

DAILY FANTASY SPORTS LEAGUES: DO YOU HAVE THE SKILL TO WIN AT THESE GAMES OF CHANCE?

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INTRODUCTION

Week three of the National Football League season just ended with the completion of the Monday night game. Jack has now witnessed his fantasy team get crushed for the third straight week, and there is no hope in sight that things will change. His number one pick in the draft is already out for the season, having torn his ACL in week two. His second and third round picks have been utter disasters, with one of them already having been benched. There is virtually no hope for Jack's team to rebound this year. However, Jack loves fantasy football. It makes the games more interesting for him. He can watch any game involving players on his fantasy roster and root like he would for his favorite team. However, when your fantasy team is not competitive, all of that goes right out the door.

Jack begins to surf the web for fantasy tips on how he might be able to save his fantasy season, but in the process he finds a handful of links for websites running "daily" fantasy (or "weekly," in the case of football) leagues. Intrigued, Jack clicks on the links and loves what he finds; he can play a "daily" league every Sunday, complete with a new draft and all new players. He no longer has to stress about his roster composition, bye-week pickups, and season-long injuries to his best players. In a daily league, he can pick new players every week and compete for the most points that week. These leagues appear to involve much more chance than a season long league. Although this is more akin to sports betting than traditional fantasy sports, Jack is hooked.

Daily and weekly fantasy sports leagues have recently gained popularity. They are a new twist on the fantasy sports phenomena that has taken hold of millions of sports fans in the last decade and a half. Although daily fantasy sports leagues appear at first glance to simply mirror traditional fantasy sports, a deeper analysis reveals that daily fantasy sports might have much more in common with sports betting.

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This note argues that U.S. courts would likely find that daily or weekly fantasy sports legally fall closer to sports betting than traditional fantasy sports leagues. Part I looks at the history of sports betting and fantasy sports in America. Part II analyzes and compares the legality of sports betting and traditional fantasy sports, both on the federal and state levels. Part III examines how courts will likely rule in regards to daily fantasy sports leagues.

I. THE HISTORY OF SPORTS BETTING AND TRADITIONAL FANTASY SPORTS

A. *Sports Betting Since the 19th Century*

Modern sports betting began with Pedestrianism.¹ Essentially race-walking, pedestrianism was enormously popular in early 19th century England.² People bet on these races so much that an athletic association was formed with the purpose of ending race fixing and other schemes intended to alter the races' outcomes.³ Eventually, pedestrianism made its way to the United States.⁴ The sport's integrity and consequently its popularity, however, quickly declined, because it was so associated with gamblers.⁵

While the popularity of pedestrianism began to decline in England, baseball began to grow in popularity in America, becoming the American sports bettor's game of choice.⁶ This culminated in the 1919 World Series; dubbed the "Black Sox Scandal," players from the heavily favored Chicago White Sox purposely played poorly in the World Series at the request of gamblers.⁷ This scandal cast a negative impression of sports bettors in the public eye.⁸ Gamblers were painted as criminals who ruined the sanctity of the game for their monetary gain.⁹ Despite the negative connotation, a new age of sports betting was right around the corner.

The 1920s encompassed the "Golden Era" in both sports and sports betting.¹⁰ Baseball, boxing, and college football and basketball were all immensely popular with bettors.¹¹ The Great Depression only strengthened the hold sports betting was taking on the nation, because of its promise of riches.¹² The advent of the point spread in the 1940's and the proliferation of televised sports in the 1950s helped expand the popularity of sports betting exponentially.¹³ In 1951, "Congress imposed a ten percent tax on all sports bets placed

¹ Allen Moody, *History of Sports Betting*, ABOUT.COM, <http://sportsgambling.about.com/od/sportsgambling101/a/sportsbettinghistory.htm> (last visited May 31, 2013).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Jerry Martin, *History of Sports Betting*, BOBBY BABOWSKI'S ULTIMATE CAPPER, <http://www.ultimatecapper.com/history-of-sports-betting.htm> (last visited Nov. 11, 2013).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *US Sport Betting History*, SPORTBETTING.COM, <http://sportbetting.com/history.html> (last visited Nov. 12, 2013).

in the United States, effectively legalizing sports betting.”¹⁴ At the same time, the first legal sports books began to pop up in Nevada in the form of stand-alone shops with betting options posted on chalkboards.¹⁵

Although Congress effectively legalized sports betting in the 1950s, it quickly began to take steps to regulate it. In 1961, Congress passed the Interstate Wire Act, also known as the Federal Wire Act, prohibiting, amongst other gambling, taking sports bets over the phone, or any other wire.¹⁶ Intended to be an anti-bookie statute, the Federal Wire Act is still good law today, and it is the most important federal statute pertaining to Internet gambling.¹⁷ Thirty years later, in 1992, Congress passed the Professional and Amateur Sports Protection Act (PASPA).¹⁸ PASPA made it illegal for a state to sponsor, in any way, any sports betting.¹⁹ The statute, however, grandfathered in states that already had some form of legalized sports betting, such as Nevada.²⁰

With the rise of the Internet in the 1990s and early 2000s, sports betting saw another large increase in popularity.²¹ Sports betting became increasingly more accessible by allowing bettors to access odds and point spreads on their computer while sitting on their couches.²² By 2005, sports betting was bringing in between \$70 billion to \$100 billion per year in bets.²³

As a result of the rise in Internet gambling in general, Congress set out to further regulate sports betting by passing the Unlawful Internet Gaming Enforcement Act (the UIGEA).²⁴ Although the UIGEA does not directly regulate gambling, it prohibits many of the financial transactions necessary for Internet gambling.²⁵ The UIGEA, however, contains numerous exceptions and loopholes, including games based on skill²⁶ and, more specifically, fantasy sports.²⁷

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* For more detailed information on the Federal Wire Act see *infra* Part II.A.i.

¹⁷ I. Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 659–61 (2012); see *infra* Part II.A.i.

¹⁸ Rose & Bolin, *supra* note 17, at 663; see *infra* Part II.A.ii.

¹⁹ Rose & Bolin, *supra* note 17, at 663.

²⁰ *Id.* at 663–64, 686.

²¹ *Sportsbetting - Past and Present*, THE SLUGGERS, http://www.thesluggers.com/sportsbooks/Sportsbetting_history.html (last visited Nov. 16, 2014).

²² *Id.*

²³ See *id.*; *US Sport Betting History*, *supra* note 13.

²⁴ See *infra* Part II.A.iii.

²⁵ Rose & Bolin, *supra* note 17, at 667.

²⁶ 31 U.S.C. § 5362(1)(A) (2012) (“The term ‘bet or wager’—means the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.”).

²⁷ 31 U.S.C. § 5362(1)(E)(ix) (2012) (stating that the definition of ‘bet or wager’ expressly excludes “participation in any fantasy or simulation sports”).

