

NAVIGATING THE LEGAL RISKS OF DAILY FANTASY SPORTS: A DETAILED PRIMER IN FEDERAL AND STATE GAMBLING LAW

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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 saw “daily fantasy sports” as “akin to a flip of the coin, which is the definition of gambling.” Today, however, 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; 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 the legal issues surrounding the industry, “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 “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 II of this Article discusses the history of “daily fantasy sports,” beginning with its di-

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morphic roots in both full-season fantasy sports contests and illegal online sportsbooks. Part III introduces the different formats of “daily fantasy sports” that exist in today’s online marketplace. Part IV explores the legal risks of “daily fantasy sports” under state gambling laws. Part V analyzes these same risks under federal law. Finally, Part VI 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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I. INTRODUCTION

Over the past two years, there has been a monumental shift in how U.S. professional sports leagues have perceived “daily fantasy sports.”¹ Back in March of 2013, the chief executive of Major League Baseball Advanced Media, Robert Bowman, told the *New York Times* that he saw “daily fantasy sports” as “akin to a flip of the coin, which is the definition of gambling.”² Today, however, Major League Baseball (“MLB”) promotes a play-for-cash “daily fantasy sports” contest on its website.³ Similarly, the National Basketball Association (“NBA”) 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.”⁴

Today’s more favorable relationship between professional sports leagues and the “daily fantasy sports” industry has led many in the media to speculate that the legal issues surrounding the industry, “although a concern, are relatively minor.”⁵ Nevertheless, such generalizations about the legal status of “daily fantasy sports” are grossly oversimplified.⁶ Indeed, there is no blanket immunity under federal or state law for “daily fantasy sports.”⁷ Rather, in all likelihood, the legal status of “daily fantasy sports” varies based on the nature of any specific contest’s game rules and where that particular contest operates.⁸

This Article explores the legal status of “daily fantasy sports” in light of both federal and state gambling laws. Part II 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 III introduces the different formats of “daily fantasy sports” that exist in today’s online marketplace. Part IV explores the legal risks

1. 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 presuming a game of skill under federal law) and not traditional sports gambling (generally illegal under federal law). See *infra* notes 35–38 and accompanying text (discussing the creation of the term “daily fantasy sports” and the intended legal reasoning behind adopting such a term).

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

3. See Ken Belson, *Will Other Leagues Join N.B.A.? Don’t Bet on It*, N.Y. TIMES, Nov. 14, 2014, <http://www.nytimes.com/2014/11/15/sports/not-all-leagues-ready-to-go-all-in-on-legalized-gambling.html> (discussing Major League Baseball’s partnership with DraftKings).

4. See *id.*; About, FANDUEL, <https://www.fanduel.com/about> (last visited Nov. 13, 2015) (describing FanDuel as the leader in one day fantasy games with over one million paid active users).

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

6. See *infra* Parts IV–V and accompanying notes.

7. See *infra* Parts IV–V and accompanying notes.

8. See *infra* notes 69–73 and accompanying text.

of “daily fantasy sports” under state gambling laws. Part V analyzes these same risks under federal law. Finally, Part VI proposes eight best practices to enable “daily fantasy sports” companies to minimize their legal risks under both federal and state gambling laws.

II. 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.”⁹ The winner of Gamson’s seminar was “the participant who, over the course of an actual Major League Baseball season, selected players who earned the most points in a predetermined set of statistical categories.”¹⁰

Gamson’s Baseball Seminar initially was a private pastime among his academically minded friends.¹¹ Over time, however, the Baseball Seminar expanded beyond the ivory towers of academia.¹² 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.¹³ Okrent then brought the contest to his friends in New York, who first participated during the 1979 MLB season.¹⁴ These friends thereafter renamed the contest “Rotisserie League Baseball” in honor of the French bistro where they held their inaugural league draft.¹⁵

9. 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) [hereinafter, Edelman, *A Short Treatise*]. For more on Professor William Gamson’s “Baseball Seminar,” see also Geoffrey T. Hancock, *Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law*, 31 T. JEFFERSON L. REV. 317, 323 (2008); Sam Allis, *Lord of the Games: Fantasy Baseball Indebted to Two Innovators*, BOS. GLOBE, Mar. 12, 2006, available at 2006 WLNR 4160544.

