

# Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law

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## Abstract:

*Over the past two years, there has been a monumental shift in how U.S. professional sports leagues have perceived “daily fantasy sports.” Back in March 2013, the chief executive of Major League Baseball Advanced Media, Robert Bowman, told the New York Times that he perceived “daily fantasy sports” as “akin to a flip of the coin, which is the definition of gambling.” However, today, Major League Baseball promotes a play-for-cash “daily fantasy sports” contest on its website. Similarly, the National Basketball Association once purported to oppose all forms of fantasy sports gaming; meanwhile it now owns an equity stake in FanDuel Inc. – the marketplace leader in “daily fantasy sports.”*

*Today’s more favorable relationship between professional sports leagues and the “daily fantasy sports” industry has led many in the media to speculate that “[l]egal issues, although a concern, are relatively minor.” Nevertheless, such generalizations about the legal status of “daily fantasy sports” are grossly oversimplified. Indeed, there is no blanket immunity under federal or state law for “daily fantasy sports.” Rather, in all likelihood, the legal status of*

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*“daily fantasy sports” varies based on the nature of any specific contest’s game rules and where that particular contest operates.*

*This article explores the legal status of “daily fantasy sports” in light of both federal and state gambling laws. Part I of this article discusses the history of “daily fantasy sports,” beginning with its dimorphic roots in both full-season fantasy sports contests and illegal online sportsbooks. Part II introduces the different formats of “daily fantasy sports” that exist in today’s online marketplace. Part III explores the legal risks of “daily fantasy sports” under state gambling laws. Part IV analyzes these same risks under federal law. Finally, Part V proposes eight best practices to enable “daily fantasy sports” companies to minimize their legal risks under both federal and state gambling laws.*

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Article:

Over the past two years, there has been a monumental shift in how U.S. professional sports leagues have perceived “daily fantasy sports.”<sup>2</sup> Back in March 2013, the chief executive of Major League Baseball Advanced Media, Robert Bowman, told the *New York Times* that he perceived “daily fantasy sports” as “akin to a flip of the coin, which is the definition of gambling.”<sup>3</sup> However, today, Major League Baseball promotes a play-for-cash “daily fantasy sports” contest on its website.<sup>4</sup> Similarly, the National Basketball Association once purported to oppose all forms of fantasy gaming; meanwhile it now owns an equity stake in FanDuel Inc. – the marketplace leader in “daily fantasy sports.”<sup>5</sup>

Today’s more favorable relationship between professional sports leagues and the “daily fantasy sports” industry has led many in the media to speculate that “[l]egal issues, although a concern, are relatively minor.”<sup>6</sup> Nevertheless, such generalizations about the legal status of “daily fantasy sports” are grossly oversimplified.<sup>7</sup> Indeed, there is no blanket immunity under federal or state law for “daily fantasy sports.”<sup>8</sup> Rather, in all likelihood, the legal status of

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<sup>2</sup> For purposes of this article, the term “daily fantasy sports” appears in quotations. This is because “daily fantasy sports” is a term of art that is defined differently by the various companies that use it. However, the primary intent of a company that calls itself “daily fantasy sports” is an attempt to define its game as a form of “fantasy sports” (generally legal under federal law) and not traditional sports gambling (generally illegal under federal law). See *infra*, notes \_\_\_ - \_\_\_ and accompanying text (discussing the creation of the term “daily fantasy sports” and the intended legal reasoning behind adopting such a term).

<sup>3</sup> Joshua Brustein, *Fantasy Sports and Gambling: The Line is Blurred*, N.Y. Times, Mar. 12, 2013, at B9.

<sup>4</sup> See Ken Belson, *Will Other Leagues Join the NBA? Don’t Bet on It*, N.Y. TIMES, Nov. 15, 2014, at D1 (discussing Major League Baseball’s partnership with DraftKings).

<sup>5</sup> See Ken Belson, *Will Other Leagues Join the NBA? Don’t Bet on It*, N.Y. TIMES, Nov. 15, 2014, at D1; <https://www.fanduel.com/investors> (describing FanDuel as market leader in daily fantasy sports with over 80% market share).

<sup>6</sup> Noah Davis, *The Daily Fantasy Sports Takeover*, VICE, Oct. 29, 2014, at <https://sports.vice.com/article/the-daily-fantasy-sports-takeover>.

<sup>7</sup> See *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>8</sup> See *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

“daily fantasy sports” varies based on the nature of any specific contest’s game rules and where that particular contest operates.<sup>9</sup>

This article explores the legal status of “daily fantasy sports” in light of both federal and state gambling laws. Part I of this article discusses the history of “daily fantasy sports,” beginning with its dimorphic roots in both full-season fantasy sports contests and illegal online sportsbooks. Part II introduces the different formats of “daily fantasy sports” that exist in today’s online marketplace. Part III explores the legal risks of “daily fantasy sports” under state gambling laws. Part IV analyzes these same risks under federal law. Finally, Part V proposes eight best practices to enable “daily fantasy sports” companies to minimize their legal risks under both federal and state gambling laws.

## **I. THE HISTORY OF DAILY FANTASY SPORTS CONTESTS**

### *A. Origins of Traditional Fantasy Sports*

The origins of fantasy sports in the United States date back to the early 1960s when Professor William Gamson, a psychology professor at both Harvard University and the University of Michigan, created “The Baseball Seminar” – a contest among esteemed college professors who “paid a ten-dollar entry fee to ‘draft’ a team of baseball players.”<sup>10</sup> The winner of Gamson’s “seminar” was “the participant who, over the course of an actual Major League

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<sup>9</sup> See *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>10</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 5-6 (2012). For more on Professor William Gamson’s “Baseball Seminar,” see also Geoffrey Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gambling Law*, 31 T. JEFFERSON L. REV. 317, 323 (2008); Sam Allis, *Lord of the Games: Fantasy Baseball Indebted to Two Innovators*, BOSTON GLOBE, Mar. 6, 2006, at A3.

Baseball season, selected the players who earned the most points in a pre-determined set of statistical categories.”<sup>11</sup>

Gamson’s “Baseball Seminar” initially was a private pastime among his academically-minded friends.<sup>12</sup> However, over time, “the Baseball Seminar” expanded beyond the ivory towers of academia.<sup>13</sup> Most notably, one of the contest’s earliest participants, Professor Robert Sklar, taught the game to his mentee, Daniel Okrent, while instructing a journalism course at the University of Michigan.<sup>14</sup> Okrent then brought the contest to his friends in New York, who first participated during the 1979 Major League Baseball season.<sup>15</sup> These friends thereafter renamed the contest “Rotisserie League Baseball” in honor of the French bistro where they held their inaugural league draft.<sup>16</sup>

### *B. The Internet Boom and Commercialization of Fantasy Sports*

Rotisserie League Baseball began “as a tongue-in-cheek exercise” among hyper-focused New York professionals.<sup>17</sup> But during the Major League Baseball strike of 1981, several

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<sup>11</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 6, n. 21 (2012) (mentioning the use of the term “Seminar” to reduce any association with organized gambling”).

<sup>12</sup> Noah Davis, *The Daily Fantasy Sports Takeover*, VICE, Oct. 29, 2014, at <https://sports.vice.com/article/the-daily-fantasy-sports-takeover>.

<sup>13</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>14</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 6 (2012).

<sup>15</sup> See *Fantasy Baseball’s Reality Defies Belief: Airline Scribbling in 1979 Has Taken Off and Become a National Phenomenon*, the DETROIT NEWS, Apr. 17, 2005, at C1 (referencing 1979 as the inaugural season of Dan Okrent’s Rotisserie League Baseball);

<sup>16</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 6-7 (2012); see also Mike Hall, *The Few Who Founded Fantasy Baseball*, N.Y. TIMES, Apr. 20, 2010, at C4 (describing the role of the original league owners and their meeting at La Rotisserie Francaise); *Fantasy Baseball’s Reality Defies Belief: Airline Scribbling in 1979 Has Taken Off and Become a National Phenomenon*, the DETROIT NEWS, Apr. 17, 2005, at C1 (same).

<sup>17</sup> Childs Walker, *Dream Teams: Tires of Second Guessing How Your Favorite Sports Clubs Are Managed? Fantasy Leagues Let You Take Charge of the Action*, THE BALTIMORE SUN, March 6, 2006, at 1D; Brad

reporters decided to write articles about Rotisserie League Baseball – leading to “a cult following among statistically oriented sports fans.”<sup>18</sup> Some of the earliest adopters of Rotisserie League Baseball replaced the game’s original scoring system with head-to-head scoring and adopted the new moniker “fantasy baseball” to describe the game.<sup>19</sup> Others expanded the concept of Rotisserie League Baseball into other sports such as football and basketball and called these games collectively “fantasy sports.”<sup>20</sup>

Then, in 1994, the Internet came along and changed everything.<sup>21</sup> The Internet facilitated the playing of fantasy sports, not only among friends, but also among participants from around the world – many of whom had never met in real-life.<sup>22</sup> The Internet also allowed participants to enjoy “instantaneously downloadable statistics” and to have third-party services collect league entry fees and payout the league’s prize winners.<sup>23</sup> Indeed, it was the advent of

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Townsend, *It Began as a Pastime among New York Literati, But Rotisserie Baseball Soon Wound up Firing up a Fantasy Word*, DALLAS MORNING NEWS, Sept. 19, 2003, at 1C.

<sup>18</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 8 (2012) (describing a *New York Times* article from the Rotisserie League’s inaugural year that described the contestants and their performances, as well as a *CBS Morning News* segment on the league).

<sup>19</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 9 (2012).

<sup>20</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 9 (2012).

<sup>21</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 10 (2012).

<sup>22</sup> See Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 210 *DUE L. & TECH. REV.* 2 (2010) (crediting the Internet for the tremendous growth in fantasy sports); Nicholas Bamman, *Is the Deck Stacked Against Internet Gambling A Cost-Benefit Analysis of Proposed Regulation*, 19 *J.L. & POL’Y* 231, 232 (2010) (describing the Internet as a \$24 billion annual industry in 2010).

<sup>23</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 10-11 (2012) (discussing ESPN’s entry into the fantasy sports hosting marketplace); *id.* at 19-21 (discussing several of the host sites that collect entry fees and pay prize money); *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D. N.J. 2007) at \*1 (same) *see generally* *C.B.C. Distribution & Marketing v. Major League Baseball Advanced Media, L.P.* 505 F.3d 818, 821 (2007) (explaining that the company C.B.C. Distribution & Marketing had begun licensing the use of Major League Baseball players’ names to use in pay-to-enter fantasy games beginning in 1995).

the Internet that truly transformed fantasy sports from an in-home, social activity into a highly publicized, commercial pursuit.<sup>24</sup>

### *C. Federal Crackdown on Sportsbooks and Online Poker*

As the Internet became a mainstream vehicle for playing fantasy sports, it also emerged as a popular venue for less socially acceptable forms of online gambling such as Internet sportsbooks and poker rooms.<sup>25</sup> By 1999, some offshore sportsbooks had begun to accept bets from U.S. residents.<sup>26</sup> Meanwhile, a 2002 article, published in the *New York Daily News*, indicated that online sports betting had become most popular among college students who regularly used computers as “part of their daily life.”<sup>27</sup>

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<sup>24</sup> *C.f.* Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 9-10 (2002) (noting more than 116 million Americans were online using the Internet by the year 2000).

<sup>25</sup> *See* Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Take for a New Legal Approach to Prize Games?* 4 NEV. L. J. 197, 215 (2004) (noting that Internet technology has created a whole new industry” in online sports gambling via casino-style games and sportsbooks); *see generally* Kevin F. King, *Geolocation and Federalism on the Internet: Cutting Internet Gambling’s Gordian Knot*, 11 COLUM. SCI. & TECH. L. REV. 41, 71 (2010) (explaining that Americans spend approximately \$7 billion per year on Internet gambling); *see also* Josh Robins, *Point, Click Trouble: Internet Gambling Continues to Take a Big Bite out of Pari-Mutuel Facilities*, ORLANDO SENTINEL, May 22, 2005, at C5 (explaining that “[i]n Florida, it’s illegal to place a bet over the Internet or by telephone, but that doesn’t necessarily stop people from logging onto their computers and wagering on races”); *Lawson v. Full Tilt Poker Ltd.*, 930 F.Supp. 2d 476, 480 (2013) (describing how “[i]n the late 1990s, various companies began providing online forums for individuals to play poker with real money”).