B. *The History of Fantasy Sports*

“[T]he concept of fantasy sports has existed in some form since the end of World War II”²⁸ In the 1950s, Wilfred Winkenbach, who would later play an instrumental role in the advent of fantasy football, created fantasy golf.²⁹ Each fantasy golf team’s “owner” would select a group of professional golfers, with the owner having the lowest total combined score at the end of the tournament declared the winner.³⁰ It was simple, with only the number of strokes to keep track of.³¹

In 1961, the Strat-O-Matic Baseball board game was introduced.³² In this game, players roll dice and consult special baseball cards based on the stats of real Major League Baseball (MLB) players to find out if the player would get a hit, strike-out, or any one of numerous other possible outcomes.³³ These games proved to be quite popular; a 2002 survey by Baseball America found that half of the major-league teams’ front-office executives had played the game as kids.³⁴

A few years later, in 1963, Winkenbach would again put his name on fantasy history by inventing fantasy football.³⁵ At the time, Winkenbach was a minority owner of the then American Football League’s Oakland Raiders.³⁶ Along with journalist Scott Stirling, and Raider’s public relations person Bill Tunnell, Winkenbach helped create the Greater Oakland Professional Pigskin Prognosticators League (GOPPL), the first ever fantasy football league.³⁷ On a rainy night in Manhattan, sitting in a Milford Plaza hotel room while the Raiders were on an East Coast road trip, they came up with the idea of drafting individual players and keeping track of those stats for an entire season.³⁸

Around the same time, William Gamson, a Harvard Sociologist, created the Baseball Seminar, a fantasy baseball league.³⁹ Baseball Seminar’s rules included an auction draft (where teams bid fake budgeted money on real play-

²⁸ Ray Vichot, *History of Fantasy Sports and its Adoption by Sports Journalists*, NEWSGAMES (Jan. 2, 2009, 7:47 AM), <http://web.archive.org/web/20131217103525/http://news.games.gatech.edu/blog/2009/01/history-of-fantasy-sports-and-its-adoption-by-sports-journalists.html>.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *What Is It?*, STRAT-O-MATIC, <http://www.strat-o-matic.com/about> (last visited Nov. 16, 2014).

³³ *How to Play - Baseball*, STRAT-O-MATIC, <http://www.strat-o-matic.com/about/how-to-play/baseball#board> (last visited Nov. 6, 2014).

³⁴ R. Emmet Sweeney, *Baseball ProGUESTus: Fantasy Baseball’s Founding Fathers*, BASEBALL PROSPECTUS (April 29, 2011), <http://www.baseballprospectus.com/article.php?articleid=13748>.

³⁵ See Michael Fabiano, *Fantasy Football 101*, NFL.COM, <http://www.nfl.com/fantasyfootball/story/09000d5d80021ece/article/fantasy-football-101> (last updated Aug. 3, 2012, 10:12 AM).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Andy Mousalimas, *Fantasy History*, NFLPA (Dec. 23, 2007), <http://web.archive.org/web/20071223205915/http://www.nflplayers.com/fantasy/history.aspx>.

³⁹ Vichot, *supra* note 28.

ers).⁴⁰ There was no limit to how many players a team could have. Throughout the season, the league's owners compared the stats of the players on each owner's teams.⁴¹ Baseball Seminar's greatest contribution to fantasy sports history was pinning fantasy team points to live MLB games.⁴² Gamson would track whatever statistics he could find in the *Sporting News* newspaper.⁴³ He then would manually add these statistics at the end of the year, declaring the highest score the winner.⁴⁴

One of the members of Gamson's league was Robert Sklar.⁴⁵ Sklar, a college professor, began his fantasy career at a young age playing Strat-O-Matic and similar dice-based board games.⁴⁶ Sklar joined Baseball Seminar in the 1960s while both he and Gamson were professors at the University of Michigan.⁴⁷ One of Sklar's students, a kid by the name of Daniel Okrent, noticed Sklar planning his player bids for the Baseball Seminar draft.⁴⁸ Okrent would eventually create his own fantasy baseball league using new stats that had become popular by the late 1970s.⁴⁹ His goal was to build a fantasy game that would more accurately simulate the one being played on the field.⁵⁰ Okrent's innovations included a limit of 23 roster spots, filling every position that a regular baseball team was required to fill (first base, second base, etc.), and allowing trades.⁵¹ Teams could no longer fill their spots with slugging first basemen and outfielders like they could in Baseball Seminar; now they had to put real research into light hitting positions, such as second base and catcher.⁵² Okrent is considered the "Founding Father" of modern fantasy sports, because his innovations are almost all still predominantly used today.⁵³

Okrent went on to write numerous articles about the game in the early '80s, including a guidebook he published with other league founders in 1984.⁵⁴ By the late '80s fantasy baseball began to become more and more popular, and fantasy football began to take shape.⁵⁵ Numerous publications dedicated to fantasy sports of all types began to spring up all over the country in the late '80s and early '90s.⁵⁶ Ultimately, the biggest boost to the popularity of the game was the Internet boom of the late 1990s.

⁴⁰ *Id.*

⁴¹ Sweeney, *supra* note 34.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* Okrent even created his own stat, innings-pitched ratio, which is now used in leagues under the name WHIP (walks and hits divided by innings pitched). *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Vichot, *supra* note 28.

⁵⁵ *Id.*

⁵⁶ *Id.*

Fantasy sports websites began to sprout up all over the Internet in the late 1990s and early 2000s, and professional sports leagues took notice.⁵⁷ In 1996, Motorola teamed up with Sports Team Analysis and Tracking Systems, Inc. (“STATS”) to create a wireless device that would deliver in-game score and stat information.⁵⁸ The National Basketball Association sued Motorola and STATS, claiming numerous trademark and appropriation claims.⁵⁹ However, the Second Circuit Court of Appeals held that because Motorola and STATS expended their resources to collect information that was purely factual, they did not “free-ride” on the NBA’s product.⁶⁰

In 2007, another case was decided in favor of fantasy sports. In *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*,⁶¹ the court denied C.B.C., through its subsidiary CDM Sports, a new licensing agreement with Major League Baseball Advanced Media, the Internet portion of MLB.⁶² CDM, however, had already secured the rights from the MLB Player’s Association.⁶³ The Eighth Circuit held that, because the player’s names and statistics were already in the public domain, state and federal law could not infringe upon CDM’s First Amendment right to “use information that is available to everyone.”⁶⁴

These cases made it clear that it was legal to use common features of fantasy sports, such as real-time statistics. Other sports leagues that have tried to suppress this live in-game information have thus been unsuccessful.⁶⁵ Live, up to the minute statistics legally available on fantasy websites allowed fantasy sports to boom into a multi-billion dollar industry by the late 2000s.⁶⁶

The UIGEA further cemented fantasy sports’ foothold in American culture.⁶⁷ Although the UIGEA prohibits many financial transactions necessary to gamble on the Internet,⁶⁸ it contains a specific carve out for fantasy sports.⁶⁹ This has further allowed fantasy sports to boom nationwide as nothing legally can be said to stop them.

To further capitalize on the now almost legally indestructible fantasy craze, daily fantasy sports websites began to emerge around 2011.⁷⁰ The timing coincided with the Federal Government’s shutdown of poker websites that same year.⁷¹ Internet bettors who could no longer obtain the instant gratifica-

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Nat’l Basketball Ass’n v. Motorola, Inc., 105 F.3d 841, 853 (2d Cir. 1997).

⁶⁰ *See id.* at 853.

⁶¹ 505 F.3d 818, 820 (8th Cir. 2007).

⁶² Vichot, *supra* note 28.

⁶³ *Id.*

⁶⁴ *C.B.C. Distrib.*, 505 F.3d at 823.

⁶⁵ Vichot, *supra* note 28.

⁶⁶ *See* Martin, *supra* note 7.

⁶⁷ *See generally* 31 U.S.C. § 5362(1)(E)(ix) (2012).

⁶⁸ *See infra* Part II.A.iii.

⁶⁹ 31 U.S.C. § 5362(1)(E)(ix).

⁷⁰ Paresh Dave, *Daily Fantasy Sports Sites Betting on Lure of Instant Payouts*, L.A. TIMES (July 12, 2013), <http://articles.latimes.com/2013/jul/12/business/la-fi-fantasy-sports-20130712>.

