league can assemble their fantasy teams. What this means is that multiple teams in larger daily fantasy sports contests could theoretically be comprised of the same players. In this case, winnings are divided among tied winners, not all that dissimilar to how a lottery might work.<sup>76</sup>

All of this isn’t to say that there are not substantial similarities between traditional and daily fantasy sports. On DraftKings, players can create their own fantasy contests to their own specifications; they can pick which fantasy sports game they want to play, and make the contests open to the public or invite only specific friends to play.<sup>77</sup> Players also have control over what (if any) amount of money the entry fee will be, and how many total participants can join the contest.<sup>78</sup> In other words, I could arrange my yearly fantasy football league with my friends through the website, with the only difference being the length of the game. The game itself is

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<sup>76</sup> “Frequently Asked Questions”. DraftKings Inc. <https://www.draftkings.com/help/faq>.

<sup>77</sup> “Create a Contest”. DraftKings Inc. <https://www.draftkings.com/directchallenge>.

<sup>78</sup> *Id.*

essentially the same. The winner of any given contest is still the participant who assembles the best team of real-world professional athletes, based on their production in certain selected playing statistics.

DraftKings and FanDuel are two of the biggest names currently in the daily fantasy industry. Given the “gambling feel” of these websites, it is not a surprise that the companies are frequently questioned about the legality of their business. According to DraftKings’ legal page, the website operates in full compliance with the UIGEA.<sup>79</sup> DraftKings’ website characterizes the UIGEA as clarifying the legality of fantasy sports as a game of skill and not gambling.<sup>80</sup> However, based on the previous analysis above, we know this statement is only partially true. The UIGEA does include a special carve-out for fantasy sports games, but it also expressly stated that it doesn’t change the legality of any game. Anything illegal under state law is still considered an illegal gambling game under the UIGEA. As we have seen, state laws regarding the legality of fantasy sports games vary widely and are often not very clear. Both DraftKings and FanDuel have taken a cautious approach in this regard. According to FanDuel’s legal page, “The states where our lawyers believe the law is unclear or questionable about the legality of fantasy sports are Arizona, Iowa, Louisiana, Montana, and Washington. Therefore we do not offer paid entry games to residents of those states.”<sup>81</sup> DraftKings will similarly not offer prize contests in those five states because of the uncertainty.<sup>82</sup>

Do daily fantasy sports games actually comply with the requirements of the UIGEA? Remember, in order for fantasy games to be considered exempt, there were several conditions that they have to meet. Websites such as DraftKings and FanDuel are careful to comply with the

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<sup>79</sup> “Why is it Legal?”. DraftKings Inc. <https://www.draftkings.com/help/why-is-it-legal>.

<sup>80</sup> *Id.*

<sup>81</sup> “Legal”. FanDuel, Inc. <https://www.fanduel.com/legal>.

<sup>82</sup> “Terms of Use”. DraftKings Inc. <https://www.draftkings.com/help/terms>.



first requirement that prizes and awards are made known in advance and not determined by the number of participants and amount of fees paid. On both websites, the potential winnings for each contest and the entry fee amounts are posted and fixed, and the number of participants is a set number that cannot be exceeded. This requirement is set up to prevent the fantasy games from too closely resembling other sports pools. The UIGEA requires that outcomes cannot be based on scores, point-spreads, etc., or the performance of a single athlete in a single real-world event. Daily fantasy games comply with this requirement by requiring one to select a fantasy team comprised of multiple real-world professional athletes who play in multiple real-world sporting events. The most questionable condition is that the fantasy games reflect “the relative knowledge and skill of the participants.” As noted below, the skill chance analysis is significantly different with daily fantasy sports, and whether the games comply with this condition is questionable.

Given that daily fantasy games and websites are a very recent phenomenon, there is almost no examination of them by any of the courts. However, in the case of *Langone v. Kaiser*, daily fantasy sports website FanDuel was challenged as being a form of illegal gambling under Illinois law.<sup>83</sup> The plaintiff, Langone, brought a civil action against FanDuel under the Illinois Loss Recovery Act. The Illinois Loss Recovery Act allows individuals to sue for the recovery of gambling losses of others as sort of a *qui-tam* action.<sup>84</sup> Langone was suing on behalf of another individual, Clement, who allegedly was a very frequent FanDuel participant and had lost a substantial amount of money on the website. Langone characterized FanDuel fantasy games as follows:

- 1). “Entry fees” for participants to participate in groups or “leagues”;

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<sup>83</sup> *Langone v. Kaiser*, 12 C 2073, 2013 WL 5567587, at \*1 (N.D. Ill. Oct. 9, 2013).

<sup>84</sup> *Id.* at \*2.

- 2). Higher potential winnings in leagues with higher entry fees and a greater number of participants, but the potential winnings are predetermined for any given league; and
- 3). FanDuel derives profit from taking a “commission” from the entry fees of the games.<sup>85</sup>

A significant question the court had to address was whether FanDuel qualified as a “winner” under the Loss Recovery statute. Langone alleged it was, as a result of the commissions that FanDuel collected from the entry fees of contest participants.<sup>86</sup> Similar to the *Humphrey* case, however, the court did not consider the collecting of commissions as evidence that FanDuel was “participating” in the wager, stating “FanDuel does not place any [‘wagers’] with particular participants by which it could lose money based on the happening of a future event (i.e., the performance of certain athletes), but merely provides a forum for the participants to engage each other in fantasy sports games.”<sup>87</sup> The court added that FanDuel was merely a host of the games, and the participants were only competing against each other; FanDuel was never risking any of its own money in the prizes.<sup>88</sup>

The previous section examined some of the flaws associated with this argument, and Langone correctly countered that FanDuel operated under the exact same mechanisms as pari-mutuel horseracing.<sup>89</sup> Oddly enough, the court in *Langone* never really addressed this issue or distinguished what FanDuel does as compared with pari-mutuel horseracing pools. The court only said that it is irrelevant whether the activity in question is legal or illegal, and FanDuel cannot be considered a “winner” under the statute because the website never risks any of its own funds.<sup>90</sup>

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<sup>85</sup> *Id.* at \*1.