<sup>26</sup> *See, e.g.*, Jim Litke, *CBS to Cut Ties to Online Sportsbook Operation*, ASSOCIATED PRESS ONLINE, Mar. 26, 2009 (discussing online sportsbook Sportsbook.com, which maintained a relationship with Sportsline USA, a company then owned 20% by CBS); *NCAA Tournament / Final Four Notes*, LOS ANGELES TIMES, Mar. 27, 1999, at 9, available at 1999 WLNR 6647672 (noting that “in response to concerns raised by the NCAA, an Internet company partially owned by CBS will sever ties to an online sportsbook”). *See generally* I. Nelson Rose, *Gambling and the Law@; The Future of Internet Gambling*, 7 VILL. SPORTS & ENT. L. J. 29, 3q (2000) (noting that “[b]etting on professional and college sports events was the first form of Internet wagering”).

<sup>27</sup> Sam Borden, *Online and On Campus*, NEW YORK DAILY NEWS, Apr. 14, 2002, at 93, available at 2002 WLNR 13840260. Not long thereafter, some accusations even emerged that college athletes were betting on their own team’s games using offshore sportsbooks. *See, e.g.*, Bill Vilona, *McPherson Bet on FSU, Friends Say*, Pensacola News Journal, Jun. 5, 2003, at 1D, available at 2003 WLNR 18199251 (discussing accusations that former Florida State University quarterback Adrian McPherson bet on Florida State University football games via an offshore sportsbook, accessible via the Internet); Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 7 (2002) (noting that the NCAA believes its athletes are especially susceptible to wagering on sporting events because they are unpaid and have greater access to the Internet).

Soon after, the U.S. Department of Justice and several state attorneys general began to investigate companies that allowed Americans to bet on sporting events and poker via the Internet.<sup>28</sup> On October 13, 2006, President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act – an act that, for the first time, held payment processors liable for the funding of unlawful Internet gambling websites that conducted business with U.S. customers.<sup>29</sup> The Unlawful Internet Gambling Enforcement Act ultimately made it more difficult for online sportsbooks, even those based overseas, to collect user fees.<sup>30</sup>

Thereafter, the more reputable online sportsbooks and poker websites voluntarily left the U.S. marketplace,<sup>31</sup> and U.S. law enforcement rid itself of the remaining websites by

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<sup>28</sup> See Jane Whitman, *Game of Chance – Prosecutors Gamble with Online Probes*, NEW YORK POST, Sept. 10, 2006, at 29 (discussing that Peter Dicks, chairman of Sportingbet.com, faced possible extradition to Louisiana for operating an illegal betting business in the state, and BetonSports.com CEO David Carruthers was facing criminal charges based on a second investigation in Missouri); David Wedge, *Web Gambling Site Rushes for Hub Paydirt*, BOSTON HERALD, Sept. 14, 2006, at 20 (referencing “a federal case pending in St. Louis against BetOnSports.com that has resulted in the company's shutdown”); see generally Simon Kennedy, *BetOnSports Agrees to Permanently Shut U.S. Operations*, THOMSON FINANCIAL NEWS, Nov. 10, 2006 (stating that BetOnSports had agreed to permanently terminate its operations in the U.S. market); see generally Simon Bowers & Andrew Clark, *Sportingbet Arrest Threatens Internet Gambling*, The Guardian, at <http://www.theguardian.com/business/2006/sep/09/gambling.newmedia> (noting that “[t]he future of all unlicensed internet gambling ... in at least seven US states was under threat ... after it emerged that the arrest of Peter Dicks, Sportingbet’s British chairman ... was linked to Louisiana state’s wide-ranging laws against gambling by computer”); c.f. y I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 221-22 (Mary Ann Liebert, Inc., 2009) (noting that one of the first targets of the U.S. crackdown of Internet sports gambling was Jay Cohen, who was charged criminally almost ten years earlier -- back in March 1998).

<sup>29</sup> See Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. TIMES, Nov. 1, 2006 (referencing President George W. Bush’s signing into law of the Unlawful Internet Gambling Enforcement Act); see also *Payment Processors Agree to Forfeit More than \$13 Million in Funds Traced to Money Laundering and Online Gambling*, THE FEDERAL BUREAU OF INVESTIGATIONS WEBPAGE, Aug. 17, 2010, at <http://www.fbi.gov/newyork/press-releases/2010/nyfo081710b.htm> (announcing the settlement agreement with two payment processors – Allied Wallet, Inc. and Allied Systems Inc. – that had allegedly accepted money and laundered funds related to online gambling).

<sup>30</sup> See Paul Moran, *Law Could Put Dent in Offshore Bookmaker’s Windfall*, NEWSDAY, Feb. 7, 2007, at 2007 WLNR 2150975 (discussing how revenues from offshore sportsbooks are expected to have declined substantially on Super Bowl Sunday as a result of the passing for the UIGEA);

<sup>31</sup> See Andy Vuong, *Jig is Up for Online Gambling – Or Is It?*, LONG ISLAND PRESS BEACH TELEGRAM, Oct. 3, 2006, at 1, available at 2006 WLNR 17677636 (noting the mass exodus on online sportsbooks and poker rooms from the U.S. market); *William Hill Halts US Gaming Bets*, BBC NEWS, Sept. 27, 2006, at <http://news.bbc.co.uk/2/hi/business/5385284.stm> (explaining that the William Hill Co. which is a publicly traded

prosecuting their owners under both federal and state law.<sup>32</sup> U.S. law enforcement also prosecuted the payment processors that allowed for transmission of funds between gamblers and these illegal online businesses.<sup>33</sup>

#### *D. The Emergence of Daily Fantasy Sports*

The mass exodus of online sportsbooks from the U.S. marketplace left a void of online contests targeted toward consumers who enjoyed the thrill of gambling from the comfort of their own home.<sup>34</sup> While most online gaming companies knew better than to test the U.S. Department of Justice's prosecutorial powers, a few of the more risk-seeking online

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company on the United Kingdom stock exchange, had ceased accepting online sports bets from those living in the United States); *Isocial Media, Inc., v. Bwin.Party Digital Entertainment*, 2013 WL 5588238 (Oct. 10, 2013), at \*3 (explaining that once the UIGEA became law in the United States, "bwin.party ceased all real money gaming in the United States and blocked access to PartyPoker and other real money gaming websites from any United States based IP addresses); *see also* Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. TIMES, Nov. 1, 2006 ("Big public companies have lost billions of dollars in market value and millions of customers as they shut their United States Web sites for sports betting, poker and other games. Those companies are anxiously searching for acquisition partners and new customers. But business is booming at some smaller private companies, which have continued to operate in the United States despite the ban").

<sup>32</sup> *See* *Lawson v. Full Tilt Poker Ltd.*, 930 F.Supp. 2d 476, 481 (2013) ("On August 15, 2011, known as 'Black Friday' in the online gambling world, the United States Attorney for the Southern District of New York shut down the websites of the three largest online poker companies operating in the United States); *see also* Andrew Ross Sorkin & Stephanie Saul, *Gambling Subpoena's on Wall Street*, N.Y. TIMES, Jan. 22, 2007, at C1 (denoting that "[t]he [U.S.] Justice Department has issued subpoenas to at least four Wall Street investment banks as part of a widening investigation into the multibillion-dollar online gambling industry"); Elizabeth Solomont *27 Charged as Prosecutors Say Huger Internet Gambling Ring is Broken*, NEW YORK SUN, Nov. 16, 2006, at <http://www.nysun.com/new-york/27-charged-as-prosecutors-say-huge-internet/43637> (discussing that the Internet sportsbook Playwithal.com was shut down and 27 individuals affiliated with the company were arrested including a high stakes poker player); Erik Larson, *PartyGaming's Dikshit Pleads Guilty to Web Gambling*, Bloomberg, Dec. 16, 2008, at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4X4XSXn4aHw> (noting that "PartyGaming PLC's founder and former director, Anurag Dikshit, pleaded guilty to illegal Internet gambling and agreed to cooperate with the U.S. Justice Department in an investigation of the Web-based gaming company).

<sup>33</sup> *See NETeller Founders Arrested in the United States*, BIRMINGHAM POST (United Kingdom), Jan. 17, 2007, at 25, available at 2007 WL 913489 (discussing the arrest of two executives at the online money transfer firm NETeller for allegedly transferring funds between U.S. residents and online gambling companies).

<sup>34</sup> *See, supra*, notes \_\_ - \_\_ and accompanying text; *but see generally* I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 45 (Mary Ann Liebert, Inc., 2009) (noting that even after the Internet crackdown on various forms of gambling, other similar activities that "are not usually thought of as gambling" remained popular, including "Day trading, involving extremely short term bets on which way stocks and commodities, and their indexes and options, will move").

entrepreneurs began to offer football survivor pools and other forms of sports-prediction contests that were not exactly traditional bookmaking, but also not exactly “fantasy sports.”<sup>35</sup>

In March 2007, Costa Mesa, CA resident Kevin Bonnett entered the illegal gambling borderland when he launched Fantasy Day Sports Corp. as a business designed to offer “daily fantasy sports” contests at the Internet domain, FantasySportsLive.com (“Fantasy Sports Live”).<sup>36</sup> Bonnett coined the term “daily fantasy sports” to give his contests the aura of legality.<sup>37</sup> But even the look of his original website resembled that of a sportsbook.

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<sup>35</sup> See KEVIN BONNETT, *ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS* (2014), at Kindle Locations 119 (describing how many of the smaller daily fantasy sports websites were “pushing the envelope” of legality because they believed they were too small to be noticed in a potential government crackdown of illegal gaming under the guise of fantasy sports).

<sup>36</sup> See Filing of Incorporation for Fantasy Day Sports, Corp., California Corporates, at <http://www.californiacorporates.com/corp/818447.html>; Corporate Officers, Directors, and C-Level Executives for Fantasy Day Sports, Corp., WYSK B2B Data Hub, at <http://www.wysk.com/index/california/costa-mesa/4jd3vj4/fantasy-day-sports-corp/officers>; see also Fantasy Sports Live One Year Anniversary, Blinders (blog), at <http://blinderspoker.blogspot.com/2008/06/fantasy-sports-live-one-year.html> (June 20, 2008) (discussing the one-year anniversary of Fantasy Day Sports Corp.’s Fantasy Sports Live, and the founder’s purported status as a “poker blogger”); c.f. KEVIN BONNETT, *ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS* (2014), at Kindle Locations 89, 106, 129 (the author mentions his history as a poker blogger, and describes himself as “the originator of the concept and the owner of the first Daily Fantasy Sports website”).

<sup>37</sup> See KEVIN BONNETT, *ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS* (2014), at Kindle Location 219 (explaining that the author’s launch of the purportedly first daily fantasy sports game was done more with a focus on traditional sports gambling and poker strategies than on fantasy sports strategies); c.f. Pares Dave, *Betting on Speed*, LOS ANGELES TIMES, Jul. 12, 2013, at 1 (“After the federal government shut down illegal online poker websites ... daily fantasy sports emerged as an instant-gratification for many Internet bettors”); Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, ASSOCIATE PRESS, Sept. 24, 2010 (describing the early appeal of daily fantasy sports contests as arising from “the possibility of quick cash payouts, instead of just end-of-season glory”); *id.* (quoting Fantasy Sports Trade Association founder Paul Charchian as explaining that daily fantasy sports contests are not the type of game people play for fun, but rather “you play it for the profit”), *id.* (describing Dave Nutini (a 31-year-old former bank contract manager who quit his job three weeks ago to play poker professionally” who explained his plans to “wager \$200 to \$300” per week on daily fantasy football” and concluded “it’s pretty similar to the online poker thing”). See generally, *Poker Entrepreneurs Launch DraftDay Daily Fantasy Sports Website with a Chance to Win \$1 Million*, PR NEWSWIRE, Sept. 27, 2011 (explaining that poker industry veterans Taylor Caby and Andrew Wiggins launched their daily fantasy sports website DraftDay based on their confidence in an overlap of the player base and that “poker players can attribute the same skills to daily fantasy sports”); *College Students Making Tuition Money Playing Daily Fantasy*, EWORLDWIRE, Mar. 12, 2012 (explaining that “[s]ince the online Poker industry took a big hit after FBI seizures on Black Friday, daily fantasy sports sites have exploded in popularity”); *DraftKings and WSOP Ink Sponsorship Deal: DraftKings to be the Exclusive Fantasy Sports Sponsor for the 2014 WSOP*, PR NEWSWIRE, May 28, 2014 (quoting Anthony Pitts, head of marketing for DraftKings, discussing “crossover potential between poker and fantasy sports”).