⁷¹ Nathaniel Popper & Tiffany Hsu, *FBI Shuts Down Internet Poker Sites*, L.A. TIMES (Apr. 15, 2011), <http://articles.latimes.com/2011/apr/15/business/la-fi-poker-busts-20110416>.

tion that poker provided could legally fill some of that void on daily fantasy sports websites.⁷²

C. Rules of the Game

i. How to Play Traditional Fantasy Sports

A traditional fantasy sports league consists of regular fans of a particular sport who each “own” their fantasy teams.⁷³ Leagues usually consist of anywhere from ten to twelve owners, but may include more or less.⁷⁴ These owners begin the league season by drafting players, usually in one of two ways.⁷⁵ The traditional draft is the “snake” style draft, where teams draw random numbers out of a hat with that number representing their position in the draft’s first round.⁷⁶ The teams then flip positions for the second round. For example, the team with the tenth pick in a ten-team league will draft last in the first round, first in the second round, last in the third round, first in the fourth round, and so on.⁷⁷ The drafting positions “snake” back and forth.

The second, less traditional, draft style is the auction draft, which mirrors Winkenbach’s original draft. Everyone starts with a certain amount of “money” in a budget, which is the same for all teams, and each owner then bids on players until their roster is full or their money is all spent.⁷⁸ Regardless of which draft style a league uses, the draft is the most important day of the year for a fantasy league. It is during the draft where teams begin to take shape.⁷⁹ All of the best players are usually drafted and, thus, are not available for pick up for the rest of the season, unless through a trade.⁸⁰

For the skilled fantasy owner, however, the season starts long before the draft. For example, in fantasy football, smart owners pay attention to the actual player transactions made by the real sport’s teams. Examples of this include hearkening players taken in the league’s drafts, free-agent signings, players recovering from injuries, preseason games, and more, all of which happens before the real season begins, and before fantasy drafts take place.⁸¹ It is a game that takes a significant amount of preparation.

The preparation and study do not end with the draft.⁸² Throughout the season, players who were rated highly routinely get hurt or play well below expectations. At the same time, other players, who went undrafted, play way above their pre-draft expectations.⁸³ Owners must constantly stay on top of

⁷² Dave, *supra* note 70.

⁷³ Jim McCormick, *So You Want to Play Fantasy Football?*, ESPN (last updated July 9, 2010), <http://sports.espn.go.com/fantasy/football/ffl/story?page=nfldk2k10howtoplay>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Rules: Live Online “Snake” Draft*, ESPN, <http://games.espn.go.com/ffl/content?page=fflruleslivedraft2009> (last visited Dec. 14, 2014).

⁷⁷ *Id.*

⁷⁸ *Rules: Auction Draft Overview*, ESPN, <http://sports.espn.go.com/fantasy/football/ffl/story?page=fflrulesauctionoverview2008> (June 23, 2008, 6:27 PM).

⁷⁹ See McCormick, *supra* note 73.

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

players who get picked up by other owners and added to their fantasy roster during the season, referred to as “pick-ups.”⁸⁴ A good owner knows who is getting hot, or, in the case of fantasy baseball, who is getting called up from the minor leagues.⁸⁵ Fantasy sports are not for people who just want to pick players at a draft, plug them into a starting lineup, and then not pay attention for the rest of the season.

Numerous variations of leagues exist as well. There are “keeper leagues,” where owners get to keep a set amount of players from the last year’s team, either at the cost of a draft pick in a certain round or auction budget money in the current year’s draft.⁸⁶ This adds even more strategy to the game, as owners may want to draft a cheap player this year, which they might not have otherwise drafted, hoping that the player will blossom, so they can keep that player next year at the same cheap price.⁸⁷

Finally, there are “dynasty leagues,” which are even more intricate than the keeper leagues.⁸⁸ A dynasty league is essentially run like a real professional league.⁸⁹ Owners purchase their players through “contracts,” keeping them on their roster for X amount of years.⁹⁰ One bad contract can cripple a team for years. These leagues are for the most serious and committed would-be owners.

Regardless of what type of league a person may join, strategy, skill, patience, and perseverance play a huge part for a successful owner. Although luck still plays a role in the outcome of fantasy sports leagues, courts agree traditional fantasy sports are enough of a game of skill to be legal.

ii. How to Play Daily Fantasy Sports

Unlike season-long fantasy sports, which require a person to micromanage their team’s roster over the course of an entire season, daily fantasy sports allow a person to draft a new team each day, for a wager (or “buy-in”).⁹¹ This means that a person can play as much or as little as he or she wants. The owner can supplement a traditional season-long fantasy league, or just play daily leagues by themselves, completely avoiding all of the micromanaging necessary for season-long leagues.⁹² Daily fantasy sports are similar to season-long fantasy sports, because an owner can win real cash prizes.⁹³ However, because

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See* Bret Cohen, *How to Run a Fantasy Football Keeper League: Rules for Dynasty Leagues and More*, ROTOWIRE (July 22, 2011), <http://www.rotowire.com/football/showArticle.htm?id=13514>.

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See* Corey McGowan, *What are Daily Fantasy Sports Leagues?*, FANTASY SPORT FANS (Nov. 5, 2013), <http://fantasysportfans.com/what-are-daily-fantasy-sports-leagues/>.

⁹² *Id.*

⁹³ *Id.*

an owner can play what is essentially a new “league” every day, the chance to win or lose is multiplied many times over.⁹⁴

Unlike traditional fantasy leagues, micromanagement of rosters plays virtually no part in a daily fantasy league. An owner does not have to worry about one or two injuries ruining his or her entire fantasy season.⁹⁵ In a daily league, a player can have a terrible week in terms of injuries or disappointing performances and still start fresh with a new roster the next week.⁹⁶

The rules for daily leagues are similar to season-long leagues, with two key differences.⁹⁷ Just like a season-long league, a daily-league owner picks a team from a pool of real players, points are then awarded based on those player’s real life stats, and a league winner is crowned.⁹⁸ However, unlike traditional fantasy sports, many daily leagues use a salary cap structured drafting system.⁹⁹ Players are assigned different price tags, and everyone has a chance to draft the same players as long as the total team salary fits within the salary cap limit.¹⁰⁰ This draft style is similar to an auction draft in a season-long league, but without the auctioning, since everyone can have the same players.¹⁰¹

The second important difference is that the chance to win or lose money is much greater for daily fantasy sports than for season-long leagues.¹⁰² Although strong on social interaction and camaraderie, most season-long fantasy sports do not offer much prize money.¹⁰³ For example, a ten-team league where everybody “buys-in” for \$50 winds up with \$500 in total prize money.¹⁰⁴ This prize is usually broken up between first, second and third place.¹⁰⁵ Meaning, if a team wins \$100, the prize, when broken down weekly by the amount of weeks a typical fantasy season lasts (in a football league, usually 16 weeks), amounts to \$6.25 per week over the course of a National Football League (NFL) season.¹⁰⁶ However, in any given year, the odds of a given player win-

⁹⁴ See Jeremy Olson, *Daily Fantasy Football vs. Season-Long Leagues*, DRAFTDAY (Sept. 12, 2012), <https://www.draftday.com/blogs/2012/09/daily-fantasy-football-vs-season-long-leagues/>.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See McGowan, *supra* note 91.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ See *supra* Part I.C.i.; McGowan, *supra* note 91 (discussing how many daily leagues offer snake draft leagues as well, which work the same way as season-long snake draft leagues); see also Joshua Brustein, *Fantasy Sports and Gambling: Line is Blurred*, N.Y. 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=1& (discussing how another variation is a “pick five” league, in which players are presented with pairs of players and wager on who will perform better).

¹⁰² See Olson, *supra* note 94.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (discussing how a typical payout for such a league would likely be \$300 for the team that wins the championship, \$150 for the team that loses the championship, and \$50 for third place).