<sup>86</sup> *Id.* at \*6.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

The court could have easily distinguished FanDuel operations from pari-mutuel horseracing and other gambling pools by pointing out that, with FanDuel, winner payouts are completely unaffected by the number of participants (which is a set number). Ultimately, Langone's case failed because he could not definitively establish when and how much the various plaintiffs had actually lost by participating in FanDuel fantasy contests.<sup>91</sup> Langone also could not prove that the amount in question satisfied the federal \$75,000 amount in controversy requirement for each individual plaintiff.<sup>92</sup>

It may just be the language of the state's civil Loss Recovery Statute, but the court's reliance on "participation in wager" still seems to produce odd results. Under this analysis, would the organizer/operator of basement poker rooms be protected from suit as long as they merely took commissions from participants? This conclusion seems to say yes. Take the Arizona Supreme Court case of *State v. Duci* as an example. The defendants in *Duci* were facing criminal charges as a result of operating illegal poker games, even though the defendants themselves were non-participants in the games.<sup>93</sup> The court of appeals initially held that the statute did not cover the defendants' conduct because they were not actually "accepting" any bets or wagers by merely taking a percentage of the pot.<sup>94</sup> This is similar to the court's conclusion in *Langone*. The Arizona Supreme Court, however, characterized the defendants' actions a bit differently. The court reasoned that defendant's conduct resembled classic bookmaking operations.

Defendants accepted bets on each hand of poker and, by taking a percentage of each pot, assured themselves a profit regardless who won the hand... Defendant's conduct also falls within the statute's proscription on selling wagering pools for a fee. "Pool selling" is generally defined as "the receiving from several persons of

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<sup>91</sup> *Id.* at \*8.

<sup>92</sup> *Id.* at \*3.

<sup>93</sup> *State v. Duci*, 727 P.2d 316, 317-318 (Ariz. 1986)

<sup>94</sup> *Id.* at 318

wagers on the same event, the total sum of which is to be given the winners, subject ordinarily to a deduction of a commission by the seller of the pool.<sup>95</sup>

The court concluded that it was irrelevant whether the defendants “participated” in the bets, as they “accepted” the bets by taking a percentage and therefore violated the state statute.<sup>96</sup>

Certainly, comparing the *Langone* and *Duci* cases is not an apples-to-apples comparison. *Langone* was applying Illinois state law in a civil context whereas *Duci* involved Arizona criminal law. However, the point of highlighting these two cases is two-fold. The first reason is they are examples of how daily fantasy operations closely resemble the operations of many other proscribed gambling games. The “pool selling” description in *Duci* is almost an exact description of how daily fantasy sites operate and derive a profit. Arizona’s broad definition of gambling pools that includes both games of skill and chance is one reason why the daily fantasy sites do not offer paid games in the state.<sup>97</sup>

The second reason is to demonstrate just how thin of a line the daily fantasy sites are straddling in some of these states. As we have seen, there are not a lot of bright-line ways to distinguish what daily fantasy operators are doing from other types of gambling. The court in *Langone* didn’t even have an answer for that argument. The saving grace of daily fantasy websites to this point has been that very few states have specifically addressed fantasy games legislatively. When the states remain silent, federal law (UIGEA) controls, ensuring that daily fantasy sports are not considered betting or wagering. However, it will only take a few enterprising state legislators to quickly change daily fantasy’s fortunes in a number of jurisdictions. The lack of good, bright-line distinguishing characteristics between daily fantasy and other gambling operations makes any future court decision tenuous at best for the industry.

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<sup>95</sup> *Id.* at 318-319

<sup>96</sup> *Id.* at 320

<sup>97</sup> *Id.* at 317.

Additionally, the court in *Langone* also did not find it necessary to address whether daily fantasy games are predominantly skill or chance.<sup>98</sup> According to Marc Edelman of the Harvard Journal of Sports and Entertainment Law, fantasy sports that extend less than a full season involve greatly heightened levels of chance as compared to the season long variety.<sup>99</sup> In daily fantasy sports games, skills such as a fantasy player’s strategic and negotiation abilities do not offset the inherent chance elements of the games, the chance elements being the host of physical, psychological, and environmental factors that are likely to have a substantial impact on an athlete’s performance.<sup>100</sup> Mr. Edelman notes that the “smaller sample size could be greatly impacted by just one occurrence of chance, such as an injury.”<sup>101</sup>

Mr. Edelman also argues that the chance elements are greatly enhanced when one is talking about a one-shot deal, such as daily fantasy sports.<sup>102</sup> Such a shortened time frame deprives a fantasy team owner of the ability to shape a roster and respond to changes in athlete production through trades, free agent pick-ups, and other roster manipulation. In addition to lacking these “team management” skills, daily fantasy sports does not include interaction and direct competition with other fantasy owners. This “strategic gamesmanship” aspect of the games has been important to the skill determination of traditional fantasy sports.<sup>103</sup> One of the conditions for an exempt fantasy sports game under the UIGEA is that it “reflects the relative

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<sup>98</sup> *Id.*

<sup>99</sup> 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, 30 (2012).

<sup>100</sup> *Id.*

<sup>101</sup> Nathaniel J. Ehrman, [Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports](#), 22 Sports Law. J. 79, 106 (2015).

<sup>102</sup> 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, 30 (2012).

<sup>103</sup> *Id.*

skill and knowledge of the participants.” It is at least arguable that daily fantasy sports do not meet this condition.