Initially, Bonnett’s entry into the “daily fantasy sports” marketplace was marred by some perception of illegality, and his original customer base consisted mainly of those within the gambling community.<sup>38</sup> But as federal and state prosecutors failed to prosecute either Bonnett or Fantasy Day Sports Corp., many others began to offer similar contests.<sup>39</sup> Some of the earliest competitors to Bonnett’s Fantasy Sports Live included DraftDay (launched in January 2011),<sup>40</sup> DraftStreet (launched in August 2010),<sup>41</sup> FanDuel (launched in summer 2009),<sup>42</sup> Fantazzle (launched in fall 2008),<sup>43</sup> Fantasy Factor (launched in fall 2009),<sup>44</sup> and Snapdraft (launched in fall 2008).<sup>45</sup>

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<sup>38</sup> See Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, ASSOCIATE PRESS, Sept. 24, 2010 (quoting Fantasy Sports trade Association founder Paul Charchian as admitted that the legal status of daily fantasy sports has “always been a little murky” and “a lot of companies didn’t have the stomach for it.”); *but see* Fantasy Sports Live One Year Anniversary, Blinders (blog), at <http://blinderspoker.blogspot.com/2008/06/fantasy-sports-live-one-year.html> (June 20, 2008) (purporting that Fantasy Day Sports Corp.’s Fantas Sports Live ran “20,000 Fantasy Sports Contests with cash prizes” in its first year).

<sup>39</sup> See Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, ASSOCIATE PRESS, Sept. 24, 2010 (noting that “more websites are springing up that offer prize money for teams that last only one night).

<sup>40</sup> See Trademark Application for DraftDay, <http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:63142u.4.1> (first use of DraftDay name in commerce occurred on January 1, 2011); *see also* Executive Summary, CHICAGO TRIBUNE, Apr. 5, 2012, at Business 1, available at 2012 WLNR 7206183 (noting that DraftDay “has raised almost \$1 million from local investment firm Lightbank”).

<sup>41</sup> See Trademark Application for DraftStreet, <http://tmsearch.uspto.gov/bin/showfield?f=doc&state=4801:63142u.6.1> (first use in commerce of DraftStreet name occurred on August 12, 2010).

<sup>42</sup> See FanDuel History, at <https://www.fanduel.com/history>; *see also* History of FanDuel, CrunchBase Website, available at <http://www.crunchbase.com/organization/fanduel>.

<sup>43</sup> See Fantazzle *Fantasy Sports Games Announces Schedule for the 2011-2012 Fantasy Football and College Fantasy Football Season*, 24-7 Press Release, at <http://www.24-7pressrelease.com/press-release-rss/fantazzle-fantasy-sports-games-announces-schedule-for-the-20112012-fantasy-football-and-college-fantasy-football-season-229547.php> (noting Fantazzle’s launch in September 2008 and joining of the Fantasy Sports Trade Association in January 2009).

<sup>44</sup> See World Championship of Fantasy Football to Offer Satellite Leagues at FantasyFactor.com, at <http://www.marketwired.com/press-release/world-championship-fantasy-football-offer-satellite-leagues-fantasyfactorcom-1271027.htm> (June 3, 2010) (referencing the launch of Fantasy Factor daily games in fall 2009); \$1,000 Fantasy Baseball Challenge at FantasyFactor.com, available at <http://www.marketwired.com/press-release/1000-fantasy-baseball-challenge-at-fantasyfactorcom-1268300.htm> (May 28, 2010); *see also* Quick Talk w/ John Zaleski, DAILY FANTASY SPORTS BLOG, at <http://dailyfantasysports.wordpress.com/2009/11/03/quick-talk-w-john-zaleski> (Nov. 3, 2009) (explaining that before launching Fantasy Factor, Zaleski had started the company

Ultimately, FanDuel emerged as the most popular of these “daily fantasy sports” websites.<sup>46</sup> One factor that contributed to FanDuel’s success was the company’s relationships with U.S. newspapers.<sup>47</sup> This mainstream marketing strategy allowed FanDuel to build a user base that extended far beyond just traditional gamblers.<sup>48</sup>

### *E. Daily Fantasy Sports Becomes Big Business*

Although some journalists predicted that FanDuel would ultimately face prosecution for violating federal and state gambling laws, to date neither FanDuel nor any other company operating under a similar business model has endured such a fate.<sup>49</sup> As a result, private equity companies have begun to invest heavily into the “daily fantasy sports” marketplace.<sup>50</sup> In

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Ultimate Fantasy Sports, which had provided full-season fantasy sports contests in the U.S. with entry fees and prizes as early as 1988).

<sup>45</sup> See Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, ASSOCIATE PRESS, Sept. 24, 2010 (purporting that Snapdraft was first launched on the Fanball website in 2008); Snapdraft No Match for Fantasy Sports Live, My Sports Report (blog), at <http://etoppsfan.blogspot.com/2008/11/snapdraft-no-match-for-fantasy-sports.html> (Nov. 27, 2008) (noting that Snapdraft had entered the daily fantasy sports marketplace to compete against Fantasy Sports Live by November 2008).

<sup>46</sup> See History of FanDuel, CrunchBase Website, available at <http://www.crunchbase.com/organization/fanduel>; *c.f.* Langone v. Kaiser, 2013 WL 5567587 (Oct. 9, 2013), at \*1 (noting, at the time, that FanDuel was a Delaware corporation with its principal place of business in Edinburgh, Scotland).

<sup>47</sup> See Andrew Goldberg, *Football Betting Is Back and It Could Be A Savior for Newspapers*, THE BUSINESS INSIDER, Sept. 12, 2010, at 2010 WLNR 18115690 (discussing the partnership between FanDuel and numerous newspapers, including the *New York Post*).

<sup>48</sup> See generally Ben Fischer, *FanDuel and DraftKings are Hot, But Newcomer Draft Hopes to Build Serious Biz on Casual Fans*, NEW YORK BUSINESS JOURNAL, Dec. 2, 2014, at 2014 WLNR 34041694 (estimating FanDuel’s user base at approximately one million).

<sup>49</sup> See generally Joshua Brustein, *Fantasy Sports and Gambling: Line Is Blurred*, NEW YORK TIMES, Mar. 12, 2013, at B9 (“Some experts in sports law say that a shakeout is inevitable because daily fantasy games have a fundamentally different relationship to chance than season-long fantasy games. 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, said Ryan Rodenberg, an assistant professor of sports law at Florida State University. ‘On the spectrum of legality to illegality, they’re getting pretty close to the line,’ he said. ‘It’s tough to make an intellectually honest distinction between the two.’”).

<sup>50</sup> See Pares Dave, *Betting on Speed*, LOS ANGELES TIMES, Jul. 12, 2013, at 1 (“Barry Diller’s IAC/InteractiveCorp has a stake in DraftStreet, a daily games website. Competitor DraftKings raised \$7 million from Atlas Venture. FanDuel picked up \$11 million, largely from Comcast Ventures. MGT Capital Investments took a majority stake in FanThrowdown for about \$2.5 million in stock.”); Kyle Alspach, *Techstars Grad StarStreet Reports \$1.4 M Fundraise*, BOSTON BUSINESS JOURNAL, Aug. 28, 2013, at 2013 WLNR 21429861

January 2013, FanDuel raised \$11 Million in equity funding from Comcast Ventures: an entity that shares the same parent as Comcast/NBC.<sup>51</sup> More recently, FanDuel has secured an additional \$70 Million funding from Shamrock Holdings, NBC Sports, and KKR & Co. LLP.<sup>52</sup>

In the past year, some “daily fantasy sports” contests have even begun to partner with the U.S. professional sports leagues.<sup>53</sup> As referenced in the introduction to this article, FanDuel in November 2014 announced its signing of the NBA as an equity investor.<sup>54</sup> Meanwhile, both Major League Baseball and the National Hockey League currently have endorsement deals with DraftKings – an even newer “daily fantasy sports” company that launched in 2012.<sup>55</sup>

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(discussing \$1.4 million in private equity funding raised by daily fantasy sports startup, StarStreet); *see also* TopLine Game LabsT Enters the Fantasy Sports and Social Gaming Marketplace with \$25 Million Investment, AP ALERT-ENTERTAINMENT, June 23, 2013 (discussing \$25 million in venture capital provided to startup daily fantasy sports website, TopLine Game Labs); *Executive Summary*, CHICAGO TRIBUNE, Apr. 5, 2012, at Business 1, available at 2012 WLNR 7206183 (noting that DraftDay in early 2012 “raised almost \$1 million from local investment firm Lightbank”).

<sup>51</sup> *See* Joshua Brustein, *Fantasy Sports And Gambling: Line Is Blurred*, NEW YORK TIMES, Mar. 12, 2013, at B9; *see also* Daily Fantasy Sports Operator, FanDuel, Closes \$11M Series C and Welcomes Comcast Ventures as an Investor, AP ALERT-HIGH TECH, Jan. 30, 2013 (noting that Comcast Ventures had invested \$11 Million in FanDuel, with Comcast Ventures partner Andrew Cleland gaining a seat on FanDuel’s board).

<sup>52</sup> *See* Justin Tasch, *Fantasy Boom: With Daily Leagues for Big Bucks, Tournaments Paying Out Millions & its Own Network, Fantasy Sports in Blowing Up*, N.Y. DAILY NEWS, Nov. 9, 2014 (discussing private equity funding for both FanDuel and DraftKings).

<sup>53</sup> *See infra*, notes \_\_\_ - \_\_\_ and accompanying text; *c.f.* *Up with Steve Kornacki*, MSNBC TELEVISION, Nov. 16, 2014, at 2014 WLNR 32374375 (Marc Edelman explains that “[a]ll four of the sports leagues now have relationships with what I call daily fantasy sports contests, which involve entry fees and prizes”).

<sup>54</sup> *See* Ken Belson, *Will Other Leagues Join the NBA? Don’t Bet on It*, N.Y. TIMES, Nov. 15, 2014, at D1 (discussing the NBA’s equity stake in FanDuel); *see generally* Marc Edelman, *7 Legal Risks of the NBA Investing in FanDuel*, FORBES, Nov. 13, 2014, at <http://www.forbes.com/sites/marcedelman/2014/11/13/7-legal-risks-of-the-nba-investing-in-fanduel> (discussing the legal and strategic business risks that come along with the NBA’s investment in FanDuel).

<sup>55</sup> *See* Marc Edelman, *Will Robert Bowman Become Major League Baseball’s First ‘Daily Fantasy Sports’ Commissioner*, FORBES, Jul. 29, 2014, at <http://www.forbes.com/sites/marcedelman/2014/07/29/will-robert-bowman-become-major-league-baseballs-first-daily-fantasy-sports-commissioner> (referencing “under the radar sponsorship agreement, in which Major League Baseball endorsed one of the start-up daily fantasy sports websites as the “Official Mini Game of MLB.com.”); Marc Edelman, *Major League Baseball Reverses Course; Now Fully Endorses Daily Fantasy Sports*, FORBES, Mar. 25, 2014, at <http://www.forbes.com/sites/marcedelman/2014/03/25/major-league-baseball-reverses-course-now-fully-endorses-daily-fantasy-sports>. *See generally* Ken Belson, *Will Other Leagues Join the NBA? Don’t Bet on It*, N.Y. TIMES, Nov. 15, 2014, at D1 (“Major League Baseball has a partnership with DraftKings, which offers a daily contest on MLB.com in which prizes include tickets to games rather than cash. Robert Bowman, the chief executive of Major

## II. DIFFERENT FORMATS OF DAILY FANTASY SPORTS

As the “daily fantasy sports” marketplace has expanded, various formats of “daily fantasy sports” have emerged across the Internet.<sup>56</sup> The most established format of “daily fantasy sports” is the FanDuel model, which involves picking a roster of players from draft lists based on a salary cap, with participants competing against one another for prizes.<sup>57</sup> Most “daily fantasy sports” companies offer this style of contest in traditional team sports such as baseball, basketball, football and hockey.<sup>58</sup> Meanwhile, a few “daily fantasy sports” companies such as DraftKings have ventured into individual sports such as golf and mixed martial arts, as well.<sup>59</sup>

Several “daily fantasy sports” companies, nevertheless, have begun to adopt business models that allow participants to compete directly against the host site, rather than against other

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League Baseball Advanced Media, the league's Internet company, said it was exploring a larger partnership with DraftKings and did not rule out the possibility of cash tournaments or other formats in which money would be at stake”); Joe Drape, *Last a Fantasy Game? Try Again Tomorrow*, NEW YORK TIMES, Jul. 29, 2014, at 2014 WLNR 20669020 (similarly discussing Major League Baseball’s strategic arrangement with DraftKings); *National Hockey League Announces Partnership with DraftKings*, ENTERTAINMENT NEWS WEEKLY, Nov. 28, 2014, at 2014 WLNR 3270599.