¹⁰⁵ *Id.* Other variations for payouts exist as well, like the team with the most regular season wins getting a payout. *Id.*

¹⁰⁶ *Id.*

ning are low, because there is a three in ten chance, at best, to win.¹⁰⁷ Thus, the per-game winnings appear even lower.¹⁰⁸

In daily fantasy sports, the amount of money a person can wager in a given week is virtually infinite.¹⁰⁹ While most websites offer daily games for as low as a dollar,¹¹⁰ some websites offer wagers of up to \$1,000, with some of the fields of players involving 1,000 players or more.¹¹¹ A person can enter as many different one-day “leagues” each day as he or she wants, without having to worry about being overwhelmed with micromanaging each team.¹¹² There are no waiver wire or trade offers to worry about; a player does not have to remember to set his lineup from week to week; and the time commitment is only as much as a person wants to put into it that day.¹¹³

Additionally, there are numerous different ways to win because daily league websites often offer many different payout structures.¹¹⁴ These include 50/50 contests, which payout to the top half of the league’s participants (as opposed to the top twenty or thirty percent in a season-long league).¹¹⁵ The chance to win or lose money is greater for daily fantasy league players than they are for traditional fantasy league players.¹¹⁶ Viewed in this way, daily fantasy sports appear to resemble sports betting more so than traditional fantasy sports. The legal distinction between traditional fantasy sports and sports betting would thus play an important role in deciding the legality of daily fantasy sports, should a court ever have a chance to decide the issue.

II. THE LEGALITY OF SPORTS BETTING AND TRADITIONAL FANTASY SPORTS

A. *Sports Betting Laws*

There are three important laws governing sports betting in America at the federal level: the Interstate Wire Act (“Wire Act”),¹¹⁷ the Professional and Amateur Sports Protection Act (“PASPA”),¹¹⁸ and the Unlawful Internet Gambling Enforcement Act (“the UIGEA”).¹¹⁹ Each law has played a major role in shaping modern sports betting.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ McGowan, *supra* note 91. Some websites offer free games that allow you to win real money, allowing a person to build a bankroll and continue playing with his winnings. *Id.*

¹¹¹ Olson, *supra* note 94.

¹¹² *Id.*

¹¹³ *Why Play Daily Fantasy Sports Over Traditional Yearly Leagues?*, FRAFTY, (on file with author) (FRAFTY is now SWOLLYOURROLLSPORTS, but the article was previously accessed on Nov. 24, 2014 by the author at <https://www.frafty.com/strategy/why-play-daily-fantasy-sports>).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ McGowan, *supra* note 91.

¹¹⁷ 18 U.S.C. § 1084 (2012).

¹¹⁸ 28 U.S.C. §§ 3701–3704 (2012).

¹¹⁹ 31 U.S.C. §§ 5361–5367 (2012).

i. The Interstate Wire Act

In 1961, Congress passed the Interstate Wire Act.¹²⁰ By enacting the act, Congress set out to prohibit illegal sports books from taking bets.¹²¹ To be convicted under the Wire Act, a business must be “engaged in the business of betting or wagering” while knowingly using a “wire communication facility for the transmission . . . of bets or wagers.”¹²² Thus, a person gambling in the form of betting or wagering is not in violation of the Wire Act.¹²³ The law makes it a crime only for a gambling *business* to take bets over wires as part of their day-to-day operation.¹²⁴

The history behind the Wire Act plays out like a Martin Scorsese movie. In 1961, organized crime in America, which had yet to enter the profitable drug market, made most of its money from running gambling rings, amongst other endeavors.¹²⁵ Then Attorney General Robert F. Kennedy decided it was up to him and his brother, President John F. Kennedy, to take down the mafia.¹²⁶ Kennedy’s Wire Act was not “intended as a sweeping federal effort to curtail public access to gambling.”¹²⁷

Once Congress passed the Racketeering Influenced and Corruptions Act (“RICO”) in 1970,¹²⁸ the Wire Act simply sat on the shelf collecting dust.¹²⁹ It was not until the Internet became hugely popular for gamblers during the 1990s and 2000s that federal law enforcement revived the Wire Act.¹³⁰ In *United States v. Cohen*, the Second Circuit held that the Wire Act prohibited Internet gambling.¹³¹ However, a year later, the Fifth Circuit affirmed a district court ruling that the plain language of the Wire Act “clearly requires that the object of the gambling be a sporting event or contest.”¹³² The Department of Justice (DOJ) used the Wire Act’s prohibition of the use of wire communications for the purpose of taking sports bets to force online betting websites to do business outside of the United States and then to prosecute those who accepted customers from the United States.¹³³

¹²⁰ 18 U.S.C. § 1084.

¹²¹ Brandon P. Rainey, Note, *The Unlawful Internet Gambling Enforcement Act of 2006: Legislative Problems and Solutions*, 35 J. LEGIS. 147, 157 (2009).

¹²² 18 U.S.C. § 1084.

¹²³ *Id.*

¹²⁴ See Michael D. Schmitt, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC. L.J. 381, 385 (2008).

¹²⁵ Larry Josephson, *Betting History 101: The Story Behind the 1961 Wire Act*, COVERS, <http://www.covers.com/articles/articles.aspx?theArt=260073> (Jan. 3, 2012).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ 18 U.S.C. §§ 1961–1968 (2012).

¹²⁹ Larry Josephson, *Wire Act Doesn’t Make Sense in the Internet Age*, COVERS, <http://www.covers.com/articles/articles.aspx?theArt=261150> (Jan. 11, 2012).

¹³⁰ *Id.*

¹³¹ 260 F.3d 68, 74–75 (2d Cir. 2001).

¹³² *In re Mastercard Int’l Inc.*, 313 F.3d 257, 262 (5th Cir. 2002).

¹³³ See Josephson, *supra* note 129.

ii. *The Professional and Amateur Sports Protection Act*

In 1976, the NFL brought a lawsuit against the state of Delaware, which had recently enacted a lottery form of parlay card wagering tied to professional sports.¹³⁴ One of these lottery games involved picking seven winners in seven selected NFL games.¹³⁵ These lotteries had become popular in many states during the 1970s, much to the chagrin of professional sports leagues.¹³⁶ One professional sports league, the NFL, decided to file a lawsuit over the issue.¹³⁷

The suit claimed that the Delaware lottery had violated various federal and state trademark and unfair competition laws.¹³⁸ The federal district court held in favor of Delaware on the majority of the issues, but required the State to add a disclaimer to its lottery stating that it was not affiliated with the NFL.¹³⁹ Similar state lotteries continued to spring up throughout the 1970s and 1980s.¹⁴⁰ By the late 1980s, many states were considering legalizing some form of sports betting.¹⁴¹ Professional sports leagues were worried as they perceived these sports-based lotteries to be a major threat to their businesses. The leagues had no choice but to seek congressional assistance.¹⁴²

Congress responded the sports leagues' concerns by enacting PASPA in 1992.¹⁴³ PASPA was passed in effort to "stop the spread of State-sponsored sports gambling."¹⁴⁴ PASPA reads:

It shall be unlawful for – (1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.¹⁴⁵

One of Congress's main concerns with sports betting was its potential effect on the integrity of sports. It worried that such wagering might lead to a player betting on a game in which he is a participant, purposefully missing a shot or a throw, and as a result, impacting the point spread on the game.¹⁴⁶

¹³⁴ *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1376 (D. Del. 1977); see also Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 4–5 (2002).

¹³⁵ Cabot & Faiss, *supra* note 134, at 4–5.

¹³⁶ *Id.* at 4.

¹³⁷ *Nat'l Football League*, 435 F. Supp. at 1375.

¹³⁸ *Id.* at 1376.

¹³⁹ *Id.* at 1391.

¹⁴⁰ *Id.*

¹⁴¹ Steven L. Shur, *Police Blockade: How the Revitalization of the Tenth Amendment Could Pave the Way to Legalized Sports Betting in New Jersey*, 10 RUTGERS J.L. & PUB. POL'Y 99, 101 (2013).