All of this is not to say that daily fantasy sports games do not require a significant degree of skill as well. A successful daily fantasy sports player must of course be knowledgeable about the players. Specifically, he or she must be familiar with the athlete’s recent statistical production and understand the athlete’s matchup on a given night. In addition, a daily fantasy player must understand which players represent a value based on their given “salary cap” number on the website.<sup>104</sup>

In a salary cap league, players have a set budget, and they must assemble their team without going over their allotted budget. The salary cap aspect is a major difference because it introduces economic analysis and requires players to strategize how to value players and allocate their roster funds.<sup>105</sup>

It could be argued that the “economic analysis” aspect of daily fantasy sports adds a more complicated skill aspect to the games than most traditional fantasy games. Similarly to traditional fantasy sports,

Daily fantasy sports players must utilize good judgment and be able to appreciate the significance of a great deal of data including player statistics, weather conditions, offensive strategies, matchups, and valuation of players in order to be successful. Being able to make sense of the multiple variables involved is truly an act of skill.<sup>106</sup>

It is also important to note that frequent daily fantasy sports participants must partake in “draft day” research much more often than a traditional fantasy sports player.

Do any of the federal laws examined earlier (PASPA and UIGEA) pose a threat to daily fantasy games as they currently are? Nathaniel Ehrman believes that daily fantasy’s emphasis on

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<sup>104</sup> In my fantasy football league, we have always done auction style drafts that utilize a similar value system. I know from experience that these determinations can be very tricky and involve a great deal of thought.

<sup>105</sup> Nathaniel J. Ehrman, Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports, 22 Sports Law. J. 79, 87 (2015).

<sup>106</sup> *Id.* at 102.

buy-ins and payouts makes it more likely that they could be labeled a gambling scheme.<sup>107</sup> In addition, he believes the shorter duration of the games in daily fantasy means they are much more dependent on single games and single performances of the athletes in those games.<sup>108</sup> This is a possible conflict with a condition of the UIGEA. As previously discussed, the skill/chance debate when it comes to fantasy sports is about as close to 50-50 as one can get. It is at least arguable that daily fantasy games do not comply with the “reflection of the participant’s skill” condition as given by the UIGEA. Opponents to daily fantasy games are not likely to succeed in arguing under PASPA. As long as daily fantasy teams are comprised of a varied selection of players from different teams playing in different games, this would not likely be a persuasive argument. Daily fantasy’s biggest threat federally would come from an amendment or added condition to the UIGEA meant to target daily fantasy sports operations.<sup>109</sup>

In addition to the skill/chance analysis, there are a number of policy considerations and other concerns that need to be addressed. In the analysis of PASPA and the UIGEA, protection of youth was a chief concern for both laws. It was argued that changing technologies would make it more attractive and easier for young people to gamble. This is especially true when it comes to sports related gambling, which is already considered more attractive to young people.

A troubling characteristic about daily fantasy sports games is that they were specifically created with the younger generation in mind. According to Nigel Eccles, the CEO of FanDuel, daily fantasy sports are “fantasy for the A.D.D. generation.”<sup>110</sup> “Eccles said that one of the main goals he had was to create a new way to play fantasy that catered to twenty-year-olds who were

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<sup>107</sup> *Id.* at 92.

<sup>108</sup> *Id.*

<sup>109</sup> An example might be an added condition that requires prize fantasy games to be played over an entire professional sports league season.

<sup>110</sup> *Id.* at 81.

not participating in traditional season-long fantasy sports because it took too long.”<sup>111</sup> The idea is that the younger generation has a shorter attention span and a need for instant gratification, and daily fantasy sports meet those needs. Not only are daily fantasy games likely to attract young people, they are designed that way. It is very common for children that young to play. Daily fantasy games draw on the familiarity that many young people have with fantasy sports games and create an enticing “gambling” option for those games when they are older. Any age verification tools used by the daily fantasy sites would be no more effective than those previously employed by online poker.

One of policy arguments previously encountered was that traditional fantasy sports should not be prohibited because they do not have a negative impact on the economy like gambling does. However, this may not be the case with daily fantasy sports. The potentially large payouts and the frequency of the games makes it very possible that individuals can lose a great deal of money by playing daily fantasy games. In other words, unlike with traditional fantasy sports games, it is possible for individuals to accumulate a substantial amount of debt with the daily variety. As pointed out by Ehrman, it is likely that payouts for the games will continue to grow as the daily fantasy industry continues to grow.<sup>112</sup> Though daily fantasy sports do not seem to encompass some of the “get rich quick” schemes of many gambling games, there is little doubt that a big part of the attraction is the possibility of winning cash prizes. Winning money is a central message in daily fantasy’s advertising and it is a significant factor in why people play, much more so than with traditional fantasy sports.

Mr. Ehrman further notes the effect that daily games can have on problem gamblers. “A compulsive gambler can play nightly depending on the sport and the time of year. Unlike season-

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<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 109



long sports that require a long wait, the instant nature of daily fantasy sports leads to a much larger issue for compulsive gamblers.”<sup>113</sup> He also notes, however, that the amount of work daily fantasy games requires may keep problem gamblers away.<sup>114</sup> Mr. Ehrman argues that there are also positive externalities associated with daily fantasy sports. In addition to increased viewership and interest in sports, he argues that daily fantasy sports may actually keep people from participating in more harmful gambling activities. “It is only logical that when faced with an illegal activity or a legal alternative, people will overwhelmingly opt for the legal one.”<sup>115</sup>

In conclusion, it is not convincing under a truly objective examination that daily fantasy sports games are predominantly games of skill. The argument that makes traditional fantasy sports mostly skill is how the participant responds to the chance elements of the game over the course of a season. Injuries to professional athletes are not predictable in either traditional or daily fantasy sports, but with traditional fantasy sports, the participant can show his/her skill by managing their fantasy roster and making changes to compensate for these unforeseen events. These “team management” decisions are almost entirely absent in daily fantasy games. In daily fantasy, one is assembling a fantasy roster on the untenable assumption that unpredictable events will not happen because there is no way for one to deal with those chance elements. That being said, the determination is still very close (near 50-50), and different jurisdictions could easily come to different conclusions.