10. Edelman, *A Short Treatise*, *supra* note 9, at 6 (2012) (mentioning the use of the term “Seminar” to reduce any association with organized gambling).

11. *Id.* at 6.

12. See *infra* notes 13–15 and accompanying text.

13. See Edelman, *A Short Treatise*, *supra* note 9, at 6.

14. See John Niyo, *Fantasy Baseball’s Reality Defies Belief: Airplane Scribbling in 1979 Has Taken Off Since and Become a National Phenomenon*, DETROIT NEWS (Apr. 17, 2005), available at 2005 WLNR 26981587 (referencing 1979 as the inaugural season of Dan Okrent’s Rotisserie League Baseball).

15. See Edelman, *A Short Treatise*, *supra* note 9, at 6–7 (2012); see also Mike Hale, *The Few Who Founded Fantasy Baseball*, N.Y. TIMES, Apr. 19, 2010, http://www.nytimes.com/2010/04/20/arts/television/20game.html?_r=0 (describing the role of the original league owners and their meeting at Rotisserie Française); Niyo, *supra* note 14 (same).

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.¹⁶ But during the MLB strike of 1981, several reporters decided to write articles about Rotisserie League Baseball, leading to “a cult following among statistically-oriented sports fans.”¹⁷ Some of the earliest adopters of Rotisserie League Baseball replaced the game’s original scoring system with head-to-head scoring, and they adopted the new moniker “fantasy baseball” to describe the game.¹⁸ Others expanded the concept of Rotisserie League Baseball into other sports, such as football and basketball, and called these games collectively “fantasy sports.”¹⁹

Then, in 1994, the Internet came along and changed everything.²⁰ 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.²¹ 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.²² Indeed, it was the advent of the Internet that truly transformed fantasy sports from an in-home, social activity into a highly publicized, commercial pursuit.²³

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

16. Childs Walker, *Dream Teams*, BALT. SUN, March 4, 2006, http://articles.baltimoresun.com/2006-03-04/features/0603040085_1_fantasy-baseball-baseball-geek-fantasy-leagues; Brad Townsend, *It Began as a Pastime Among New York Literati, but Rotisserie Baseball Soon Wound Up Firing Up a Fantasy World*, DALL. MORNING NEWS, Sept. 19, 2003, available at 2003 WLNR 16498692.

17. Edelman, *A Short Treatise*, *supra* note 9, at 8 (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).

18. *Id.* at 9.

19. *Id.*

20. *Id.* at 10.

21. See Risa J. Weaver, *Online Fantasy Sports Litigation and the Need for a Federal Right of Publicity Statute*, 2010 DUKE L. & TECH. REV. i, ii (crediting the Internet for the tremendous growth in fantasy sports); see also Nicholas Bamman, *Is the Deck Stacked Against Internet Gambling? A Cost-Benefit Analysis of Proposed Regulation*, 19 J.L. & POL’Y 231, 231–32 (2010) (describing the Internet as a \$24 billion annual industry in 2010).

22. See Edelman, *A Short Treatise*, *supra* note 9, at 10–11 (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); see also *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *1 (D. N.J. June 20, 2007) (same). See generally *C.B.C. Distribut’n & Mktg. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 821 (8th Cir. 2007) (explaining that the company CBC Distribution & Marketing had begun licensing the use of MLB players’ names to use in pay-to-enter fantasy games beginning in 1995).

23. Cf. 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).

rooms.²⁴ By 1999, some offshore sportsbooks had begun to accept bets from U.S. residents.²⁵ 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 a “part of their daily life.”²⁶

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.²⁷ 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

24. See Anthony N. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New Legal Approach to Prize Games?*, 4 NEV. L.J. 197, 215 (2003-2004) [hereinafter Cabot & Csoka, *The Games People Play*] (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 *Lawson v. Full Tilt Poker Ltd.*, 930 F. Supp. 2d 476, 480 (S.D.N.Y. 2013) (describing how “[i]n the late 1990s, various companies began providing online forums for individuals to play poker with real money.”); see also Josh Robbins, *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.”).