¹⁴² *Id.*

¹⁴³ 28 U.S.C. §§ 3701–3704 (2012).

¹⁴⁴ See S. REP. NO. 102-248, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 3553, 3555.

¹⁴⁵ 28 U.S.C. § 3702. *But see* 28 U.S.C. § 3704 (detailing exemptions).

¹⁴⁶ Cabot & Faiss, *supra* note 134, at 6.

Congress worried that this type of game and point fixing would negatively affect fans' perception of the sports, thus hurting the integrity of the games.¹⁴⁷ Predictably, professional sports leagues shared similar concerns and also wanted to avoid another "Black Sox" scandal.¹⁴⁸

Although Congress did not pass either the Wire Act or PASPA with a futuristic eye on how the Internet would affect both gambling and sports betting, combined, these acts have had a major effect on both the eventual illegality of online gambling through the advent of the UIGEA, and sports betting's subsequent inability to escape the UIGEA when the DOJ eventually decided not to enforce it.

iii. The Unlawful Internet Gambling Act

In the early days of the Internet, when people were just starting to learn about and understand the "information super-highway," Congress prophetically began endeavoring to pass some form of Internet gambling legislation.¹⁴⁹ At the time, both houses of Congress could not seem to agree on such legislation.¹⁵⁰ In 2006, however, Congress finally passed the UIGEA.¹⁵¹ Proponents of the law linked Internet gaming to crime, disorder, identity theft, fraud, money laundering, and more.¹⁵² Eventually, these proponents were able to pass the UIGEA by tacking it on to an unrelated Homeland Security bill, which had garnered little to no opposition, despite numerous polls showing that the American people did not want the government to prohibit Internet gambling.¹⁵³

The UIGEA contains five sections regarding its enforcement.¹⁵⁴ It reads, in pertinent part:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person in unlawful Internet gambling - -

- (1) credit, or the proceeds of credit, extended to or on behalf of such other person (including credit extended through the use of a credit card);
- (2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund transfer or money transmitting service, from or on behalf of such other person;
- (3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution.¹⁵⁵

¹⁴⁷ *Id.*

¹⁴⁸ See Martin, *supra* note 7.

¹⁴⁹ Lawrence G. Walters, *On Second Thought . . . —What Does the UIGEA Really Mean for Internet Gambling?*, WALTERS LAW GROUP, <http://www.firstamendment.com/site-articles/UIEGA> (last visited Sept. 25, 2014).

¹⁵⁰ *Id.*

¹⁵¹ 31 U.S.C. §§ 5361–5367 (2012).

¹⁵² Walters, *supra* note 149.

¹⁵³ *Id.*

¹⁵⁴ Joe Falchetti, *UIGEA, 6 Years Later*, CALVINAYRE.COM (Oct. 15, 2012), <http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/>.

¹⁵⁵ 31 U.S.C. § 5363 (2012).

Essentially, the UIGEA makes it illegal for individuals and businesses to receive funds or credit transfers related to Internet gaming.¹⁵⁶ It does not, however, criminalize deposits made by private citizens.¹⁵⁷ Ultimately, due to the millions of online transactions processed every day, the Act proved virtually impossible to enforce.¹⁵⁸ Banks simply did not have the resources to sort through a plethora of transactions to search for those covered under the Act.¹⁵⁹ In addition, at the time the UIGEA was passed, internet gaming websites were based mostly offshore, and any portions of the Act directed at these offshore businesses were essentially unenforceable, effectively taking the teeth out of the legislation.¹⁶⁰

In September 2009, the Interactive Media Entertainment & Gaming Association brought suit against the Attorney General claiming that the UIGEA was unconstitutional.¹⁶¹ Although the Third Circuit upheld the law, it found that because the UIGEA penalizes “unlawful Internet gambling,” the act itself does not actually outlaw any gambling activity.¹⁶² Instead, the legality of the transactions covered by the act “turns on how the law of the state from which the bettor initiates the bet would treat that bet.”¹⁶³ In other words, the wager must be illegal under state law in the state where was made before the UIGEA would take effect.¹⁶⁴ This was seen as a small victory for online gamblers because at the time of the ruling, Internet gaming had only been outlawed in six of the fifty states in America.¹⁶⁵ However, this ruling did not affect the federal government’s ability to use the Wire Act to enforce interstate gambling prohibitions.¹⁶⁶

Due to the limitations on the UIGEA through both the Third Circuit’s ruling and the general difficulty in enforcing it, “many people viewed the UIGEA as nothing more than a warning shot to online gamblers and betting websites.”¹⁶⁷ However, on April 15, 2011, a day known in the online poker community as “Black Friday,” this view proved to be mistaken.¹⁶⁸

On April 15, 2011, the DOJ shut down five of the world’s online largest poker websites, seizing their domain names, indicting their owners, employees and payment processors.¹⁶⁹ Charging them with multiple the UIGEA violations, the DOJ froze dozens of the companies’ bank accounts.¹⁷⁰ As a result, most of the affected websites left the US market.¹⁷¹ The online poker and gam-

¹⁵⁶ Falchetti, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S., 580 F.3d 113, 114 (3d Cir. 2009).

¹⁶² *Id.* at 116.

¹⁶³ *Id.* at 117.

¹⁶⁴ *Id.*

¹⁶⁵ Falchetti, *supra* note 154.

¹⁶⁶ See *supra* Part II.A.i.

¹⁶⁷ Falchetti, *supra* note 154.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

ing communities took notice that the DOJ meant business; that is until “White Friday” less than a year later.¹⁷²

After looking at both the Wire Act and the UIGEA, on “White Friday,” December 23, 2011, the DOJ declared that the Wire Act prohibited sports betting activities only.¹⁷³ No longer would the Wire Act be used in conjunction with the UIGEA to create “unlawful” interstate gaming. Internet sports betting was the lone form of gambling that was still illegal under the Wire Act.¹⁷⁴

B. *Classifying Sports Gambling and Traditional Fantasy Sports*

i. *How Does the Government Classify Sports Gambling?*

The UIGEA defines a bet or wager as:

The staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon and agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.¹⁷⁵

The key to determining whether something is considered a wager under the definition of the UIGEA is whether it is placed on a game of chance or skill.¹⁷⁶ Most states use a “dominant factor (or predominance) test” when determining what is a game of chance and what is a game of skill.¹⁷⁷ Under the dominant factor test, courts decide whether chance or skill is the dominating factor in determining the result of a game.¹⁷⁸ If the winner of a game is determined by skill, it is a contest.¹⁷⁹ If the winner is determined by chance, it is gambling.¹⁸⁰ Some states follow a stricter anti-gambling stance, prohibiting games whose dominant factor is skill as well.¹⁸¹ In these states, games such as fantasy sports would be unlawful, regardless of whether the dominant factor is

¹⁷² Tony Batt, *DOJ’s Wire Act Ruling Lights Fire for Federal Regulation*, GAMBLING COMPLIANCE (Jan. 3, 2012), http://law.uark.edu/faculty/gallini/Gallini-DOJs-Wire_Act_Ruling_Lights_Fire_For_Federal_Regulation.pdf.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 31 U.S.C. § 5362(1)(A) (2012).

¹⁷⁶ See, e.g., Erica Okerberg, *What’s in a Game? A Test Under Which We May Call a “VGT” a Gambling Game is Not So Sweet: Why Courts Should Not Apply the Material Element Test to VGTs*, 5 UNLV GAMING L.J. 27, 28 (2014); Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1202–03 (2007).

¹⁷⁷ Jon Boswell, Note, *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, 1264 (2008).

¹⁷⁸ See, e.g., *Commonwealth v. Dent*, 992 A.2d 190, 191 (Pa. 2010) (“[T]he controlling question for the trial court was whether the element of chance predominates over skill in the game.”); *In re Allen*, 377 P.2d 280, 281 (Cal. 1962) (discussing the test on whether chance or skill is the dominating factor in determining the result of a game).