If, for argument’s sake, skill versus chance is too close to call, then the policy arguments also weigh substantially against daily fantasy sports games. The increased number of games and money involved create a slew of potential concerns. Daily fantasy sports games do not present

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<sup>113</sup> *Id.* at 110

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 112.

the same degree of danger as other gambling games, but the potential for abuse and the appeal to children is not insignificant either. Above all, nowhere is there any evidence that daily fantasy games for money were among the activities Congress was looking to protect with the UIGEA exemption. In fact, one could argue the opposite is true based on Congress's specific concerns with other forms of gambling. Daily fantasy games are certainly not some scourge that is going to threaten all decency in this country. In fact, the ingenuity that daily fantasy sports providers have had in creating a profitable business that is completely within compliance of federal law is admirable. But, if Congress is truly concerned with safeguarding the values that they have claimed in the past, then it needs to examine daily fantasy sports games.

#### IV. DAILY FANTASY NOW AND BEYOND

Before we can make conclusions about the industry, we must know where it currently stands. Of the 33.5 million Americans that played fantasy football in 2012, 25% of that group also participated in daily fantasy games.<sup>116</sup> The daily fantasy sports segment of the industry now accounts for \$492 million annually according to a study produced by the FTSA.<sup>117</sup> According to Ben Fischer of the New York Business Journal, daily fantasy websites FanDuel and DraftKings derive their profit by taking a 9-10% cut of the entry fees for contests before giving out prizes.<sup>118</sup> These are the "commissions" that were discussed in the *Langone* case. FanDuel claims 70% of

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<sup>116</sup> Nathaniel J. Ehrman, Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports, 22 Sports Law. J. 79, 81 (2015).

<sup>117</sup> *Id.* at 82.

<sup>118</sup> Fischer, Ben. "Big Money Wants Piece of the Daily Fantasy Sports Action". New York Business Journal. Mar. 17, 2015. <http://www.bizjournals.com/newyork/blog/techflash/2015/03/big-money-wants-a-piece-of-the-daily-fantasy.html?page=all>.

the daily fantasy sports market and was expected to have revenue of over \$60 million in 2014.<sup>119</sup> FanDuel paid out over \$150 million in prizes in 2013, and that number was expected to rise to over \$400 million in 2014.<sup>120</sup> According to Fischer, websites such as FanDuel and DraftKings are increasingly attracting legitimate investor dollars. It is rumored that DraftKings has received a very large capital investment from Disney Corp. (owners of ESPN) that places the value of the daily fantasy sports site at over \$1 billion.<sup>121</sup> FanDuel has attracted similarly substantive amounts of investment dollars from companies such as Comcast.<sup>122</sup> A reputable company like Disney investing in the industry lends credence to it being a legitimate business.

As noted by Nathan Ehrman, one of the troubling aspects of daily fantasy sports for lawmakers is the advocacy and involvement of many former online poker and betting participants.<sup>123</sup> A recent article written by Matt Burke highlighted the involvement in daily fantasy sports by notorious gambling types. Once a prolific online poker player, Peter Jennings was looking for a new outlet and he found it in daily fantasy sports.<sup>124</sup> Jennings was able to quit

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<sup>119</sup> Schrottenboer, Brent. "Leagues See Real Benefit in Daily Fantasy Sports Leagues". USA Today Sports. Jan. 1, 2015. <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

<sup>120</sup> Drape, Joe. "Lost a Fantasy Game? Try Again Tomorrow". The New York Times. Jul. 28, 2014. [http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?\\_r=0](http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?_r=0).

<sup>121</sup> Fischer, Ben. "Big Money Wants Piece of the Daily Fantasy Sports Action". New York Business Journal. Mar. 17, 2015. <http://www.bizjournals.com/newyork/blog/techflash/2015/03/big-money-wants-a-piece-of-the-daily-fantasy.html?page=all>.

<sup>122</sup> Heitner, Darren. "Fantasy Sports Service, FanDuel, Secures \$11 Million Investment; Includes Money From Comcast Ventures". Forbes Business. Jan. 30, 2013. <http://www.forbes.com/sites/darrenheitner/2013/01/30/fantasy-sports-service-fanduel-secures-11-million-investment-includes-money-from-comcast-ventures/>.

<sup>123</sup> Nathaniel J. Ehrman, *Out of Bounds?: A Legal Analysis of Pay-to-Play Daily Fantasy Sports*, 22 Sports Law. J. 79, 85 (2015).

<sup>124</sup> Burke, Matt. "Why 'Gambling' at Daily Fantasy Sites DraftKings and FanDuel is Legal". Oct. 22, 2014. <http://www.metro.us/news/why-gambling-at-daily-fantasy-sites-draftkings-fanduel-is-legal/zsJnjw---tOAsTVwwwggPI/>.

his job as a stockbroker and now has a lucrative job as a full-time daily fantasy sports player. Jennings himself is a firm believer that daily fantasy sports are games of skill, and he compares it to stock trading given the level of data analysis that is required to be successful.<sup>125</sup> “I realized that playing daily fantasy was becoming more lucrative than my day job,” Jennings told Metro. “I was a poker player throughout college and I was playing regular fantasy sports for a while, but the day I found out about daily fantasy, it was a euphoric experience.”<sup>126</sup> There is also the case of Gavin Lamonthe who, like Jennings, used to be a prolific online poker player before the Justice Department crackdown. Lamonthe found another vice in daily fantasy sports, where he spends nearly 35 hours a week researching and participating in daily fantasy sports but won more than \$50,000 in 2013.<sup>127</sup> Lamonthe described daily fantasy websites as “an extended poker room” and noted that as the prizes for the games have gotten larger he has seen a substantial increase in the number of recreational gamblers who play the games.<sup>128</sup>