25. See, e.g., Jim Litke, *CBS to Cut Link to Online Sportsbook Operation*, ASSOCIATED PRESS ONLINE, (Mar. 26, 1999) (discussing online sportsbook Sportsbook.com, which maintained a relationship with Sportsline USA, a company then owned 20% by CBS); *NCAA Tournament/Final Four Notes*, L.A. TIMES, Mar. 27, 1999, at 9, available at 1999 WLNR 6647672 (noting that “[i]n 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, 31 (2000) (noting that “[b]etting on professional and college sports events was the first form of Internet wagering. . .”).

26. Sam Borden, *Online and On Campus*, N.Y. 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 Testify*, PENSACOLA NEWS J., June 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); see also Cabot & Faiss, *supra* note 23, at 7–8 (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).

27. See Janet Whitman, *Game of Chance—Prosecutors Gamble with Online Probes*, N.Y. 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); see also David Wedge, *Web Gambling Site Rushes for Hub Paydirt*, BOS. 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”); cf. I. NELSON ROSE & MARTIN OWENS, *INTERNET GAMING LAW 221–22* (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). See generally Simon Bowers & Andrew Clark, *Sportingbet Arrest Threatens Internet Gambling*, GUARDIAN (London), Sept. 9, 2006, <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”); see generally Simon Kennedy, *BetOnSports Agrees to Permanently Shut U.S. Operations*, THOMSON FIN. NEWS, Nov. 10, 2006 (stating that BetOnSports had agreed to permanently terminate its operations in the U.S. market).

conducted business with U.S. customers.²⁸ The Unlawful Internet Gambling Enforcement Act ultimately made it more difficult for online sportsbooks, even those based overseas, to collect user fees.²⁹

Thereafter, the more reputable online sportsbooks and poker websites voluntarily left the U.S. marketplace,³⁰ and U.S. law enforcement rid itself of the remaining websites by prosecuting their owners under both federal and state law.³¹ U.S. law enforcement also prosecuted the payment processors that allowed for transmission of funds between gamblers and these illegal online businesses.³²

28. See Heather Timmons & Eric Pfanner, *U.S. Law Causing Turmoil in Online Gambling Industry*, N.Y. TIMES, Nov. 1, 2006, http://www.nytimes.com/2006/11/01/business/01gamble.html?_r=0 (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*, CRIMINAL JUSTICE FORUM, Aug. 18, 2010, http://www.criminaljustice-online.com/view_topic.php?id=3153&forum_id=31&highlight=issued (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).

29. See Paul Moran, *Law Could Put Dent in Offshore Bookmakers' Windfall*, NEWSDAY (Melville, N.Y.), Feb. 4, 2007, available 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 of the UIGEA).

30. See *iSocial Media Inc., v. Bwin.Party Digital Entm't*, 2013 WL 5588238, at *3 (S.D. Fla. Oct. 10, 2013) (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.”); Andy Vuong, *Jig is Up for Online Gambling—Or Is It?*, LONG BEACH PRESS TELEGRAM, Oct. 3, 2006, at A1, available at 2006 WLNR 17677636 (noting the mass exodus of online sportsbooks and poker rooms from the U.S. market); *William Hill Halts US Gaming Bets*, BBC NEWS (Sept. 27, 2006), <http://news.bbc.co.uk/2/hi/business/5385284.stm> (explaining that the William Hill Co. which is a publicly traded company on the U.K. stock exchange, had ceased accepting online sports bets from those living in the United States); see also Timmons & Pfanner, *supra* note 28 (“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.”).

31. See *Lawson v. Full Tilt Poker Ltd.*, 930 F. Supp. 2d 476, 481 (S.D.N.Y. 2013) (“On April 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 Erik Larson, *PartyGaming's Dikshit Pleads Guilty to Web Gambling*, BLOOMBERG (Dec. 16, 2008), <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.”); Andrew Ross Sorkin & Stephanie Saul, *Gambling Subpoenas on Wall Street*, N.Y. TIMES, Jan. 22, 2007, <http://www.nytimes.com/2007/01/22/business/22gaming.html> (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 Huge Internet Gambling Ring is Broken*, N.Y. SUN, Nov. 16, 2006, <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).