<sup>56</sup> *Cf.* Tony Biasotti, *Former Agoura High Friends Make a Bet on Fantasy Sports*, VENTURA COUNTY STAR (Ventura County, CA), Aug. 17, 2013, at 2013 WLNR 33581595 (quoting Marc Edelman for the proposition that the legality of daily fantasy sports contests turns on the level of chance vis-à-vis skill in a particular contest); Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195 (2007) (“[W]hile some iterations of fantasy sports may pass [the test of legal scrutiny], others clearly will fail that test, given their lack of skill and lack of immersive elements in the particular competition, such as opportunities to draft, play and trade players, the lack of the requisite length of the competition, and the lack of an appropriate scoring methodology for the contest”).

<sup>57</sup> *See* How It Works, FanDuel Website, available at <https://www.fanduel.com/how-it-works> (describing how the FanDuel contests operate); *Langone v. Kaiser*, 2013 WL 5567587 (Oct. 9, 2013), at \*1 (discussing the basic manner in which FanDuel daily fantasy sports contests operate); *see generally* Joshua Brustein, *Fantasy Sports and Gambling: The Line is Blurred*, N.Y. Times, Mar. 12, 2013, at B9 (discussing some of the various other forms of “daily fantasy sports” contests).

<sup>58</sup> *See generally* Kyle Lytle, *Fake Teams Real Money for Daily Fantasy Sports Players*, Fort Collins Coloradoan, Nov. 28, 2013, at 2013 WNLN 20048905 (explaining generally how “daily fantasy sports” operates);

<sup>59</sup> *See DraftKings Signs on as Daily Fantasy Sports Partner to the Pittsburgh Steelers*, BUSINESS WIRE, Jan. 27, 2015 (describing company, in its own press release, as offering fantasy sports in individual sports such as “golf” and “mixed martial arts”). For an example of a niche fantasy sports website that provides only contests in mixed martial arts, *see generally* Kountermove Mixed MMA Website, at <http://www.kountermove.com>.

contestants.<sup>60</sup> BetAmerica, which is a longstanding online horse and greyhound wagering website, operates a contest that it describes as “daily fantasy sports,” which allows contestants to pay a \$1 “entry fee for the chance to win \$1 million by correctly picking nine players that will hit a homerun on any given day” – a task with approximate odds of one in two-million.<sup>61</sup> Meanwhile, Game Sports Network recently launched HotRoster, a contest in which participants compete “against the house” in attempting to select between four and ten consecutive, correct player events.<sup>62</sup>

A third category of newer online sports contests that has adopted the moniker “daily fantasy sports” has transitioned even further away from the FanDuel business model by reducing lineup sizes to three or fewer players.<sup>63</sup> Among these more simplified versions of “daily fantasy sports” are games operated by TopLine Game Labs both on the DailyMVP.com website and in conjunction with the *Sports Illustrated* app, FanNation.<sup>64</sup> These contests market

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<sup>60</sup> See, *infra*, notes \_\_ - \_\_ and accompanying text.

<sup>61</sup> See Marc Edelman, *BetAmerica’s Home Run Derby Tests the Outer Limits of Legal Sports Gaming*, FORBES, Jun.2, 2014, at <http://www.forbes.com/sites/marcedelman/2014/06/02/betamericas-home-run-derby-tests-the-outer-limits-of-legal-sports-gaming>; see generally *BetAmerica Launches FanEx Sports*, PR NEWSWIRE, Sept. 12, 2013 (discussing BetAmerica’s entree into the daily fantasy sports marketplace).

<sup>62</sup> See Ben Fischer, *Daily Fantasy Sports Takes Step Toward Casinos*, SPORTS BUSINESS JOURNAL, Dec. 15, 2014, at <http://www.bizjournals.com/newyork/blog/techflash/2014/12/daily-fantasy-sports-takes-step-toward-casinos.html?ana=tw>

<sup>63</sup> See, *infra*, note \_\_ and accompanying text.

<sup>64</sup> See Aaron Goldstein, *DailyMVP.com Hits the Daily Fantasy Sports Market Minus the Salary Cap*, at <http://www.gambling911.com/gambling-news/dailymvpcom-hits-daily-fantasy-sports-market-minus-salary-cap-112214.html> (quoting TopLine Games Lab and DailyMVP.com CEO David Geller stating his goal when creating the game was that “[w]hen you’re standing in line for coffee you can enter into one of our contests before you get to the front of the line”); *TopLine Games Labs Showcases Humorous Side of Tom Brady in New DailyMVPSpot*, PR NEWSWIRE, Dec. 3, 2014, at <http://www.prnewswire.com/news-releases/topline-game-labs-showcases-humorous-side-of-tom-brady-in-new-dailymvp-spot-300003915.html> (discussing the launch of TopLine Games Labs contests via DailyMVP.com).

themselves as user friendly and easy to enter, even though many “daily fantasy sports” players would acknowledge the skill-to-luck ratio of these games is lowered.<sup>65</sup>

Finally, a fourth segment of the “daily fantasy sports” marketplace has altogether dropped the lineup generation aspect from its games and moved toward an event-based betting model.<sup>66</sup> One of the companies within this segment is the Silicon Valley startup ScoreStreak, which launched in May 2014 and allows users to compete at selecting players who they believe will “complete objectives in their real life games” such as rushing for a certain number of yards or completing a certain number of passes.”<sup>67</sup> Meanwhile, the New Jersey startup Tradesports allows users to “buy and sell positions on sporting events in real time,” including bets on “which team will win, how many points are going to be scored, or the performance of this particular player in rebounds or points or hits or pitches.”<sup>68</sup>

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<sup>65</sup> See Aaron Goldstein, *DailyMVP.com Hits the Daily Fantasy Sports Market Minus the Salary Cap*, at <http://www.gambling911.com/gambling-news/dailymvpcom-hits-daily-fantasy-sports-market-minus-salary-cap-112214.html> (quoting TopLine Games Lab and DailyMVP.com CEO David Geller stating his goal when creating the game was that “[w]hen you’re standing in line for coffee you can enter into one of our contests before you get to the front of the line”); *TopLine Games Labs Showcases Humorous Side of Tom Brady in New DailyMVPSpot*, PR NEWSWIRE, Dec. 3, 2014, at <http://www.prnewswire.com/news-releases/topline-game-labs-showcases-humorous-side-of-tom-brady-in-new-dailymvp-spot-300003915.html> (discussing the launch of TopLine Games Labs contests via DailyMVP.com).

<sup>66</sup> See, e.g., *ScoreStreak™ Aims to Revolutionize Daily Fantasy Sports Game*, MARKETWIRED, May 8, 2014 (providing an example that replaces the selection of player lineups in “daily fantasy sports” with the selection of players that contestants expect will complete certain game-related objectives); see also *Tradesports.com CEO Ron Bernstein Invd on Bloomberg TV*, BLOOMBERG TV, Apr. 9, 2014, at 2014 WLNR 9578092 (TradeSport founder Ron Bernstein describes his trading game based on predictive sport game that includes trading “shares” of teams performing in live sporting contests also as “fantasy sports”).

<sup>67</sup> *ScoreStreak™ Aims to Revolutionize Daily Fantasy Sports Game*, MARKETWIRED, May 8, 2014; c.f. *Up with Steve Kornacki*, MSNBC TELEVISION, Nov. 16, 2014, at 2014 WLNR 32374375 (Marc Edelman explains that online sports gaming is moving even further away from traditional definitions of fantasy sports “with contests like ScoreStreak out there that let you predict specific player performance, not even in the traditional fantasy format”). According to the company’s initial press release, its objective is “to bring the joy of daily fantasy sports to all sports fans -- not just the ones with advanced math degrees.” *ScoreStreak™ Aims to Revolutionize Daily Fantasy Sports Game*, MARKETWIRED, May 8, 2014.

<sup>68</sup> See *Tradesports.com CEO Ron Bernstein Invd on Bloomberg TV*, BLOOMBERG TV, Apr. 9, 2014, at 2014 WLNR 9578092 (quoting TradeSports founder Ron Bernstein – an innovator in the online gaming marketplace who had previously founded Intrade – a website that “allowed users to bet on everything from Oscar winners to the

### III. LEGAL RISKS FOR DAILY FANTASY SPORTS UNDER STATE GAMBLING LAWS

#### A. General Definition of Illegal Gambling under State Law

Like most other forms of online gaming, “daily fantasy sports” contests are legally obligated to comply with both federal and state gambling laws.<sup>69</sup> Nevertheless, not every online “game for money” or “bet on an uncertain outcome” will be found to violate these laws.<sup>70</sup> In many states, a plaintiff can make a *prima facie* claim of illegal gambling only if it can show that the given activity meets the state-specific definition for three factors: “consideration,” “reward,” and “chance.”<sup>71</sup>

Because most “daily fantasy sports” contests uncontestedly meet the legal definitions of both “consideration” and “reward” (the exception, of course, being “free to enter” contests),<sup>72</sup> the legality, under state law, of any given “daily fantasy sports” contest generally comes down

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next US president [but] halted its trading due to scrutiny from regulators”); *see also* *TradSports.com Launches, Providing the First Fantasy Sports Experience Where Users Play in Real-Time with Real Money*, MARKETWIRED, Apr. 30, 2014 (describing TradeSports as an outgrowth of daily fantasy sports based on the “real-time trading” component).

<sup>69</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 26 (2012) (discussing the application of state gambling laws generally to fantasy sports).

<sup>70</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 26 (2012). For examples of such activities that are seen as legal under state law, *see, e.g.*, MONT. CODE ANN. § 23-5-802 (permitting certain forms of fantasy sports contests under Montana state law); *S.E.C. v. J.W. Howrey Co.*, 328 U.S. 293, 298-99 (1946) (explaining that Congress, under the Securities and Exchange Act of 1933, has insulated “investment contracts” from liability under state gambling law).

<sup>71</sup> See I. NELSON ROSE & MARTIN OWENS, *INTERNET GAMING LAW* 1 (Mary Ann Liebert, Inc., 2009) (“The definition of ‘gambling,’ unless changed by statute, consists of any activity with three elements: consideration, chance and prize); *see also* Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Economic Value, Equal Dignity, and the Future of Sweepstakes*, 1 UNLV GAMING L. J. 1, 1 (2010) (“If you take away any one of the three elements of gambling—consideration, prize, or chance—you have an activity that is legal in most states.”).

<sup>72</sup> See I. NELSON ROSE & MARTIN OWENS, *INTERNET GAMING LAW* 9 (Mary Ann Liebert, Inc., 2009) (explaining that “[g]ames that are completely free, like many online bingo games giving small prizes, are almost universally legal).

to whether a court would find the contest to involve skill (which is legal) or chance (which is not).<sup>73</sup> The requisite level of “skill” needed for a contest to be legal varies by state.<sup>74</sup>

### *B. Are Daily Fantasy Sports Contests Illegal Gambling? (Majority View)*

In a majority of states, courts will determine the legality of a “daily fantasy sports” contest based on whether the contest involves more skill than chance (“predominant purpose test”).<sup>75</sup> In “daily fantasy sports,” the primary elements of skill are mathematical modeling and prognostication, and these elements of skill arise exclusively through the initial task of selecting players.<sup>76</sup> Meanwhile, chance-based elements in “daily fantasy sports” lie within three separate categories.<sup>77</sup>

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<sup>73</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 26-27 (2012); see also *Geis v. Con'l Oil Co.*, 511 P.2d 725, 727 (1973) (explaining that under Utah state law “the statutory elements of a lottery are: (1) prize; (2) chance; and (3) any valuable consideration); *Valentin v. El Diario Prensa*, 427 N.Y.S.2d 185, 186 (N.Y.C. Civ. Ct. 1980) (noting that in New York State, three elements are needed to constitute an illegal lottery: (1) consideration, (2) chance, and (3) prize).