It is not just ex-poker players that are getting into the industry. Amaya Gaming, the current owner of online poker provider PokerStars, is looking to be fully integrated into the daily fantasy sports business by next football season.<sup>129</sup> With online poker illegal in the United States, Amaya Gaming CEO David Baazov sees a significant opportunity in an industry expected to be

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<sup>125</sup> Burke, Matt. “Why ‘Gambling’ at Daily Fantasy Sites DraftKings and FanDuel is Legal”. Oct. 22, 2014. <http://www.metro.us/news/why-gambling-at-daily-fantasy-sites-draftkings-fanduel-is-legal/zsJnjw---tOAsTVwwwggPI/>.

<sup>126</sup> *Id.*

<sup>127</sup> Drape, Joe. “Lost a Fantasy Game? Try Again Tomorrow”. The New York Times. Jul. 28, 2014. [http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?\\_r=0](http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?_r=0).

<sup>128</sup> *Id.*

<sup>129</sup> Henderson, Hartley. “Venture into Daily Fantasy Sports is a Skillful move for Amaya Gaming”. Off shore Gaming Association. Apr. 9, 2015. [http://www.osga.com/online\\_gaming\\_articles.php?Venture-into-daily-fantasy-sports-is-a-skillful-move-for-Amaya-Gaming-15376#.VU7YR0us1g3](http://www.osga.com/online_gaming_articles.php?Venture-into-daily-fantasy-sports-is-a-skillful-move-for-Amaya-Gaming-15376#.VU7YR0us1g3).

valued at \$11 billion by 2018.<sup>130</sup> Most surprisingly, Baazov stated that “(We) see a clear crossover from poker and fantasy sports.”<sup>131</sup> For strategic reasons, Amaya Gaming is looking forward to politicians deciding once and for all what is truly skill. Amaya is hoping to use the expected success of its daily fantasy sports product to make a case for a poker exemption in the UIGEA. “Baazov and company lawyers will likely point to the two skill sets involved in both and conclude that the differences are so remote that it's inconceivable that one could be legal as a game of skill, while the other is deemed not legal because of luck.”<sup>132</sup>

For players looking to enter the daily fantasy industry, the recent involvement of some of these parties seems very concerning. If it wasn't already clear, the legislators who passed the UIGEA could not have foreseen or intended these developments. The targets of the UIGEA were casino-style gaming and especially online poker. Fantasy sports were granted the exemption because there used to be clear separation between fantasy sports and those casino-type games. It has to be very disconcerting to lawmakers that daily fantasy sports have seemingly blurred that separation beyond recognition. The line is so blurred that individuals like David Baazov are intending to use arguments for the legality of daily fantasy sports in the fight to legalize online poker. When Baazov says that he sees a clear crossover between poker and fantasy sports, he is not talking about the games themselves, but the intended customer. Baazov is very aware that the same individuals who used to spend untold amounts of money on online poker are likely to make that seamless transition to daily fantasy sports. Those looking to satiate their “gambling urge” are likely to turn to daily fantasy sports. This appears even more likely in light of individuals such as Pete Jennings who is now a “professional” daily fantasy sports player. It simply would not have

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

been possible for somebody to be a full-time professional player with traditional fantasy sports, but it is a reality with the daily games.

Another quite curious aspect of daily fantasy sports has been the relationship that websites like FanDuel and DraftKings have with the professional sports leagues. The professional sports leagues have historically avoided anything that even closely resembles gambling and have been staunch supporters of anti-gambling bills such as PASPA and the UIGEA. Earlier we looked at some statements made by league officials testifying in support of these laws. The professional sports leagues have often cited concerns for the integrity of the games as the main reason for their support. As part of the Senate discussion on PASPA, former NFL commissioner Paul Tagliabue testified,

With legalized sports gambling, our games instead will come to represent the fast buck, the quick fix, the desire to get something for nothing. The spread of legalized sports gambling would change forever—and for the worse—what our games stand for and the way they are perceived.<sup>133</sup>

The professional sports leagues have long been promoters of traditional fantasy sports given the value they present in terms of viewership (i.e. advertising money). But many legal scholars, including Florida State sports law professor Ryan Rodenberg see daily fantasy sports as something different entirely.

On a given day an injury, a hailstorm or a ball bouncing strangely could affect a result. In this regard, playing daily fantasy seems very similar to placing a bet with a bookmaker. On the spectrum of legality to illegality, they're getting pretty close to the line. It's tough to make an intellectually honest distinction between the two.<sup>134</sup>

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<sup>133</sup> S. REP. 102-248, 5, 1992 U.S.C.C.A.N. 3553, 3555

<sup>134</sup> Brunstein, Joshua. "Fantasy Sports and Gambling: The Line is Blurred". The New York Times. Mar. 11, 2013. [http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?pagewanted=all&\\_r=4&](http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?pagewanted=all&_r=4&)

If I were a gambling man (no pun intended), based on the professional sports leagues historical aversion to gambling in any form, they would likely be similarly opposed to pay-for-play daily fantasy sports games. And initially, it appeared as if that would be the case. As recently as a few years ago, the CEO of Major League Baseball's Internet company was quoted as saying in regards to daily fantasy sports, "It becomes akin to a flip of the coin, which is the definition of gambling."<sup>135</sup> At the time these statements were made several years ago, it appeared almost certain that some kind of action would be taken by either Congress, courts, or the professional sports leagues themselves.