¹⁷⁹ Anthony N. Cabot & Louis V. Csoka, *Symposium: The Games People Play: Is it Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 202 (2004).

¹⁸⁰ *Id.*

¹⁸¹ Boswell, *supra* note 177, at 1264; see also, e.g., FLA. STAT. § 849.14 (2014) (making it unlawful to bet on a result of a trial or contest of skill).

found to be skill or chance.¹⁸² But wagers on games that are determined almost solely by skill, such as chess, are lawful.¹⁸³ However, most states do not follow such a strict interpretation of gambling, and the dominant factor is the key in determining whether borderline games such as poker are games of chance or skill.¹⁸⁴

Courts disagree on whether games such as poker and backgammon are predominantly games of chance or skill.¹⁸⁵ The decisions usually boil down to whether the game's outcome is controlled more by chance or by another factor that participants can control.¹⁸⁶ Most courts, however, consider chance to be the dominant factor when deciding sports betting cases.¹⁸⁷

Sports leagues themselves have historically attempted to protect the integrity of their respective sports by maintaining rules prohibiting team owners, athletes, and other personnel from associating with gambling.¹⁸⁸ The federal government has taken it a step further by outlawing sports betting outright, with a few exceptions, because it is in the best interest of the nation.¹⁸⁹ The issue of integrity is what led to the passing of PASPA.¹⁹⁰ However, even before PASPA, courts held that chance dominated the outcomes of football pool games.¹⁹¹ Because no one knows what will happen in a particular sporting event, skill cannot dominate the outcome of a sports wager.¹⁹² Further, the court said that these football pools required participants to pick teams to beat a certain point spread, which injected another layer of chance into the outcome of the pool.¹⁹³ The courts held that these football pools were chance-dominated and, thus, illegal.¹⁹⁴

ii. *The Legality of Traditional Fantasy Sports*

Although many professional sports leagues have strong aversions toward sports gambling, traditional fantasy sports do not solicit the same animosity. At first, the leagues were uneasy about fantasy sports.¹⁹⁵ Now, however, most professional leagues have come to embrace the games.¹⁹⁶ The reason lies in the believed effects each has toward the integrity of the respective sports.

¹⁸² Boswell, *supra* note 177, at 1264.

¹⁸³ Cabot & Csoka, *supra* note 179, at 202.

¹⁸⁴ Boswell, *supra* note 177, at 1264.

¹⁸⁵ Cabot & Csoka, *supra* note 179, at 202–03.

¹⁸⁶ Boswell, *supra* note 177, at 1265.

¹⁸⁷ *Id.*

¹⁸⁸ Cabot & Csoka, *supra* note 179, at 208.

¹⁸⁹ *Id.*

¹⁹⁰ See *supra* Part II.A.ii.

¹⁹¹ See *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1367 (Wash. 1972) (explaining that chance factors—such as the physical and mental conditions of the players, weather conditions, team animosity—can greatly affect the outcome of a football game).

¹⁹² See *Nat'l Football League v. Governor of Del.*, 435 F. Supp. 1372, 1385 (D. Del. 1977).

¹⁹³ See *id.* at 1385–86.

¹⁹⁴ See Boswell, *supra* note 177, at 1266.

¹⁹⁵ See *supra* Part I.B.

¹⁹⁶ For example, the National Football League's offers its own fantasy league webpage that manages leagues for players. See *Fantasy Football*, NFL.COM, www.nfl.com/fantasyfootball (last visited Aug. 14, 2014).

There are numerous reasons why sports leagues have embraced fantasy sports, not the least of which is the fact that they have brought more popularity to the leagues.¹⁹⁷ Perhaps more important to the leagues is that fantasy sports do not bring with them the negative implications of sports betting.¹⁹⁸ For one, fantasy sports do not involve the large amounts of money associated with sports gambling.¹⁹⁹ Money is usually only a secondary or tertiary reason for playing fantasy sports. For many, it is the thrill of the competition and the glory of beating one's friends and co-workers.²⁰⁰ For others, it's a way to maintain longstanding and long distance relationships.²⁰¹ Additionally, many players enjoy the emotional investment in a team whose lineup they choose, create, and maintain.²⁰² Money is usually not the motivating factor in fantasy sports.²⁰³

As a result of this indifference towards monetary prizes, fantasy sports do not carry the baggage associated with gambling.²⁰⁴ For example, traditional fantasy sports have not been associated with organized crime, compulsive gamblers, gambling debts or severe economic loss.²⁰⁵ In fact, because fantasy sports leagues involve such a minimal amount of money, players would have to participate in an inordinate amount of fantasy sports leagues to accumulate the type of debt usually associated with compulsive gamblers.²⁰⁶

Because Congress passed the UIGEA with an explicit exception carved out for fantasy sports, it apparently also feels that fantasy sports do not carry the same baggage as sports betting.²⁰⁷ This exception indicates that the government does not consider fantasy sports to have the same negative connotation that sports betting has garnered. Congress has shown in this exception that fantasy sports are games played properly with skill and knowledge. Federal Courts have already upheld this ruling, explicitly finding that the UIGEA confirms that fantasy sports do not constitute gambling as a matter of law.²⁰⁸

¹⁹⁷ See Boswell, *supra* note 177, at 1275 ("A study taken circa 2006 showed that 55% of fantasy sports players reported watching more sports on television since they started playing fantasy sports.")

¹⁹⁸ See *id.* at 1271–75; Anthony Vecchione, Comment, *Fantasy Sports—Has Recent Anti-Gambling Legislation 'Dropped the Ball' by Providing a Statutory Carve-out for the Fantasy Sports Industry?*, 61 SMU L. REV. 1689, 1704 (2008).

¹⁹⁹ *Id.* at 1271.

²⁰⁰ Vecchione, *supra* note 198, at 1695 (2008).

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Boswell, *supra* note 177, at 1271–72.

²⁰⁴ *Id.*

²⁰⁵ See *id.*

²⁰⁶ See Michael J. Thompson, *Give Me \$25 on Red and Derek Jeter for \$26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 SPORTS L.J. 21, 40 (2001).

²⁰⁷ The text of the UIGEA expressly exempts:

(ix) participation in any fantasy or simulation sports game . . . that meets the following conditions: (I) All prizes and awards offered . . . are established and made known to the participants in advance (II) 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 . . . in multiple real-world sporting or other events.

³¹ U.S.C. §§ 5361–5367.

²⁰⁸ See *Humphrey v. Viacom, Inc.*, No. 06-2768(DMC), 2007 U.S. Dist. LEXIS 44679, at *30 (D.N.J. June 20, 2007).

Laws similar to the UIGEA can be found at the state level. Almost every state's anti-gambling statute reflects the general common law rule that a contest is an illegal lottery if it consists of "(1) the distribution of prizes, (2) according to chance, (3) for a consideration."²⁰⁹ For fantasy sports, the key element at the state level is whether or not the outcomes of these leagues depend on chance or skill.²¹⁰ Although no state court has ever directly applied the dominant factor test to fantasy sports,²¹¹ it is hard to imagine that any court would find that fantasy sports have the same level of chance that sports betting does.