<sup>74</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 28-29 (2012)

“To determine whether an activity satisfies the gambling element of chance, [most] courts will ... apply one of three tests: the ‘predominant purpose test,’ the ‘any chance test,’ or the ‘gambling instinct test.’ The ‘predominant purpose test,’ which is applied by most states, deems an activity to be one of chance where ‘greater than 50 percent’ of the result is derived from chance. By contrast, the ‘any chance test’ finds that an activity is based on chance if ‘a particular game contains any chance that influences the outcome of the game,’ and the ‘gambling instinct test ... looks to the nature of an activity to determine if it appeals to one’s gambling instinct.’”

<sup>75</sup> See generally Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 29 (2012) (“A majority of states adopt ... the ‘predominant purpose test’ as the measure of chance”); *c.f.* *O’Brien v. Scott*, 89 A.2d 280, 283 N.J. Super. Ct. Ch. Div. 1952) (explaining that under New Jersey’s application of the predominant purpose test, “[t]he test of the character of the game is, not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game, or, alternatively, whether or not the element of chance is present in such a manner as to thwart the exercise of skill or judgment”).

<sup>76</sup> See KEVIN BONNETT, *ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS* (2014), at Kindle Location 337 (acknowledging that in daily fantasy sports, the psychological skill of predicting what players other teams will select in a draft as well as the knowledge-based skill on long-term player projection are removed from the game, leaving the game with primarily mathematical and prediction based skills).

<sup>77</sup> See, *infra*, notes \_\_ - \_\_ and accompanying text.

The first category of chance in “daily fantasy sports” is “systematic chance,” which emerges based on random elements or drawings within a contest itself.<sup>78</sup> For example, “daily fantasy sports” contests that use a “snake draft” model for selecting players entails the “systematic chance” of a random lottery to determine which participant is to receive the first overall choice of real-world players.<sup>79</sup> The participant randomly selected to draft first garners a superior likelihood of winning the “daily fantasy sports” contest because this participant has the opportunity to select the real-world player with the highest expected statistical return; whereas no other participant would have the opportunity to include this player on his “daily fantasy” team.<sup>80</sup>

A second category of chance in “daily fantasy sports” contests is “imperfect information” chance, which is based on “limits to the analysis that can be taken by [a contestant] in assessing the situation” when entering.<sup>81</sup> The chance of injuries to previously healthy players and thus their absence from parts of real-world sporting events represents one

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<sup>78</sup> See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 395 (2009); see also *Boardwalk Regency Corp. v. Att’y Gen. of N.J.*, 457 A.2d 847, 851-52 (N.J. 1982) (finding backgammon to be a game of chance based on the systematic chance factor of rolling a die within the game).

<sup>79</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 30 (2012) (explaining the “snake draft” model and discussing how the initial player draft used for allocating players in some fantasy sports contests increases the contest’s overall level of chance).

<sup>80</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 14, 29-30 (2012) (discussing how a league draft in fantasy sports operates).

<sup>81</sup> See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 396 (2009); see also *Boardwalk Regency Corp. v. Att’y Gen. of N.J.*, 457 A.2d 847, 851-52 (N.J. 1982) (discussing the systematic chance in backgammon).

such element of “imperfect information” chance in “daily fantasy sports.”<sup>82</sup> Another aspect of “imperfect information” chance is the chance of a game being cancelled due to an event that is not within the reasonable contemplation of any human being irrespective of how much due diligence is exercised.<sup>83</sup> While game cancellations due to weather conditions may perhaps be predictable for those with an expertise in meteorology,<sup>84</sup> game cancellations for reasons such as underground water main breaks are simply not predictable to anyone.<sup>85</sup>

A third type of chance in “daily fantasy sports” is “lucky shot” chance.<sup>86</sup> This is the type of chance that exists where, while a particular success is based on skill, such success could almost certainly not be repeated with additional tries – such as the success of a novice golf player shooting a hole in one on any particular hole.<sup>87</sup> One can reasonable surmise that “daily fantasy sports” contests have an elevated level of “lucky shot” chance due to the impact of a single, lucky real-world player selection on an overall contest’s results – a factor arising from

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<sup>82</sup> See generally Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Take for a New Legal Approach to Prize Games?* 4 NEV. L. J. 197, 218 (2004) (discussing injury risk as a factor of chance within fantasy sports contests).

<sup>83</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>84</sup> See generally Nate Silver, *The Weatherman is Not a Moron*, N.Y. Times, Sept. 9, 2012, at MM34 (discussing how meteorologists predict weather and why they are frequently accurate); but see Bill Belichick *Unfazed about Weather, Blasts Meteorologists*, NESN, Oct. 31, 2014, at <http://nesn.com/2014/10/bill-belichick-unconcerned-about-weather-blasts-meteorologists-accuracy> (an article in which an NFL coach criticizes each meteorologists’ ability to predict football game day weather accurately).

<sup>85</sup> See Marc Edelman, *Can a Water Main Break Derail The Daily Fantasy Sports Industry*, FORBES, Aug. 18, 2014 (discussing the cancellation of a Colorado Rockies game against the Cincinnati Reds on August 17, 2014 based on a water main break just outside of Coors Field just before game time, and the impact of this water main break on the results of daily fantasy sports contests played on that day).

<sup>86</sup> See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 398 (2009).

<sup>87</sup> See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 399-400 (2009).

the low number of iterations in most “daily fantasy sports” contests.<sup>88</sup> In addition, “lucky shot” chance is most elevated in contests such as BetAmerica’s Home Run Derby, where participants have to predict a series of extraordinarily unlikely events, such as a combination of nine players who will all hit a home run on a given day.<sup>89</sup>

When balancing the skill-based elements of “daily fantasy sports” against these various elements of chance, it is difficult to predict with certainty whether a court would find skill or chance to predominate.<sup>90</sup> This is because such an inquiry would rely heavily upon expert testimony and a fact intensive investigation.<sup>91</sup> In addition, the factual findings pertaining to whether skill or chance predominates in “daily fantasy sports” may vary based on the specific

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<sup>88</sup> See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 408 (2009) (discussing “[t]he law of large numbers” – “one of several theorems expressing the idea that as the number of trials of a process increases, the percentage difference between the expected and actual values approaches zero” – thus reducing the overall ratio of chance to skill); see also *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 30 (2012) (explaining that daily fantasy sports contests might not “extend over a period of time sufficient in length for a fantasy sports participant’s strategic and negotiating skills to offset ‘chance factors such as the physical and mental conditions of players, potential problems between team members, and the game—time weather conditions’”).

<sup>89</sup> See, *supra*, note \_\_ and accompanying text (discussion the operation of BetAmerica’s Home Run Derby contest).

<sup>90</sup> See, *infra*, notes \_\_ - \_\_ and accompanying text.

<sup>91</sup> See I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 15-16 (Mary Ann Liebert, Inc., 2009) (explaining that the determination of whether a contest is one of skill or chance today “often come[s] down to a battle of experts”); Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 DRAKE L. REV. 383, 401 (2009) (same). See generally *People v. Mason*, 68 Cal. Rept. 17, 21 (Cal. Ct. App. 1968) (explaining that under the predominant purpose test, whether a contest is one of skill or chance is predominantly an issue of fact); *O’Brien v. Scott*, 89 A.2d 280, 284-85 (N.J. Super. Ct. Div. 1952) (explaining the court’s consideration of expert testimony from mathematicians at elite universities to consider whether a particular game involves predominantly skill).

nature of each individual contest.<sup>92</sup> Thus, a court may find skill to predominate in one format of “daily fantasy sports” but yet find chance to predominate in a different format.<sup>93</sup>

Although no court to date has directly analyzed the legality of “daily fantasy sports” under the “predominant purpose test,” dicta from one New Jersey federal court decision, *Humphrey v. Viacom*, seems to support the argument that “daily fantasy sports” entails at least some degree of skill.<sup>94</sup> In *Humphrey*, the U.S. District Court for the District of New Jersey opined that “[t]he success of a [full-season] 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>95</sup> Although “daily fantasy sports” contests include only the first of these elements – the skill of selecting players – the mere fact that *Humphrey* recognized this element as a form of skill is helpful to any argument in support of “daily fantasy sports” being legal.<sup>96</sup>

By contrast, the advisory opinions issued in both Florida and Kansas seem to reject the legality of certain formats of fantasy sports, even under the general rudiments of a “predominant purpose test.”<sup>97</sup> In Florida, a 1991 advisory opinion concluded that it is illegal to participate “in a fantasy sports league whereby contestants pay a fee for the opportunity to select actual

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<sup>92</sup> See generally *People v. Mason*, 68 Cal. Rept. 17, 21 (Cal. Ct. App. 1968) (explaining how some pinball machines might be found to be skill based while others may be found to involve predominantly chance).

<sup>93</sup> See, *supra*, note \_\_ and accompanying text.

<sup>94</sup> 2007 WL 1797648 (D. N.J. 2007)

<sup>95</sup> *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D. N.J. 2007), at \*2

<sup>96</sup> See *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D. N.J. 2007), at \*2; *c.f.* *National Collegiate Athletic Association v. Christie*, 2012 WL 6698684 (D.N.J. 2012), at \*8, n.2 (providing an example another U.S. District Court for the District of New Jersey decision noting that “fantasy sports fall outside the definition of gambling envisioned by New Jersey’s *qui tam* statute”).

<sup>97</sup> See, *infra*, notes \_\_ - \_\_ and accompanying text.

professional sports players.”<sup>98</sup> Its reasoning was that “[w]hile the skill of the individual contestant picking the members of the fantasy team is involved, prizes are paid to the contestants based upon the performance of the individual professional football players in actual games” and not the direct performance of the fantasy sports participants.<sup>99</sup>

Meanwhile, in Kansas, the state’s Racing & Gaming Commission has opined that chance predominates over skill in all fantasy sports contests.<sup>100</sup> Reason being, according to the Kansas Racing & Gaming Commission, “a [fantasy sports] manager leaves to chance a number of things, including: (1) how the drafted athlete performs in a future event; (2) whether a drafted player is injured; (3) whether the player’s actual team in a given week executes a game plan that fits the player’s talents ...; and (4) how opponents of the actual player (who may be drafted by another manager) actually play.”<sup>101</sup>

### *C. A Look at Potentially Stricter States Views Toward Daily Fantasy Sports*

A minority of states, meanwhile, takes an even stricter view toward the definitions of “skill” and “chance,” and thus may view “daily fantasy sports” contests even more critically than do the “predominant purpose test” states.<sup>102</sup> Among these many stricter tests for skill,

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<sup>98</sup> See Fla. Op. Att’y Gen. 91 3 (1991), available at 1991 WL 528146 (opinion also available on Florida attorney general webpage); *c.f.* Faircloth v. Central Florida Fair, Inc., 202 So.2d 608, 608 (Fla. App. 1967) (noting that Florida allows individuals to wager on contests on skill in which they participate, but disallows wagering on the activities of skill of third parties”).

<sup>99</sup> See Fla. Op. Att’y Gen. 91 3 (1991), available at 1991 WL 528146 (opinion also available on Florida attorney general webpage).

<sup>100</sup> See Are Fantasy Sports Leagues Legal, at Kansas Racing & Gaming Commission Webpage, available at <http://www.krgc.ks.gov/index.php/component/content/article/2-uncategorised/113-fantasysportsillegal>.

<sup>101</sup> Are Fantasy Sports Leagues Legal, at Kansas Racing & Gaming Commission Webpage, available at <http://www.krgc.ks.gov/index.php/component/content/article/2-uncategorised/113-fantasysportsillegal>.