32. See *NETeller Founders Arrested in the US*, BIRMINGHAM POST (U.K.), Jan. 17, 2007, 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).

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.³³ 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 entrepreneurs began to offer football survivor pools and other forms of sports prediction contests that were not exactly traditional bookmaking, but they were also not exactly "fantasy sports."³⁴

In March 2007, Costa Mesa, California resident Kevin Bonnet 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").³⁵ Bonnet coined the term "daily fantasy sports" to give his contests the aura of legality.³⁶ But, even the look of his original website resembled that of a sportsbook.

33. See *supra* notes 30–31 and accompanying text; but see generally ROSE & OWENS, *supra* note 27, at 45 (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 "[d]ay trading, involving extremely short term bets on which way stocks and commodities, and their indexes and options, will move. . .").

34. See KEVIN BONNET, ESSENTIAL STRATEGIES FOR WINNING AT DAILY FANTASY SPORTS 10 (2014) (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).

35. See *Corporate Officers, Directors, and C-Level Executives for Fantasy Day Sports, Corp.*, WYSK B2B DATA HUB, <http://www.wysk.com/index/california/costa-mesa/4jd3vj4/fantasy-day-sports-corp/officers> (last visited Oct. 2, 2015); *Filing of Incorporation for Fantasy Day Sports, Corp.*, CAL. CORPS., <http://www.californiacorporates.com/corp/818447.html> (last visited Oct. 2, 2015); see also BLINDERS, *Fantasy Sports Live One Year Anniversary*, BLINDERS (BLOG) (June 20, 2008, 2:18 PM), <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"); cf. BONNET, *supra* note 34, at 8–11 (mentioning the author's history as a poker blogger and describing himself as "the originator of the concept and the owner of the first Daily Fantasy Sports website").

36. See BONNET, *supra* note 34, at 17 (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); cf. Paresh Dave, *Betting on Speed*, L.A. TIMES, July 12, 2013, at B5 ("After the federal government shut down illegal online poker websites. . . daily fantasy sports emerged as an instant-gratification alternative for many Internet bettors."); Oskar Garcia, *Daily Fantasy Sports Become a Gambling Reality*, ASSOCIATED PRESS, Sept. 24, 2010, at 1 (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.* at 2 (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 fantasy football" and concluded "it's pretty similar to the online poker thing. . ."). See generally *College Students Making Tuition Money Playing Daily Fantasy NCAA Basketball, With Real Money Fantasy Leagues*, EWORLDWIRE (Mar. 12, 2012), <http://www.eworldwire.com/pressreleases/212482> (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*, PR NEWswire (May 28, 2014), <http://www.prnewswire.com/news-releases/draftkings-and-wsop-ink-sponsorship-deal-260939261.html> (quoting Anthony Pitts, head of marketing for DraftKings, discussing "crossover potential between poker and fantasy sports. . .");

Initially, Bonnet'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.³⁷ But as federal and state prosecutors failed to prosecute either Bonnet or Fantasy Day Sports Corp., many others began to offer similar contests.³⁸ Some of the earliest competitors to Bonnet's Fantasy Sports Live included DraftDay (launched in January 2011),³⁹ DraftStreet (launched in August 2010),⁴⁰ FanDuel (launched in summer 2009),⁴¹ Fantazzle (launched in fall 2008),⁴² Fantasy Factor (launched in fall 2009),⁴³ and Snapdraft (launched in fall 2008).⁴⁴

Poker Entrepreneurs Launch DraftDay Daily Fantasy Sports Website with a Chance to Win \$1 Million, PR NEWSWIRE (Sept. 27, 2011), <http://www.prnewswire.com/news-releases/poker-entrepreneurs-launch-draftday-daily-fantasy-sports-website-with-a-chance-to-win-1-million-130646728.html> (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").

37. See Garcia, *supra* note 36, at 1 (quoting Fantasy Sports trade Association founder Paul Charchian as admitting 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* BLINDERS, *supra* note 35 (purporting that Fantasy Day Sports Corp.'s Fantasy Sports Live ran "20,000 Fantasy Sports Contests with cash prizes" in its first year).