There are numerous differences between sports betting and traditional fantasy sports that tend to show that fantasy sports are more games of skill than chance.²¹² For instance, a typical sports betting pool, multiple competitors are allowed to pick the same teams, even when competing against each other for the most wins.²¹³ A traditional fantasy league, however, allows each real-world player to be represented on only one team in a given league.²¹⁴ This gives the more skilled and alert fantasy sports owner an upper hand (when picking up an injured player's backup off of the waiver wire),²¹⁵ but has no effect on a sports betting pool where everyone can simply pick against that injured player's team.²¹⁶

Perhaps the biggest difference, and one rooted in the professional sports leagues' animosity towards sport betting, is the incentive and possibility of "fixing" an actual sporting event. A bettor who has a chance to win a large purse from the outcome of a particular sporting event would have a strong incentive to try and fix the event by paying off a player, coach, or referee.²¹⁷ Sports in the 20th century, particular the early part of the century, were riddled numerous times with such schemes.²¹⁸ Recent examples show that, despite the money now associated with player salaries (which presumably make it less likely that an athlete would take money to fix a game or spread), sports betting can still have an effect on people who play a peripheral role in the outcome of a game, such as referees.²¹⁹

²⁰⁹ Boswell, *supra* note 177, at 1263 (quoting *Lucky Calendar Co. v. Cohen*, 117 A.2d 487, 494 (N.J. 1955)).

²¹⁰ *See id.* at 1263–64.

²¹¹ *See id.* at 1265–67.

²¹² *Id.* at 1266.

²¹³ *Id.* at 1265–66.

²¹⁴ *Id.* at 1266–67.

²¹⁵ *See generally* *What are Waivers?*, ESPN, <http://games.espn.go.com/ffl/resources/help/faq?name=what-are-waivers> (last visited Oct. 25, 2014) (discussing the waiver process).

²¹⁶ Boswell, *supra* note 177, at 1266–67.

²¹⁷ *See id.* at 1267.

²¹⁸ *See* Joe Goldstein, *Explosion: 1951 Scandals Threaten College Hoops*, ESPN (Nov. 19, 2003), http://sports.espn.go.com/classic/s/basketball_scandals_explosion.html (discussing the 1951 NCAA College Basketball scandal where seven college basketball teams were involved in point shaving schemes); *supra* Part I.A (discussing the 1919 Chicago White Sox, who threw the World Series in exchange for money from a professional gambler).

²¹⁹ *See generally* *Donaghy Under Investigation for Betting on NBA Games*, ESPN, <http://sports.espn.go.com/nba/news/story?id=2943095> (July 20, 2007) (discussing the investigation of former NBA referee Tim Donaghy, who bet on basketball games in which he was the referee, and made calls that affected the outcome of games in which he had a wager).

In fantasy sports, however, the likelihood of someone fixing a game in order to win a weekly matchup is almost non-existent.²²⁰ The structure of a traditional fantasy sports league simply does not allow for such a scheme to have any purpose for a fantasy sports team owner.²²¹ For example, a fantasy owner has numerous players from many different real life teams on his roster,²²² meaning that he would have to “pay-off” numerous different players or referees participating in many different games to have any effect on his own fantasy team. Further, if a fantasy player paid off a real-life player on a team, it would benefit other owners in his league that “own” different players from that same team.²²³ Therefore, it would seem that traditional fantasy sports leagues do not threaten the integrity of sports leagues, at least from the standpoint of players and referees being paid to fix games.

III. WHEN COMPARED, DAILY FANTASY SPORTS LEAGUES PARALLEL SPORTS BETTING MORE THAN TRADITIONAL FANTASY SPORTS

If ever challenged at the federal level, it appears that the carve-out in the UIGEA for fantasy sports may not apply to daily fantasy sports leagues. Further, if a court decides that daily fantasy sports are games of chance under the dominant factor test, states may begin to outlaw them. Many of the characteristics of traditional fantasy sports leagues that separate the game from the stigma surrounding sports betting appear to apply to daily leagues when viewed under a microscope. Although there are some important areas where daily leagues do not reach the level of sports betting, overall, the daily league websites are skirting the fine line between legal fantasy sports websites and illegal sports betting websites.

A. *Chance Appears to be the Dominant Factor in the Outcomes of Daily Fantasy Sports Games*

Although an Illinois court has already dismissed a lawsuit against a daily fantasy sports website, the court avoided the dominant factor issue.²²⁴ Another case in the same district is pending, but should that court (or any other court) apply the dominant factor test to daily fantasy sports, the outcome will likely show that, unlike traditional fantasy sports, daily fantasy sports are comprised more of chance than of skill.²²⁵ The many differences that separate traditional fantasy sports leagues from sports betting are, in large part, non-existent in daily fantasy sports leagues. In fact, for many reasons, daily fantasy sports are more similar to sports betting than to traditional fantasy sports.

²²⁰ See Thompson, *supra* note 206, at 30.

²²¹ *Id.*

²²² See McCormick, *supra* note 73.

²²³ See Boswell, *supra* note 177, at 1274.

²²⁴ Langone v. Patrick Kaiser & Fanduel, Inc., 2013 U.S. Dist. LEXIS 145941, at *23–24 (N.D. Ill. Oct. 9, 2013); see also Marc Edelman, *FanDuel Secures an Important Victory in Daily Fantasy Sports Lawsuit, However Plaintiff Plans to Appeal*, FORBES (Oct. 9, 2013), <http://www.forbes.com/sites/marcedelman/2013/10/09/fanduel-secures-an-important-victory-in-daily-fantasy-sports-lawsuit-however-plaintiff-plans-to-appeal/>.

²²⁵ Edelman, *supra* note 224.

Traditional fantasy sports allow a real-life player to be on only one fantasy team owner's roster in any given league.²²⁶ This allows for a greater use of skill, knowledge, and strategy. For instance, a fantasy team owner might keep a player on his team's roster either as injury insurance for another player, or to keep another team owner who might need that player to fill a roster spot from acquiring that player. This not only strengthens the owner's team, but weakens other teams as well.

In contrast, in daily fantasy sports, every single team may own the same players.²²⁷ Although there is skill involved in the fantasy team owner's use of the "salary cap,"²²⁸ there is much less strategy needed to decide which players to draft.²²⁹ The owner will not make moves in an effort to make other teams weaker. They will only base their moves on their team's makeup. In this way, daily leagues are more akin to sports betting pools.

In a sports betting pool, players pay a set buy-in and pick whom they think will be the winners of each game for that week's schedule.²³⁰ Whoever picks the most winning games wins that week's prize.²³¹ Similar to daily fantasy sports, there are thousands of entries into these pools every week, and all players can pick the same teams. There is little strategy involved in trying to pick different teams than other players because the "smart play" would be to pick the team that has the best chance to win. Although correctly picking the upset pick for a given week may pay off because most teams will not employ that strategy, this strategy necessarily reduces the odds of winning, and is greatly based on luck rather than on any kind of skill. This is echoed in daily fantasy sports where the "smart play" is to pick the best players with the best matchups in order to maximize one's chance of winning. Drafting a team's backup quarterback for a game where the starter is hurt, therefore, is a strategy that can be employed by everyone if they think that quarterback has a good chance of scoring a lot of points.

Further, picking a so-called "sleeper" in a traditional fantasy league is a strategy that might pay off further along in the season if that player starts to play well.²³² It is worth taking risks on players whom an owner might think are worth keeping in order to reap the benefits later. In contrast, in a daily league where you pick different players every single week, there is no real concept of "sleepers." By the time a player starts to play well, everyone in the league is

²²⁶ See McCormick, *supra* note 73.

²²⁷ See McGowan, *supra* note 91.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ See *2013 Pick the Pros Contest*, BOYD GAMING, <https://web.archive.org/web/20130903133815/http://static.boydgaming.net/pickthepros/media/downloads/pickthepros-2013-lasvegas.pdf> (last visited Nov. 14, 2014) (explaining the rules for the 2013 NFL Pick the Pros football betting pool).