<sup>102</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

states such as Missouri and New York apply a “material element test.”<sup>103</sup> Under the “material element test,” it is possible for a court to find a contest is not determined by skill even if one can prove mathematically that the contest is 51% or more skill.<sup>104</sup> Indeed, a court applying the “material element test” may consider, among other factors, whether the contest is entered into among novices or experts, as well as whether the amount of information provided to the contestants negates the skill-based advantages that true experts may have obtained.<sup>105</sup>

Even stricter still, states such as Arizona, Arkansas, Iowa, Louisiana and Tennessee have interpreted contests to be illegal games of chance if they involve any chance at all: even a modicum of chance.<sup>106</sup> In these states, “daily fantasy sports” contests of any type – as long as

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<sup>103</sup> See, Peter v. Turner, 629 N.Y.S. 2d 661, 662 (Crim. Ct. 1995) (“Gambling differs from other kinds of contests in that in gambling ‘the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein’”); United States v. DiCristina, 726 F.3d 92, 98 (2d. Cir. 2013) (defining a contest of chance under New York Law as “any contest, game, gaming scheme or gaming device in which the outcome depends to a material degree upon an element of chance, notwithstanding that skill of contestants may be a factor therein”)

<sup>104</sup> See, e.g., Thole v. Westfall, 682 S.W.2d 33, 37, n. 8 (Mo. 1984) (explaining that under Missouri’s version of the material element test, for a contest to be illegal “chance must be a material element in determining the outcome of a gambling game,” but “[i]t need not be the dominant element”).

<sup>105</sup> Ellison v. Lavin, 71 N.E. 753, 755-56 (N.Y. 1904) (indicating that in a prediction competition, provision of substantial information to negate much of the advantage in knowledge that a skilled expert may have would point in the direction of deeming a contest as a game of chance).

<sup>106</sup> See Ariz. Rev. Stat. 13-301(4) (2014) (defining illegal gambling as “risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event but does not include bona fide business transactions which are valid under the law of contracts including contracts for the purchase or sale at a future date of securities or commodities, contracts of indemnity or guarantee and life, health or accident insurance”) (emphasis added); State v. Torres, 831 S.W.2d 903, 905 (Ark. 1992); Parker-Gordon Importing Co. v. Benakis, 238 N.W. 611, 613 (Iowa 1931) (noting that Iowa find it irrelevant whether a particular game is predominantly based on chance or skill); TENN. CODE ANN. § 39-17-501 (2010) (defining “gambling,” subject to a number of generally irrelevant exceptions to fantasy sports, as “risking anything of value for a profit whose return is to any degree contingent on chance”); but see generally State v. Am/ Joliday Ass’n, 727 P.2d 807, 809-11 (Ariz. 1986) (explaining that even under Arizona’s ‘any chance’ statute, an entrance fee does not suddenly become a bet if a prize is awarded” where individuals are competing not on their ability to predict performances of third parties, but rather based on their own mental or physical abilities such as “golf tournaments, bridge tournaments, local and state rodeos or fair contests”).

they include entry fees and prizes – would seem to violate state gambling laws.<sup>107</sup> The reason for this conclusion is because “even the most intricate fantasy sports games involve at least some level of chance with respect to weather conditions and player injuries.”<sup>108</sup>

Finally, states such as Montana disallow all forms of commercial online gambling, irrespective of whether the underlying contest would be deemed a game of skill or chance.<sup>109</sup> Meanwhile, states such as Hawaii forbid contests that encourage a gambling instinct.<sup>110</sup> Each of these two alternative tests leaves substantial ambiguity about the specific factors needed to prove that a contest would comply with the state’s gambling law requirements.<sup>111</sup>

#### **IV. LEGAL RISKS FOR DAILY FANTASY SPORTS UNDER FEDERAL GAMBLING LAW**

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<sup>107</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 31-32 (2012) (explaining that all forms of fantasy sports contests seem to be illegal in “any chance states”); see also I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 12 (Mary Ann Liebert, Inc., 2009) (noting that the Attorney General of Louisiana in a 1991 advisory opinion “disposed of the claim that a 900-number fantasy football service was not gambling with a single sentence: ‘Whether an element of skill is involved in the election of the team or individual players ... is not dispositive of the issue of whether the activity constitutes gambling’”).

<sup>108</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 33 (2012).

<sup>109</sup> See MONTANA CODE ANN. § 23-5-112; c.f. I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 213 (Mary Ann Liebert, Inc., 2009) (describing Louisiana as another such state that disallows all forms of Internet gaming).

<sup>110</sup> *State v. Prevo*, 44 Haw. 665, 675-76 (1961). The Hawaii test is interesting because it seems to preserve the legality of a pay-to-play, daily fantasy sports contest if entered only by those with a true research methodology and expertise, but would seem to call into doubt the legality of the same contests if even some of the participants were considered mere novices, and who were not using *bona fide* strategic methods for selecting players. See *State v. Prevo*, 44 Haw. 665, 675-76 (1961). For two other states that seem to differentiate between contests featuring experts and novices, see *Redd v. Simmons*, 167 So. 65, 67 (Miss. 1936) (finding a pin marble machine to be a game of chance because, amongst other reasons, when children or novices played the ability to score a high score was almost entirely chance based); *Ellison v. Lavin*, 71 N.E. 753, 755-56 (N.Y. 1904) (finding that an advertisement inviting customers to predict the number of cigars subject to tax dollars in the U.S. over a given month was a contest of chance, but recognizing that if the same contest was held among industry experts it may reasonably be construed as a contest of skill”).

<sup>111</sup> See, *supra*, notes \_\_\_ - \_\_\_ and accompanying text.

In addition to complying with state gambling laws, “daily fantasy sports” contests also must comply with at least four pertinent federal gambling laws.<sup>112</sup> In some instances, the federal gambling laws may be more stringent than the state gambling requirements.<sup>113</sup> Meanwhile, in other instances, the federal gambling requirements may be less stringent.<sup>114</sup>

#### A. Wire Act

The first of the four federal statutes pertaining to “daily fantasy sports” is the Interstate Wire Act of 1964 (“Wire Act”).<sup>115</sup> This act prohibits individuals and entities from engaging in the business of betting or wagering through the knowing use of “a wire communication for the transmission in interstate and foreign commerce.”<sup>116</sup> The Wire Act was recommended as law by U.S. Attorney General Robert Kennedy “to crack down on organized crime members using the

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<sup>112</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 34 (2012); *see also* Schneider v. United States, 459 F.2d 540, 542 (8th Cir. 1972) (noting that “[g]ambling activity conducted in one state may be a federal offense, while the same activity in another state may not be a federal offense”); *see also* United States v. Corrar, 512 F.Supp. 2d 1280, 1289 (N.D. Ga. 2007) (explaining that the Wire Act is “an independent federal policy aimed at those who would, in furtherance of any gambling activity, employ any means within direct federal control” and that the act “does not require an underlying violation of state law”).

<sup>113</sup> *See infra*, notes \_\_ - \_\_ and accompanying text (discussing how the Professional and Amateur Sports Protection Act illegalizes certain conduct on a national level, even if state law does not in itself forbid such practices).

<sup>114</sup> *See infra*, notes \_\_ - \_\_ and accompanying text (discussing the “fantasy sports carve-out” to the Unlawful Internet Gambling Enforcement Act that may protect certain conduct from scrutiny under federal law even where the same conduct would violate state law in states that apply tests such as the “any purpose test” for determining whether online gaming is illegal).

<sup>115</sup> 18 U.S.C. 1084(c).

<sup>116</sup> 18 U.S.C. 1084(c); *see also id.* at 18 U.S.C. 1084(b) (explaining two important limitation to the Wire Act: (1) that the transmission of information for news purposes does not violate the act, and (2) that there is no violation of the Wire Act where transmission of information assisting in the placing of bets or wagers on sporting events is made from one State or foreign country where betting on that event is legal to another) *See generally* I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 36 (Mary Ann Liebert, Inc., 2009) (explaining that “[t]he generic definition of ‘wager’ is to risk something on the occurrence or nonoccurrence of a particular event outside of the bettor’s control”); *In re MasterCard Intern. Inc.*, 313 F.3d 257, 262-63 (5th Cir. 2002) (explaining that courts seem to limit application of the Wire Act to “gambling on sporting events or contests”). *Cf.* NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 128-29 (Mary Ann Liebert, Inc., 2009) (explaining that even though the Wire Act is part and parcel to state law, as a general matter federal gambling laws such as the Wire Act are only triggered when there is an underlying violation of state law).

telegraph to get results on horse races.”<sup>117</sup> However, the U.S. Department of Justice also on occasion has used this act to prosecute professional gamblers.<sup>118</sup>

Under the Wire Act, the legal definition of a “wire communication” includes any communication made through an “instrumentality used or useful in the transmission of writings, signs, pictures, and sounds ... by aid of wire, cable, or other like connection between the points of origin and reception.”<sup>119</sup> Although Congress’s passing of the Wire Act predated the advent of the Internet, several court decisions have held that the Wire Act’s scope includes Internet communications based on the clear meaning of “wire communications” set forth in the act.<sup>120</sup>

For instance, the U.S. Court of the Appeals for the First Circuit held in *United States v. Lyons*

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<sup>117</sup> See Jane Whitman, *Game of Chance – Prosecutors Gamble with Online Probes*, NEW YORK POST, Sept. 10, 2006, at 29 (discussing Robert Kennedy’s passing of the act); see also I. Nelson Rose, *The DOJ Gives a Gift*, 4 UNLV GAMING LAW JOURNAL 1 (2013) (“The Wire Act was enacted in 1961 as part of Attorney General Robert F. Kennedy’s war on organized crime. It was designed to aid the states in their public policies, which, at the time, were almost entirely prohibitory against all commercial gaming”); Remarks by I. Nelson Rose, *Internet Gambling and the Law*, 8 RICH. J. GLOBAL L. & BUS. 3, 6 (2008) (“[The Wire Act] was passed in 1961, literally to cut the wire. The wire was a telegraph wire that illegal bookies used so that they would know the results of horse races.”)

<sup>118</sup> See generally *Cohen v. U.S.*, 378 F.2d 751, 756-67 (9th Cir. 1967) (explaining that violations of the Wire Act apply against a “professional gambler” even if it likely would not against an “occasional social bettor”); *U.S. v. Donaway*, 447 F.2d 940 (9th Cir. 1971) (finding that it would be inappropriate to find a violation of the Wire Act against an individual who placed just a single bet, on one occasion, for an individual at a state-licensed betting facility).

<sup>119</sup> 18 U.S.C. 1081.

<sup>120</sup> See, e.g., *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014) (noting the “Wire Act’s evident applicability to the internet”); *United States v. Corrar*, 512 F.Supp. 2d 1280, 1289 (N.D. Ga. 2007) (finding the Wire Act to apply to sports gambling activity on the Internet, even though at the time there had been “a dearth of cases in which defendants have been convicted under the Wire Act as a result of intent gambling, notwithstanding the fact that internet gambling appears to be quite widespread in this country”); *United States v. Cohen*, 260 G.3d 68, 76 (2d. Cir. 2001) (affirming the conviction under the Wire Act of the founder of an online sportsbook for transmitting bets via the Internet); *Vacco v. World Interactive Gaming Corp.*, 185 Misc. 2d 852, 860 (N.Y. 1990) (a state court decision, explaining that the Wire Act applies despite the fact betting instructions “are transmitted from outside the United States, over the Internet). Although some defendants in criminal matters arising under the Wire Act have attempted to argue that the Wire Act does not apply to Internet transmissions because the Internet did not exist when Congress passed the Wire Act in 1961, the U.S. Court of Appeals for the First Circuit cogently rebutted this arguments in *United States v. Lyons* based on both the clear language of the statute and its definition of “wire communication facility”. See *United States v. Lyons*, 740 F.3d 702, 717 (1st Cir. 2014) (“On the first point, we regularly apply statutes to technologies that were not in the place when the statutes were enacted. As for the second point, nothing in the statute suggests that any instrumentality covered by the Wire Act must be structurally similar to a telephone exchange”).

that online sports betting violated the Wire Act because “[a]nyone ... would readily agree that the internet is used and useful in the transmission of writings.”<sup>121</sup> The court further noted that even though the Wire Act predated the Internet, its definition of wire communications “so accurately describes it].”<sup>122</sup>

As of the date of this article’s publication, the Department of Justice has not prosecuted any “daily fantasy sports” company under the Wire Act.<sup>123</sup> Nevertheless, the Department of Justice’s past reluctance to prosecute any “daily fantasy sports” company does mean there will be no legal challenges in the future.<sup>124</sup> It is important to remember that the “daily fantasy sports” marketplace did not even exist prior to 2007, and the industry did not reach a notable size or scope until at least 2013.<sup>125</sup> Thus, the Department of Justice’s historic inattention to “daily fantasy sports” may emerge more from its lack of knowledge about the industry than from any formal policy or presumption about the industry’s legality.<sup>126</sup>

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<sup>121</sup> United States v. Lyons, 740 F.3d 702, 716 (1st Cir. 2014).