However, in a surprising turn of events, not only are the professional sports leagues not opposed to the daily fantasy sports sites, they have even started going to business with them. Major League Baseball, for example, has partnered with daily fantasy site DraftKings.<sup>136</sup> Remember MLB's Mr. Bowman who previously analogized daily fantasy sports to flipping a coin? Needless to say, in light of recent events, he has changed his opinion just slightly. "We have spent a lot of time inside here and talking to other outside experts and have concluded these are games of skill and adhere to the federal law. It keeps people interested in the games."<sup>137</sup>

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<sup>135</sup> Brunstein, Joshua. "Fantasy Sports and Gambling: The Line is Blurred". The New York Times. Mar. 11, 2013. [http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?pagewanted=all&\\_r=4&](http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?pagewanted=all&_r=4&).

<sup>136</sup> Drape, Joe. "Lost a Fantasy Game? Try Again Tomorrow". The New York Times. Jul. 28, 2014. [http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?\\_r=0](http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?_r=0).

<sup>137</sup> Drape, Joe. "Lost a Fantasy Game? Try Again Tomorrow". The New York Times. Jul. 28, 2014. [http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?\\_r=0](http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?_r=0).

Bowman added that daily fantasy sports are just part of the “evolution” of fantasy games, are better suited for the younger generation, and drive a great deal of online traffic.<sup>138</sup>

Moreover, MLB is not the only professional league partnering with daily fantasy sports. In November 2014, the NBA agreed to an exclusive daily fantasy deal with FanDuel. This was only after the NHL agreed to a similar deal with rival site DraftKings.<sup>139</sup> It is not hard to find the explanation for why the sports leagues have taken this position. We highlighted earlier how beneficial all fantasy sports games are to increased consumption of sports, and consequently, advertising dollars. According to Michael Rathburn, who tracks the fantasy industry for Rotowire.com, “In their eyes, the leagues don’t want to see gambling legalized, but they know how much traffic and interest fantasy is driving. This was the happy medium.”<sup>140</sup>

Even though daily fantasy sports are currently 100% legal under federal law, it is difficult to see the professional leagues’ actions as anything other than hypocritical. In a 2012 submission to a federal court, ex-MLB commissioner, Bud Selig, noted that legalized sports gambling would incline fans to cheer for themselves to win money rather than their favorite players (harming the sports character).<sup>141</sup> While heavy daily fantasy sports participation may not “harm” the character of the games, it would certainly change the dynamic. It appears the professional sports leagues have made a conscious decision to sacrifice a bit of their moral high ground in exchange for the

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<sup>138</sup> Drape, Joe. “Lost a Fantasy Game? Try Again Tomorrow”. The New York Times. Jul. 28, 2014. [http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?\\_r=0](http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?_r=0).

<sup>139</sup> Rovell, Darren. “NBA Partners with FanDuel”. ESPN. Nov. 12, 2014. [http://espn.go.com/nba/story/\\_/id/11864920/nba-fanduel-reach-4-year-exclusive-daily-fantasy-deal](http://espn.go.com/nba/story/_/id/11864920/nba-fanduel-reach-4-year-exclusive-daily-fantasy-deal).

<sup>140</sup> Drape, Joe. “Lost a Fantasy Game? Try Again Tomorrow”. The New York Times. Jul. 28, 2014. [http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?\\_r=0](http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html?_r=0).

<sup>141</sup> Schrottenboer, Brent. “Leagues See Real Benefit in Daily Fantasy Sports Leagues”. USA Today Sports. Jan. 1, 2015. <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.



promise of increased viewership and television revenues. As put by Brent Schrottenboer, “...nobody watches live sports on television quite as intensely as fans with money at stake.”<sup>142</sup> If television ratings are the professional leagues chief concern, then why not push for more legalized sports betting? There are some who believe that the professional sports league’s relationships with daily fantasy are actually representative of shift in their stance towards sports gambling in general. According to Laurence DeGaris, a sports marketing professor at the University of Indianapolis, “Legalized sports gambling is the endgame. One-day fantasy delivers a similar fan experience to gambling, so I expect the current database of customers would provide a good foundation.”<sup>143</sup>

We have previously examined the crossover between daily fantasy and other forms of gambling, but would the professional sports leagues ever openly adopt such an about-face stance? Current NBA commissioner, Adam Silver, has publicly been at the forefront of this change. In a November op-ed for the New York Times, Silver shared that he believes sports betting, “should be brought out of the underground and into the sunlight where it can be appropriately monitored and regulated.”<sup>144</sup> Opponents to federal anti-gambling laws such as PASPA have often argued that strict prohibition of sports gambling only empowers the underground market and bookies. It is possible the professional sports leagues have come to the realization that the better alternative would be to have these activities legal and regulated under

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<sup>142</sup> Schrottenboer, Brent. “Leagues See Real Benefit in Daily Fantasy Sports Leagues”. USA Today Sports. Jan. 1, 2015. <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

<sup>143</sup> Matuszewski, Erik. “Daily Fantasy Sites Seen Positioned for Jump to Sports Gambling”. Bloomberg Business. Feb. 24, 2015. <http://www.bloomberg.com/news/articles/2015-02-24/daily-fantasy-sites-seen-positioned-for-jump-to-sports-gambling>.

<sup>144</sup> Matuszewski, Erik. “Daily Fantasy Sites Seen Positioned for Jump to Sports Gambling”. Bloomberg Business. Feb. 24, 2015. <http://www.bloomberg.com/news/articles/2015-02-24/daily-fantasy-sites-seen-positioned-for-jump-to-sports-gambling>.

their terms (and price). If that is the case, then daily fantasy could certainly serve as a gateway to that transition. Mr. Edelman believes daily fantasy sites were designed to look similar to online sports betting purposefully, and that, "...the differences are not as great as one may think."<sup>145</sup> Only time will tell if daily fantasy games will work to serve this greater purpose.