38. See Garcia, *supra* note 36 (noting that "more websites are springing up that offer prize money for teams that last only one night").

39. See DraftDay—Trademark Details, JUSTIA, <https://trademarks.justia.com/851/59/draftday-85159413.html> (last visited Oct. 2, 2015) (listing the date of the first use in commerce of the DraftDay name as January 1, 2011); *see also* Executive Summary, CHI. TRIB., Apr. 5, 2012, available at 2012 WLNR 7206183 (noting that DraftDay "has raised almost \$1 million from local investment firm Lightbank").

40. See DraftStreet—Trademark Details, JUSTIA, <https://trademarks.justia.com/850/13/draft-street-85013485.html> (last visited Oct. 2, 2015) (listing the date of the first use in commerce of DraftStreet name as August 12, 2010).

41. See History, FANDUEL, <https://www.fanduel.com/history> (last visited Oct. 2, 2015); *see also* FanDuel, CRUNCHBASE, <http://www.crunchbase.com/organization/fanduel> (last visited Oct. 2, 2015).

42. See Press Release, Fantazzle, Fantazzle Fantasy Sports Games Announces Schedule for the 2011–2012 Fantasy Football and College Fantasy Football Season!, (Aug. 14, 2011), available 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).

43. See *World Championship of Fantasy Football to Offer Satellite Leagues at FantasyFactor.com*, MARKETWIRED (June 3, 2010, 5:39 PM), <http://www.marketwired.com/press-release/world-championship-fantasy-football-offer-satellite-leagues-fantasyfactorcom-1271027.htm> (referencing the launch of Fantasy Factor daily games in fall 2009); *\$1,000 Fantasy Baseball Challenge at FantasyFactor.com*, MARKETWIRED (May 28, 2010, 8:33 PM), <http://www.marketwired.com/press-release/1000-fantasy-baseball-challenge-at-fantasyfactorcom-1268300.htm>; *see also* Quick Talk w/ John Zaleski, DAILY FANTASY SPORTS BLOG (Nov. 3, 2009), <http://dailyfantasysports.wordpress.com/2009/11/03/quick-talk-w-john-zaleski> (explaining that before launching Fantasy Factor, Zaleski had started the company Ultimate Fantasy Sports, which had provided full-season fantasy sports contests in the U.S. with entry fees and prizes as early as 1988).

44. See Garcia, *supra* note 36, at 1 (purporting that Snapdraft was first launched on the Fanball website in 2008); *Snapdraft No Match for FANTASY SPORTS LIVE*, MY SPORTS REPORT (Nov. 27, 2008), <http://etoppsfan.blogspot.com/2008/11/snapdraft-no-match-for-fantasy-sports.html> (noting that Snapdraft had entered the daily fantasy sports marketplace to compete against Fantasy Sports Live by November 2008).

Ultimately, FanDuel emerged as the most popular of these “daily fantasy sports” websites.⁴⁵ One factor that contributed to FanDuel’s success was the company’s relationships with U.S. newspapers.⁴⁶ This mainstream marketing strategy allowed FanDuel to build a user base that extended far beyond just traditional gamblers.⁴⁷

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.⁴⁸ As a result, private equity companies have begun to invest heavily into the “daily fantasy sports” marketplace.⁴⁹ In January 2013, FanDuel raised \$11 Million in equity funding from Comcast Ventures, an entity that shares the same parent as Comcast/NBC.⁵⁰ More recently, FanDuel has secured an additional \$70 million funding from Shamrock Holdings, NBC Sports, and KKR & Co., LLP.⁵¹

45. See *FanDuel*, *supra* note 41; *cf.* *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587, at *1 (N.D. Ill. Oct. 9, 2013) (noting, at the time, that FanDuel was a Delaware corporation with its principal place of business in Edinburgh, Scotland).

46. See Andrew Goldberg, *Football Betting Is Back, and It Could Be A Savior for Newspapers*, BUS. INSIDER (Sept. 12, 2010, 2:53 PM), <http://www.businessinsider.com/fantasy-football-betting-2010-9> (discussing the partnership between FanDuel and numerous newspapers, including the *New York Post*).