<sup>122</sup> United States v. Lyons, 740 F.3d 702, 716 (1st Cir. 2014).

<sup>123</sup> See Aaron Stanley, *Daily Fantasy Games, Legal or Not, Rise in the World of Fantasy Sports*, CDC Gaming Report, Oct. 20, 2013, at <http://cdcgamingreports.com/commentaries/daily-fantasy-games-legal-or-not-rise-in-the-world-of-fantasy-sports-by-aaron-stanley> (noting that no criminal charges have ever been filed under the Wire Act for operating a “daily fantasy sports” contest).

<sup>124</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 35 (2012) (citing United States v. Bergland, 209 F. Supp. 547, 548 (E.D. Wis. 1962)); see also United States v. Corrar, 512 F.Supp.2d 1280, 1286 (2007) (“That the United States has often used the Wire Act to prosecute bookmakers does not estop the Government from bringing charges against other persons whose conduct the Act criminalizes. Neither the text of the Wire Act nor the case law interpreting it requires the narrow reading that the defendant suggests. If Congress sought only to criminalize bookmaking, ‘being engaged in the business of betting or wagering’ would simply read ‘receives bets or wagers’).

<sup>125</sup> See, *supra*, notes \_\_\_ - \_\_\_ and accompanying text; see also KEVIN BONNETT, ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS (2014), at Kindle Location 219 (reiterating that no such thing as “daily fantasy sports” existed prior to 2007).

<sup>126</sup> See, *supra*, notes \_\_\_ - \_\_\_ and accompanying text (discussing how “daily fantasy sports” did not even exist until 2007, and even in its early years “daily fantasy sports” operated relatively under the radar without much attention being paid in the mainstream to the contests).

Furthermore, even if one presumes that some forms of “daily fantasy sports” fully comply with the Wire Act (as may be the case), that does not mean all online contests operating under the moniker “daily fantasy sports” comply with the act.<sup>127</sup> For example, online contests such as Tradesports, which allows users to “buy and sell positions on sporting events in real time,” represent the riskiest fringe of the “daily fantasy sports” marketplace under current interpretation of the Wire Act.<sup>128</sup> Reason being, these contests stray most dramatically from the traditional notions of fantasy sports.<sup>129</sup>

### *B. Illegal Gambling Business Act*

A second federal statute that may impact the legal status of “daily fantasy sports” is the Illegal Gambling Business Act of 1970 (“Gambling Act”).<sup>130</sup> The Gambling Act, in pertinent part, states that “whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than \$20,000 or imprisoned not more than five years.”<sup>131</sup> The statute thereafter defines an “illegal gambling business” as any gambling business which “(i) is a violation of the law of a State of political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous

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<sup>127</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text.

<sup>128</sup> See *Tradesports.com CEO Ron Bernstein Invd on Bloomberg TV*, BLOOMBERG TV, Apr. 9, 2014, at 2014 WLNR 9578092 (quoting TradeSports founder Ron Bernstein – an innovator in the online gaming marketplace who had previously founded Intrade – a website that “allowed users to bet on everything from Oscar winners to the next US president [but] halted its trading due to scrutiny from regulators”); see also *Tradesports.com Launches, Providing the First Fantasy Sports Experience Where Users Play in Real-Time with Real Money*, MARKETWIRED, Apr. 30, 2014 (describing TradeSports as an outgrowth of daily fantasy sports based on the “real-time trading” component).

<sup>129</sup> See, *infra*, notes \_\_\_ - \_\_\_ and accompanying text (discussing the traditional notions of fantasy sports recognized in the Unlawful Internet Gambling Enforcement Act).

<sup>130</sup> 18 U.S.C. § 1955.

<sup>131</sup> 18 U.S.C. § 1955.

operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.”<sup>132</sup>

In certain respects, the Gambling Act encompasses a broader range of conduct than does the Wire Act.<sup>133</sup> For example, the Gambling Act prohibits certain gambling activities even if they occur without the use of a “wire communication.”<sup>134</sup> In addition, the Gambling Act may outlaw certain activities that are predominantly skill if these activities are operated within states that apply a definition of skill that is stricter than the “predominant purpose test.”<sup>135</sup> Nevertheless, in other respects, the Gambling Act is far narrower than the Wire Act.<sup>136</sup> For example, the Gambling Act only targets “illegal gambling activities of major proportions.”<sup>137</sup> At the same time, sole proprietorships with few, if any, employees are not subject to legal challenge under the Gambling Act.<sup>138</sup>

For the most part, the potential liability of a “daily fantasy sports” business under the Gambling Act appears to be similar to its potential liability under the Wire Act.<sup>139</sup> Nevertheless, it is possible that if a “daily fantasy sports” business constructs a contest that allows individuals

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<sup>132</sup> 18 U.S.C. § 1955(b)(1).

<sup>133</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 35 (2012).

<sup>134</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 35 (2012) (citing 18 U.S.C. § 1955).

<sup>135</sup> See *United States v. DiCristina*, 726 F.3d 92, 100-101 (2d. Cir. 2013) (holding that the issue of whether poker is predominantly a game of chance or skill is irrelevant to its legality under the Illegal Gambling Business Act because all that is required is the contest be illegal in a state in which it operates, and in the state of New York a game is illegal gambling if chance represents a material element in the game).

<sup>136</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 36 (2012).

<sup>137</sup> *United States v. Riehl*, 460 F.2d 454, 458 (3d. Cir. 1972).

<sup>138</sup> See Gambling Act, 18 U.S.C. § 1955(b) (iii) (noting that the definition of an illegal gambling business under the act “involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of [a gambling] business”).

<sup>139</sup> *Cf.* Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 35-36 (2012) (comparing the Wire Act with the Gambling Act).

to enter via an immovable video game device or gaming console rather than the Internet, such a contest might still violate the Gambling Act, even if there is not enough nexus to a “wire communication” to establish liability under the Wire Act.<sup>140</sup>

### *C. Professional and Amateur Sports Protection Act*

A third federal statute that could impact some “daily fantasy sports” contests is the Professional and Amateur Sports Protection Act (“PASPA”).<sup>141</sup> Congress passed PASPA in 1992, in response to pressure by the U.S. sports leagues to crack down on private and state-sponsored sports gambling.<sup>142</sup> In pertinent part, PASPA makes it illegal for any private person or state to operate “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly ... on one or more competitive games in which amateur or professional athletes participate.”<sup>143</sup> The statute further grants standing to America’s four major professional

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<sup>140</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 35-36 (2012) (noting that the Gambling Act may encompass conduct immune from the Wire Act based on lack of the involvement of a wire).

<sup>141</sup> 28 U.S.C. § 3701 (1972).

<sup>142</sup> See Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 36 (2012) (citing Erick S. Lee, *Play Ball!: Substituting Current Federal Non-Regulation of Fantasy Sports Leagues with Limited Supervision of Hyper-Competitive Leagues*, 29 LOY. L.A. ENT. L. REV. 53, 78 (2008)); see also 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, 663 (2012) (“In 1991, Democratic Senator Dennis DeConcini introduced [PASPA] in response to the concerns from public sports organizations”); *Nat’l Collegiate Athletic Assn. v. Governor of N.J.* 730, F.3d 208, 216 (3d. Cir. 2013) (explaining that the Senate Report that provides the underlying rationale behind PASPA’s passing “noted its concern for the integrity of, and the public confidence in, amateur and professional sports and its concern that widespread legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think the fix was in whenever their team failed to beat the spread”) (internal citations and quotations omitted).

<sup>143</sup> 28 U.S.C. § 3702 (1972). The original language is PASPA further disallows the case with respect to the operation of a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on “one or more performances of such athletes in such games;” however, that provision was arguably invalidated by Congress when it passed the narrow federal carve-out for certain fantasy sports contests, articulated in the Unlawful Internet Gambling Enforcement Act. *Id.*; see also Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5362(10) (2006); Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1215 (2007) (“[A] strong argument can be made that the UIGEA has clarified PASPA and that certain fantasy sports contests are now exempt from federal gambling prohibitions”); I.

sports leagues, as well as the National Collegiate Athletic Association, to bring suit against any state or individual that operates such a wagering scheme.<sup>144</sup>

PASPA is the only federal statute that indubitably makes it illegal to operate certain forms of sports gambling, even where these forms of gambling otherwise comply with all applicable state laws.<sup>145</sup> PASPA even prevents states themselves from legalizing certain forms of sports gambling within their own borders where they would have no effect on interstate commerce.<sup>146</sup>

In recent years, numerous legal scholars have described PASPA as “controversial” based on the unusual power it grants to U.S. professional sports leagues.<sup>147</sup> PASPA also has been criticized for its grandfather clause that allows for the states of Delaware, Montana, Nevada, and Oregon to maintain certain forms of sports gambling that the act outlaws elsewhere.<sup>148</sup>

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Nelson Rose & Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 CONN. L. REV. 653, 686 (2012) (“PASPA in its modern incarnation now has haphazard exceptions including jai alia from PASPA definitions, likely fantasy sports from UIGEA’s loopholes, and the gray area of some state’s Calcutta pools) (emphasis added). *But see generally* Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5361(b) (2006) (explaining that language of the UIGEA was not intended to serve as a defense to any other crime).

<sup>144</sup> 28 U.S.C. § 3703 (1972) (explaining that “[a] civil action to enjoin a violation of [the UIGEA] may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.”) (emphasis added).

<sup>145</sup> See I. Nelson Rose, *The DOJ Gives a Gift*, 4 UNLV GAMING LAW JOURNAL 1, 2 (2013) (“With the exception of PASPA, no act of Congress makes illegal any form of gambling that is legal under state law”).

<sup>146</sup> 28 U.S.C. § 3702(1) (1972) (noting that it shall be unlawful for “a government entity to sponsor, operate, advertise, promote, license or authorize by law or compact ... 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”).

<sup>147</sup> See Marc Edelman, *Controversial Sports Gambling Law Turns 22*, FORBES, Oct. 28 2014, at <http://www.forbes.com/sites/marcedelman/2014/10/28/controversial-u-s-sports-gambling-law-turns-22-today> (discussing controversial nature of PASPA);

<sup>148</sup> See Nelson Rose, *The DOJ Gives a Gift*, 4 UNLV GAMING LAW JOURNAL 1, 6 (2013) (predicting that PASPA “will be declared unconstitutional” because it limits which states may allow sports gambling and prohibits individual states from changing their policies). See also *Nat’l Collegiate Athletic Assn. v. Governor of N.J.* 730, F.3d 208, 215 (3d. Cir. 2013) (“Nevada alone began permitting widespread betting on sporting events in 1949 and

Nevertheless, recent attempts by the State of New Jersey to invalidate PASPA have failed.<sup>149</sup> Thus, at the moment, PASPA remains binding law on all states and individuals.<sup>150</sup>

As long as PASPA remains binding law, the legal risks under PASPA for “daily fantasy sports” contests seem to relate to the whims of professional sports league ownership.<sup>151</sup> Based on the broad prosecutorial powers granted by PASPA to the U.S. professional sports leagues, it is unlikely that any “daily fantasy sports” contest that is operated in partnership with a U.S. league would face legal challenge under the act.<sup>152</sup> By contrast, companies that describe themselves as “daily fantasy sports” but do not partner with any U.S. league may be more likely to face a legal challenge.<sup>153</sup> The risk of a legal challenge under PASPA seems greatest among college-related “daily fantasy sports” contests, given that the National Collegiate Athletic

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just three other states—Delaware, Oregon, and Montana—have on occasion permitted limited types of lotteries tied to the outcome of sporting events, but never single-game betting”); *id.* at 216 (noting that according to The Report of the Senate Judiciary Committee, PASPA was drafted to include an exemption for Nevada “because the Committee did not wish to ‘threaten [Nevada’s] economy; or of the three other states that had chosen in the past to enact limited forms of sports gambling”); *OFC Comm Baseball v. Markell*, 579 F.3d 293, 296-97 (3d. Cir. 2009) (“Although PASPA has broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also ‘grandfathered’ gambling schemes in individual states “to the extent that the scheme was conducted by that State between 19976 and 1990) (internal quotations omitted); *c.f.* *National Football League v. State of Delaware*, 435 F.Supp. 1372 (D. Delaware 1977) (describing a generally failed attempt by the NFL to keep all forms of football gambling out of the State of Delaware, fifteen years prior to the passing of the Professional and Amateur Sports Protection Act).