Are the professional leagues putting the integrity of the games at risk by "getting in bed" with daily fantasy? One of the reasons given for why traditional fantasy sports should not be prohibited is that they present very little risk to the integrity of the games. In other words, because of the composition of fantasy teams and the insubstantial money amounts involved, there is little risk that real-world players would accept bribes or otherwise be corrupted by fantasy game participants. There is clearly a slightly higher integrity risk in daily fantasy sports as a result of the money involved and the greater emphasis on single games.

While the professional leagues would never admit to such a possibility, it has clearly been discussed in league circles. Athletes in the NBA, NCAA, and MLB<sup>146</sup> are prohibited from participating in any fantasy games in their sport where entry fees and prizes are involved.<sup>147</sup> The NCAA actually defines these activities as gambling interestingly enough. In all fairness to daily fantasy, athletes would also be prohibited from participating in my annual fantasy football league based on these restrictions. The spread of real-world athletes on fantasy teams still sufficiently protects the games from any legitimate corruption risk, but there is no question the risk is slightly

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<sup>145</sup> Matuszewski, Erik. "Daily Fantasy Sites Seen Positioned for Jump to Sports Gambling". Bloomberg Business. Feb. 24, 2015. <http://www.bloomberg.com/news/articles/2015-02-24/daily-fantasy-sites-seen-positioned-for-jump-to-sports-gambling>.

<sup>146</sup> Rovell, Darren. "MLB, Union Prohibit Players from Daily Fantasy Games". ESPN. Apr. 10, 2015. [http://espn.go.com/mlb/story/\\_/id/12661248/major-league-baseball-forbids-players-participate-daily-fantasy-games](http://espn.go.com/mlb/story/_/id/12661248/major-league-baseball-forbids-players-participate-daily-fantasy-games).

<sup>147</sup> Schrottenboer, Brent. "Leagues See Real Benefit in Daily Fantasy Sports Leagues". USA Today Sports. Jan. 1, 2015. <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

more pronounced when it comes to the daily games. According to Mr. Schrotenboer, daily fantasy games don't carry the integrity risk of other sport betting because "...It seems infeasible to fix a fantasy game involving a group of real players who are on multiple teams."<sup>148</sup> Nevertheless, it still seems odd that the professional sports leagues would openly promote and endorse games that their athletes are prohibited from playing in themselves.

This perceived hypocrisy by the professional sports leagues has even become the rallying cry in New Jersey's fight against PASPA restrictions. Those on the New Jersey side have argued that the leagues cannot continue to say that gambling threatens the integrity of the games while simultaneously supporting daily fantasy sports.<sup>149</sup> In a brief submitted to the 3<sup>rd</sup> U.S. District Court of Appeals in New Jersey's most recent battle with PASPA, the professional sports league's relationships with daily fantasy sports was a key argument. The brief argues that the professional sports league's well versed concerns about protecting the integrity of the games is directly conflicted by their involvement with the daily fantasy industry.<sup>150</sup> The real reason, the brief argues, that the professional sports leagues continue to support PASPA is to establish and maintain a monopoly on sports betting.

In reality, the Leagues are nothing more than the NJTHA's (New Jersey Thoroughbred Horsemen's Association) business competitors. They are seeking (so far very successfully) to use the federal judicial machinery to preserve an unfair competitive advantage in the multi-billion dollar market for sports betting

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<sup>148</sup> Schrotenboer, Brent. "Leagues See Real Benefit in Daily Fantasy Sports Leagues". USA Today Sports. Jan. 1, 2015. <http://www.usatoday.com/story/sports/2015/01/01/daily-fantasy-sports-gambling-fanduel-draftkings-nba-nfl-mlb-nhl/21165279/>.

<sup>149</sup> Brunstein, Joshua. "Fantasy Sports and Gambling: The Line is Blurred". The New York Times. Mar. 11, 2013. <http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?pagewanted=all&r=4&>.

<sup>150</sup> Pagels, Jim. "Court Briefing Blasts Sports Leagues' Hypocritical Stance Against Legalized Gambling". Hit and Run Blog. Jan. 16, 2015. <http://reason.com/blog/2015/01/16/court-briefing-blasts-sports-leagues-hyp>.

dollars. Using PASPA as their hammer, the leagues have fenced the NJTHA out of the sports betting market.<sup>151</sup>

Though New Jersey's opinion in the brief is not entirely accurate, there is certainly a valid point being made. In daily fantasy sports, the professional sports leagues have found a perfect medium where they can promote and endorse a "game of skill," while still enjoying many of the beneficial side-effects of a heavily invested viewing audience. Right now the professional sports leagues are able to "make their cake and eat it too," and only time will tell if the current characterizations of the daily fantasy games will remain static. The biggest issue with the argument made in the New Jersey brief is that the plaintiffs are directly comparing daily fantasy sports to other forms of sports betting. It is worth noting that neither PASPA nor any other current federal law would prevent states from operating their own daily fantasy sports operations. Fantasy games that meet the requisite conditions are expressly not a "gambling" scheme under the UIGEA, and therefore a state endorsing these operations would not be a violation under PASPA. This could be done in a state as a type of sports lottery. Indiana, for example, is currently considering a bill that would allow for casinos in the state to hold daily fantasy sports contests.<sup>152</sup>

## CONCLUSION

The daily fantasy game phenomenon is very new, and given how malleable the law is in this area, the landscape could change seemingly overnight. At this stage, it is difficult to tell whether daily fantasy sports are a temporary fad or possess staying power, or if they are simply the first step in a movement towards less restricted sports gaming. To wrap up this analysis, it is

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<sup>151</sup> Pagels, Jim. "Court Briefing Blasts Sports Leagues' Hypocritical Stance Against Legalized Gambling". Hit and Run Blog. Jan. 16, 2015. <http://reason.com/blog/2015/01/16/court-briefing-blasts-sports-leagues-hyp>.