²³¹ See *id.*

²³² See *Fantasy Football Glossary*, FF TOOLBOX, http://www.fftoolbox.com/fantasy_football_dictionary.cfm (last visited Mar. 14, 2014) (Sleeper is a fantasy term referring to a player that not many people think is going to have a good year, but a select few people see something that they think will make that player a candidate for a breakout year. Thus, savvy fantasy owners draft that player or pick him up on waivers to stash him on the fantasy owner's bench in an effort to reap the possible benefits later on if the player starts to play really well).

already picking that player for his or her team. There is no “bench” to roster a player on from week to week. Instead, each player simply picks a different roster each week. In all, it appears that chance, not skill, plays the dominant role in the daily fantasy league. Because of the limited duration of a daily fantasy league’s games, the importance of chance is greatly heightened. As Major League Baseball Advanced Media chief executive Robert Bowman puts it, daily fantasy sports are “akin to a flip of the coin, which is the definition of gambling.”²³³

B. The Societal Aspects of Daily Fantasy Sports Compared to Traditional Fantasy Sports and Sports Betting

The many social aspects of traditional fantasy sports that make it attractive simply do not exist, nor can they, in daily fantasy sports leagues. One of the chief reasons that people play traditional fantasy sports is for the companionship.²³⁴ This camaraderie simply cannot exist in a daily fantasy league where a person plays against thousands of unknown people on a website. The thrill of competition and glory present in a traditional league is likely not important to a daily fantasy player, at least not to the same extent. The purpose of a daily league is to win money, first and foremost. The opportunity to create the same emotional attachment to a team that a player will only have for one week (or one day, in the case of fantasy football) does not exist in daily fantasy sports. Gambling, not camaraderie, competition, or the thrill of victory against friends, appears to be the main purpose of playing daily fantasy sports.²³⁵

This again puts daily fantasy sports in the purview of sports betting. Because monetary prizes appear to be a motivating factor for playing daily fantasy sports, it is easy to attach the social stigmas of sports bettors to daily fantasy league players as well. There appears to be a greater chance for a daily fantasy player to become a compulsive gambler, a dishonor associated with sports gamblers.²³⁶ If a person gets the itch to gamble and enjoys playing fantasy football, they may decide that playing in a new league every day, with a new payout every day, and with as many opportunities to play as they want every day, is the best way to satisfy their urge. Thus, it is possible that a person may become addicted to gambling while playing in a daily fantasy league more easily than playing a traditional fantasy league.

This feeds into another key difference between traditional and daily fantasy sports: the amount of money available to win (or, more likely, to lose). Most serious traditional fantasy sports leagues charge around \$100 per team owner.²³⁷ This \$100 wager will last the entire season, with owners getting paid at the end of the fantasy league season based on their status in the league (i.e.

²³³ Joshua Brustein, *Fantasy Sports and Gambling: Line is Blurred*, N.Y. TIMES (Mar. 11, 2013), http://www.nytimes.com/2013/03/12/sports/web-sites-blur-line-between-fantasy-sports-and-gambling.html?_r=1&.

²³⁴ See Vecchione, *supra* note 198, at 1713.

²³⁵ *Id.*

²³⁶ See generally *id.* at 1707–09.

²³⁷ Brad Perniciaro, *Creating and Collecting Fantasy Football League Fees*, CHEAT SHEET WAR ROOM, <http://www.cheatsheetwarroom.com/blog/post/establish-fantasy-football-league-fees.aspx#.U9AQ2bsg8Zg> (last updated Nov. 2, 2013).

league champion, second place, third place, etc.). In daily fantasy sports, however, fantasy owners pay a new entry fee every day (or week), with payouts based solely on that day's (or week's) standings.²³⁸ Additionally, the daily fantasy league player can join leagues that have higher or lower entry fees, depending on how much he or she wants to spend.

Furthermore, a daily fantasy league player may join as many leagues as they want in a given week. Although the same may be true for traditional fantasy sports, the dynamics of a traditional league make it difficult to manage multiple teams at the same time.²³⁹ In a traditional fantasy league, a fantasy team owner drafts players for the whole season, with each move having repercussions for future weeks.²⁴⁰ Additionally, a persistent traditional fantasy team owner will watch players not on his or her team throughout the season, either in anticipation of a trade or waiver wire pickup, or simply to size up the league's competition. A daily fantasy league team owner, however, needs only to worry about that week's game. This means that the daily fantasy league team owner does not need to keep track of a team and its corresponding league. This makes it much more appealing to play in multiple daily fantasy sports leagues at once because an owner will not have to micromanage each team; an owner simply has to draft as many teams as he or she wants and sit back and watch. This is yet another area where daily fantasy sports are similar to sports betting; a person may bet on as many teams, and in as many different ways, as they want without having to strategize for the next week. There is a much greater opportunity for a person to bet larger sums of money on daily fantasy sports than on traditional fantasy sports. It is this substantial emphasis on buy-ins and payouts that may place daily fantasy sports within the social realm of sports betting.

The hands-on aspect of daily fantasy sports may also contribute to a person degenerating into a compulsive gambler.²⁴¹ In fact, it may be this aspect that makes it most similar to traditional fantasy sports leagues (*i.e.* the fact that it acts more like a game or competition than merely betting on teams), which may make daily fantasy sports leagues even more dangerous than sports betting. A sports bettor simply bets on teams or groups of teams and waits out the results. A daily sports league player, however, gets the opportunity to pick players and watch them perform throughout the day, with each play having significance. A person may become just as addicted to the "game" aspect of daily leagues as they do to the monetary aspect. Although the same may be true of a traditional fantasy player, as noted above, there is less of an opportunity to lose large sums of money in traditional leagues than there is in a daily league format. Therefore, there are multiple ways in which a person may become addicted to daily fantasy sports leagues.

The one major difference between daily fantasy sports leagues and sports betting appears to be in the area of integrity for the professional sports leagues. The possibility of "fixing" a sports event is the major reason professional sports leagues do not support sports betting.²⁴² However, for the same reason that

²³⁸ See *supra* Part I.C.ii.

²³⁹ See *supra* Part I.C.i.

²⁴⁰ *Id.*

²⁴¹ See generally Vecchione, *supra* note 198, at 1707–09.

²⁴² *Id.*

traditional fantasy sports leagues are not considered a threat to the integrity of professional sports, daily sports leagues likely do not pose the same incentive to fix a game that sports betting does.²⁴³ A daily fantasy player will have a similar makeup for his fantasy roster as a traditional fantasy player. He or she will have players from numerous different teams, as will the team owners he or she is competing against. In this way, it would be almost impossible, and certainly counterproductive, to attempt to fix these games.²⁴⁴ In a recent development, Major League Baseball has begun endorsing a daily fantasy sports site (although its games are free-to-play), providing solid evidence that the sports leagues themselves are not worried about daily leagues affecting the integrity of their respective sports.²⁴⁵ Despite this one aspect, however, for the reasons above, it seems that traditional fantasy sports leagues resemble sports betting more than they do traditional fantasy sports leagues.

CONCLUSION

Daily fantasy sports leagues appear to be more analogous to sports betting than to traditional fantasy sports leagues. Although the daily games are played similarly to traditional fantasy sports, chance, as opposed to skill, seems to be the dominant factor when deciding a winner. Further, daily fantasy sports leagues likely will lead to a social stigma closer to sports betting than to traditional fantasy sports. If daily fantasy sports leagues ever wind up as the subject of adjudication, it is likely that courts will find that daily fantasy sports leagues are a form of sports betting, and thus are illegal under the UIGEA.

²⁴³ Boswell, *supra* note 177, at 1273–75.

²⁴⁴ *Id.*

²⁴⁵ Marc Edelman, *Major League Baseball Reverses Course; Now Fully Endorses Daily Fantasy Sports*, FORBES (Mar. 25, 2014), <http://www.forbes.com/sites/marcedelman/2014/03/25/major-league-baseball-reverses-course-now-fully-endorses-daily-fantasy-sports/>.