<sup>149</sup> *See, e.g., National Collegiate Athletic Association v. Governor of New Jersey*, 730 F.3d 308 (3d. 2013) (upholding constitutionality of PASPA).

<sup>150</sup> *See, supra*, note \_\_ - \_\_ and accompanying text.

<sup>151</sup> *See generally infra*, notes \_\_ - \_\_ and accompanying text (explaining that it is generally the pro sports leagues that directly attempt to enforce PASPA).

<sup>152</sup> *See Christie’s Bid to Legalize Sports Gambling May Be a Longshot, Experts Say*, Legal Monitor Worldwide, Sept. 9, 2014, at 2014 WLNR 24933130 (quoting Marc Edelman for the proposition that pro sports leagues’ view of illegal sports gambling has “become somewhat more complicated with the MLB maintaining a business relationship with a daily fantasy sports league that collects entry fees and pays winners based on their prognostication ability over just a single day of games.”); *c.f.* *Nat’l Collegiate Athletic Assn. v. Governor of N.J.* 730, F.3d 208, 223, n. 4 (2013) (concluding that there is a “legal difference between paying fees to participate in fantasy leagues and single-game wagering as contemplated by the Sports Wagering Act).

<sup>153</sup> *See general supra* notes \_\_ - \_\_ and accompanying text.

Association acts in a manner especially fearful of online gambling.<sup>154</sup> In addition, contests that describe themselves as “daily fantasy sports” but offer the opportunity for users to bet on game results rather than player performances are at a substantially elevated risk of a legal challenge.<sup>155</sup>

#### *D. Unlawful Internet Gambling Enforcement Act*

Finally, the Unlawful Internet Gambling Enforcement Act (“UIGEA”) makes it illegal for those “engaged in the business of betting or wagering” to “knowingly accept” funds “in connection with the participation of another person in unlawful Internet gambling.”<sup>156</sup> For purposes of the UIGEA, Congress defines “unlawful Internet gambling” as “knowingly

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<sup>154</sup> See Marissa Lankester, *Time to Fight against Sports Gambling*, STAR LEDGER (Newark, NJ), May 29, 2014, at 17 (describing the NCAA as “most staunchly opposed” to sports gambling of any of the U.S. sports leagues). For a more general discussion of the NCAA’s general opposition to online gambling, see, e.g., Cathleen Crowley, *Cashing in on Online Gambling*, ALBANY TIMES UNION, Jul. 7, 2014, at C1 (mentioning the NCAA’s opposition to legalized sports gambling in New Jersey); *Indiana: Attorney General Opposes Internet Gambling Bills Before Congress*, RIGHT VISION NEWS (Pakistan), June. 6, 2010 (available on Westlaw News) (quoting Rachel Newman Baker, Director of Agent, Gambling and Amateurism Activities for the National Collegiate Athletic Association, as stating that “[t]he NCAA has long opposed sports wagering because it threatens student-athlete well-being and the integrity of competition”). Some may also argue the NCAA is most concerned about its athletes engaging in a gambling scheme because the NCAA Principle of Amateurism attempts to bar college athletes from earning an income based on their athletic talents, thus placing them in greater need of financial resources and with less to lose financially if caught in a gambling scheme. See generally Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA’s ‘No Pay’ Rules Violate Section One of the Sherman Act*, 64 CASE W. RES. L. REV. 61 (2013) (discussing in general the NCAA’s concerted ‘no pay’ rules and how they hamper the financial status of collegiate athletes to their detriment).

<sup>155</sup> See National Hockey League Memorandum in Opposition to Legalized Sports Gambling in New Jersey, <http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/PDF/Briefs/C290/NHL-EN.pdf> (document on file with author) (explaining that National Hockey League’s greatest concern under PASPA is preventing “[t]he widespread and legal availability of gambling on single-game results [which, in the NHL’s opinion] will inevitably lead to concerns (and possibly the widespread perception) that NHL games are not completely legitimate, including allegations asserting the possibility of ‘point-shaving’ activities and the manipulation of player injury and participation practices). Furthermore, one of the plausible readings of the “fantasy sports carve-out” to the Unlawful Internet Gambling Act is that the act provides a complete carve-out under federal law (including PASPA) to certain forms of online sports gaming contests, yet even the act unequivocally does not provide a carve-out for games that involve a “winning outcome is based – (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.” Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5362(1)(E)(ix)(I)-(III); see also *infra*, notes \_\_ - \_\_ and accompanying text.

<sup>156</sup> 31 U.S.C. §5362(10) (2006).

transmitting a bet or wager, by means of the Internet, where the bet or wager is illegal under the laws of the place where the wager is “initiated, received, or otherwise made.”<sup>157</sup> Stated otherwise, “if a person located in a state where gambling is illegal places a bet over the Internet, any business that knowingly accepts a financial instrument in connection with that bet, irrespective of the gambling business’s location, would unambiguously be violating the act.”<sup>158</sup>

The primary purpose of the UIGEA is to supplement “traditional [gambling] law enforcement mechanisms” and to simplify the enforcement of “gambling prohibitions on regulations on the Internet, especially where such gambling crosses State and national borders.”<sup>159</sup> In other words, the act serves to crackdown on foreign companies that were providing online sportsbooks and poker to United States residents, by making it risky for payment processing companies to process credit transactions related to these types of contests.<sup>160</sup>

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<sup>157</sup> 31 U.S.C. §5362(10)(A)(2006); *see also* Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 37 (2012).

<sup>158</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 37 (2012) (citing *Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 116 (F. 3d 2009); *see also* *United States v. Elie*, 2012 WL 383403 (Feb. 7, 2012), at \*2 (explaining that if a person engaged in gambling is located in New York, then under the UIGEA New York shall be treated as the place where the gambling occurred); *see generally* *United States v. Rubin*, 743 F.3d 31, 34(2d. Cir. 2014) (upholding the conviction of Ira Rubin under the Unlawful Internet Gambling Enforcement Act for creating sham e-commerce websites that purported to sell clothing, jewelry and sporting equipment to defraud banks into opening up accounts for what really amounted to illegal gambling transactions).

<sup>159</sup> *Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 116 (F. 3d 2009).

<sup>160</sup> *C.f.* Catherine Holahan, *Neteller Arrests Bode Ill for Online Gaming*, Bloomberg Businessweek, Jan. 17, 2007, at <http://www.businessweek.com/stories/2007-01-17/neteller-arrests-bode-ill-for-online-gamblingbusinessweek-business-news-stock-market-and-financial-advice> (discussing the arrest of two former directors and the founding shareholders of Neteller, a publicly traded Internet payment processor, for accepting payments related to sportsbooks and poker websites doing business in the United States); *United States v. Elie*, 2012 WL 383403 (Feb. 7, 2012), at \*3 (upholding an indictment against individuals who were employed by payment processors that opened bank accounts and processed payments for Internet poker companies that did business in the United States).

Nevertheless, the UIGEA includes a carve-out that makes it safer for payment processors to fund certain businesses that might otherwise fall within the scope of the UIGEA.<sup>161</sup> Included within this carve-out are “any fantasy or simulation sports game or educational game or contest in which ... no fantasy or simulation sports team is based on the current membership of an actual team,” so long as the following three criteria are met:

- (I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.
- (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 (athletes in the case of sports events) in multiple real-world sporting or other events.
- (III) No winning outcome is based – (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.<sup>162</sup>

Given that the UIGEA became law in 2006 (one year before the term “daily fantasy sports” entered the vernacular), it is not entirely certain whether the UIGEA’s “fantasy sports carve-out” protects anything beyond the traditional, full-season versions of fantasy sports.<sup>163</sup> In addition, the carve-out does not seem to protect fantasy sports contests where the ratio of skill-to-chance does not meet a minimum threshold, or where the fantasy sports contest’s outcome is

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<sup>161</sup> 31 U.S.C. §5362(1)(E)(i)-(ix)(2006) (listing a wide range of activities that are explicitly exempted from the Unlawful Internet Gambling Enforcement Act).

<sup>162</sup> 31 U.S.C. §5362(1)(E)(ix)(I)-(III).

<sup>163</sup> See KEVIN BONNETT, *ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS* (2014), at Kindle Location 208 (discussing the author’s purported “invention” of daily fantasy sports specifically as a strategy for trying to take advantage of what the author perceived as a loophole in the fantasy sports carve-out to the Unlawful Internet Gambling Enforcement Act).

based on the performance of either teams in a team sport or individual athletes in an individual sport.<sup>164</sup>

Nevertheless, even if a “daily fantasy sports” contest does not fall specifically within the UIGEA’s “fantasy sports carve-out,” such a contest may still comply more generally with the UIGEA if the contest is found to be a *bona fide* contest of skill.<sup>165</sup> Thus, even presuming the UIGEA carve-out does not apply to contests merely based on the moniker “daily fantasy sports,” certain formats of “daily fantasy sports” contests might still be found in full compliance with the UIGEA if the contest itself is found to be sufficiently skill-based.<sup>166</sup>

## V. EIGHT STRATEGIES TO MITIGATE THE LEGAL RISKS OF OPERATING DAILY FANTASY SPORTS CONTESTS

**[THIS SECTION HAS BEEN REDACTED BY THE AUTHOR AND WILL BE RELEASED ON SSRN AT A LATER DATE. PLEASE CONTACT THE AUTHOR FOR FURTHER INFORMATION ABOUT THIS SECTION]**

## VI. CONCLUSION

“Daily fantasy sports” is a booming industry that is expected to continue growing at a rapid pace. Nevertheless, the recent explosion of the “daily fantasy sports” marketplace does not mean that all forms of “daily fantasy sports” are legal, or even that any “daily fantasy sports” companies may legally operate their businesses in all fifty states. To the contrary, the

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<sup>164</sup> See 31 U.S.C. §5362(1)(E)(ix)(II) (stating that the fantasy sports carveout to the Unlawful Internet Gambling Enforcement Act requires that “[a]ll winning outcomes reflect the relative knowledge and skill of the participants”); *id.* at 31 U.S.C. §5362(1)(E)(ix)(III) (stating that “No winning outcome is based – (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event”).

<sup>165</sup> See 31 U.S.C. §5362(10)(A)(1992) (noting that no UIGEA violation could exist if the contest is legal in all states in which bets are made); *c.f.* I. NELSON ROSE & MARTIN OWENS, INTERNET GAMING LAW 62 (Mary Ann Liebert, Inc., 2009)

<sup>166</sup> See, *supra*, note \_\_ and accompanying text.

legality of “daily fantasy sports” is very much unsettled, and the ultimate issue of legality seems to depend on each individual contest’s game rules and states of operation.

Under state law, any “daily fantasy sports” business that offers contests that include both entry fees and prizes must ensure that their contests are deemed to be “games of skill” in the states in which they operate. To achieve this ends, “daily fantasy sports” companies should forbid participants from entering into these contests in the “any chance” states (Arizona, Arkansas, Iowa, Louisiana and Tennessee). In addition, “daily fantasy sports” companies should exercise extreme caution if they elect to operate their contests in any state that has not adopted the “predominant purpose test,” or where either attorneys general or gaming commissions have issued negative advisory opinions.

Under federal law, “daily fantasy sports” companies further must safeguard that their contests are based on the results of real-world player performances across multiple real-world events, and not based on any real-world game outcomes. In addition, each “daily fantasy sports” business should serve exclusively as a host site, and not as a direct participant in the contests themselves.

Finally, in terms of general business practices, each “daily fantasy sports” company should adopt the eight strategies detailed in this article. Among these strategies include avoiding the “snake draft” method of allocating real-world players, and avoiding allocating players through draft lists that are so short that winners may emerge purely by accident. “Daily fantasy sports” companies further need to ensure that their contests involve a sufficiently high number of iterations to minimize the impact of a single random event, and that they have

implemented proper technology to block minors and those based in prohibited jurisdictions from accessing their contests.

Although the “daily fantasy sports” industry is booming, the industry’s sustained growth will require companies, moving forward, to act with this higher degree of legal prudence. Indeed, the future success of the “daily fantasy sports” industry will rely heavily on its members’ ability to conduct themselves professionally, and to comply with the letter of federal and state gambling laws. It is only with this careful attention to federal and state laws that the U.S. government will likely allow the “daily fantasy sports” industry to survive, and that U.S. policymakers will continue to treat “daily fantasy sports” contests differently from generally illegal businesses such as online sportsbooks and poker websites.