<sup>152</sup> Horridge, Kevin. "Indiana Considers Sports Betting, Daily Fantasy Sports". Casino.org. Jan. 17, 2015. <http://www.casino.org/news/indiana-considers-sports-betting-daily-fantasy-sports>.

worth noting the opinions of two individuals who routinely deal with the issues surrounding daily fantasy: Chris Soriano, a partner with Duane Morris LLP in New Jersey who is well known for his work and experience in the gaming law field, and Melissa Blau, a Harvard MBA graduate who is currently Editor of the Business and Finance Section at iGaming Business and has a wealth of knowledge about online gaming matters.

Mr. Soriano and Ms. Blau both expressed support for the legality of daily fantasy sports games. Mr. Soriano acknowledged that the daily games are certainly closer to gambling than the season-long games, but emphasized that as long as the games continue to utilize multiple athletes and multiple sporting events (as required by the UIGEA), he did not see a legal issue.<sup>153</sup> Ms. Blau also did not see any issue with the daily games; she believes that in this day and age (where professional athletes are paid much better), the games present no threat to the integrity of the sports.<sup>154</sup> Ms. Blau was particularly adamant that daily fantasy sports games are predominantly skill. She said that daily fantasy games and poker are both predominantly skill because the better player will win the majority of the time, noting the reason she doesn't "enter the World Series of Poker is because there is no way I could win. If it were all chance, I would."<sup>155</sup>

In attempting to predict where the daily fantasy games go from here, Mr. Soriano posited that the professional sports leagues have grown comfortable with the status of fantasy games and are now looking to "monetize the opportunities provided by fantasy sports."<sup>156</sup> Ms. Blau was very happy with the change in stance of the professional sports leagues. She praised the visionary approach of NBA commissioner Adam Silver and was hopeful that daily fantasy might serve as a

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<sup>153</sup> Written Interview with Christopher L. Soriano, Partner, Duane Morris LLP, Cherry Hill, NJ (Apr. 17, 2015).

<sup>154</sup> Interview with Melissa Blau, Director at iGaming Capital, London, UK (May 4, 2015).

<sup>155</sup> *Id.*

<sup>156</sup> Written Interview with Christopher L. Soriano, Partner, Duane Morris LLP, Cherry Hill, NJ (Apr. 17, 2015).

transition to the legality of more sports betting.<sup>157</sup> Both Mr. Soriano and Ms. Blau agreed that while a significant legal challenge to daily fantasy sports games is not likely, if there were to be a challenge it would likely come from the state level. Mr. Soriano noted that the more time that passes without a major legal challenge, the less likely there is to be one, though he did remark that anti-gambling interest groups could play a role as well.<sup>158</sup> Meanwhile, Ms. Blau noted that the UIGEA intentionally left a great deal of wiggle room so that states may decide for themselves what is acceptable and what isn't. While she believes the likeliest challenge would come from a rouge state legislature, Ms. Blau also noted that the major players in the daily fantasy sports industry are tempting regulators with their aggressive marketing campaigns that emphasize large payouts.<sup>159</sup>

Moreover, with the professional sports leagues in tow, there is little to no pressure on the federal government to take any kind of action with regards to daily fantasy sports. The professional sports leagues have always been major supporters for federal laws such as PASPA and UIGEA; without their powerful lobbying, the federal government is likely to remain idle. There should be a great deal of activity at the state level however, as each state individually will look at the daily games and decide if it approve or disapprove. While a significant legal challenge is unlikely in the near future, one cannot rule out the possibility that an enterprising state legislator will make prohibiting daily fantasy games a key item on his or her "moral agenda." With the backing of some anti-gambling lobby groups, there could be a movement to analyze the games at the federal level. Courts have also shown a tendency to be rather unpredictable in this area of law. It seems unlikely that they will be able to continue to kick the

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<sup>157</sup> Interview with Melissa Blau, Director at iGaming Capital, London, UK (May 4, 2015).

<sup>158</sup> Written Interview with Christopher L. Soriano, Partner, Duane Morris LLP, Cherry Hill, NJ (Apr. 17, 2015).

<sup>159</sup> Interview with Melissa Blau, Director at iGaming Capital, London, UK (May 4, 2015).

can down the road on the issue of fantasy sports. A major court ruling could change the landscape of the industry significantly.

Ultimately, there are very strong arguments for why traditional fantasy sports should continue to be considered skill and not gambling. The arguments for daily fantasy games are not nearly as strong though, and the possible negative externalities of the daily games are concerning. It does not appear from the evidence that Congress specifically intended to protect games of that nature. Under the skill versus chance analysis that most states employ, the final determination for the daily games would be very close. But, if it turns out that the daily fantasy games are permissible under the current legal framework, it is possible that courts will need to re-examine the arguments against other “gambling” games like poker. There are definitely differences between poker and daily fantasy, but those distinctions are not as pronounced as they may have initially appeared.

Fantasy sports games have certainly become a form of mainstream entertainment here in America, especially for sports connoisseurs. It is difficult to fault the professional sports leagues for looking to maximize this revenue stream and explore new avenues with the daily games. At minimum, it will be interesting to monitor the dynamic between the professional sports leagues and Congress in the coming years. With strong leaders like Adam Silver at the forefront, the U.S. may be witnessing an evolution in thought regarding sports gaming. Given the vast range of new situations occurring, lawmakers will hopefully take a fresh look at the issues surrounding daily fantasy and gaming in general. As John F. Kennedy once said, “For time and the world do not

stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future."<sup>160</sup>

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<sup>160</sup> John F. Kennedy Presidential Library and Museum.  
<http://www.jfklibrary.org/Research/Research-Aids/Ready-Reference/JFK-Quotations.aspx>.