47. See generally Ben Fischer, *FanDuel and DraftKings are Hot, But Newcomer Draft Hopes to Build Serious Biz on Casual Fans*, N.Y. BUS. J. (Dec. 2, 2014), available at 2014 WLNR 34041694 (estimating FanDuel’s user base at approximately one million).

48. See generally Brustein, *supra* note 2 (“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.’”).

49. See Kyle Alspach, *Techstars Grad StarStreet Reports \$1.4M Fundraise*, BOS. BUS. J. (Aug. 28, 2013), available at 2013 WLNR 21429861 (discussing \$1.4 million in private equity funding raised by daily fantasy sports startup, StarStreet); Dave, *supra* note 36, at B5 (“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.”); see also *Executive Summary*, *supra* note 39 (noting that DraftDay in early 2012 “raised almost \$1 million from local investment firm Lightbank”); *TopLine Game LabsT Enters the Fantasy Sports and Social Gaming Marketplace with \$25 Million Investment*, AP ALERT-ENT. (June 25, 2013) (discussing \$25 million in venture capital provided to startup daily fantasy sports website, TopLine Game Labs).

50. See Brustein, *supra* note 2; see also *Daily Fantasy Sports Operator, FanDuel, Closes \$11M Series C and Welcomes Comcast Ventures as an Investor*, PR NEWSWIRE (Jan. 30, 2013), <http://www.prnewswire.com/news-releases/daily-fantasy-sports-operator-fanduel-closes-11m-series-c-and-welcomes-comcast-ventures-as-an-investor-188979481.html> (noting that Comcast Ventures had invested \$11 Million in FanDuel, with Comcast Ventures partner Andrew Cleland gaining a seat on FanDuel’s board).

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

In the past year, some “daily fantasy sports” contests have even begun to partner with the U.S. professional sports leagues.⁵² As referenced in the introduction to this Article, in November 2014, FanDuel announced its signing of the NBA as an equity investor.⁵³ Meanwhile, both the MLB and the National Hockey League (“NHL”) currently have endorsement deals with DraftKings—an even newer “daily fantasy sports” company that launched in 2012.⁵⁴

III. 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.⁵⁵ 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.⁵⁶ Most “daily fantasy sports” companies offer this style of contest in traditional

52. See *infra* notes 53–55 and accompanying text; cf. Transcript, *Up with Steve Kornacki*, MSNBC TELEVISION, Nov. 16, 2014, at 2014 WLNR 32374375, at *21 (quoting Marc Edelman 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.”).

53. See Belson, *supra* note 3 (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, 8:28 AM), <http://www.forbes.com/sites/marcedelman/2014/11/13/7-legal-risks-of-the-nba-investing-in-fanduel> [hereinafter Edelman, *7 Legal Risks*] (discussing the legal and strategic business risks that come along with the NBA’s investment in FanDuel).

54. See Marc Edelman, *Major League Baseball Reverses Course; Now Fully Endorses Daily Fantasy Sports*, FORBES (Mar. 25, 2014, 4:25 PM), <http://www.forbes.com/sites/marcedelman/2014/03/25/major-league-baseball-reverses-course-now-fully-endorses-daily-fantasy-sports>; Marc Edelman, *Will Robert Bowman Become Major League Baseball’s First ‘Daily Fantasy Sports’ Commissioner?*, FORBES (July 29, 2014, 9:50 AM), <http://www.forbes.com/sites/marcedelman/2014/07/29/will-robert-bowman-become-major-league-baseball-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.”). See generally Belson, *supra* note 3 (“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 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, *Lost a Fantasy Game? Try Again Tomorrow*, N.Y. TIMES, July 28, 2014, <http://www.nytimes.com/2014/07/29/sports/baseball/daily-fantasy-sports-sites-draw-the-real-worlds-attention.html> (similarly discussing Major League Baseball’s strategic arrangement with DraftKings); *National Hockey League Announces Partnership with DraftKings*, ENT. NEWS WKLY. (Nov. 28, 2014), available at 2014 WLNR 32705997.

55. Cf. Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. MARSHALL L. REV. 1195, 1219 (2007) [hereinafter Cabot & Csoka, *Fantasy Sports*] (“[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.”); 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).

56. See Langone v. Kaiser, 2013 WL 5567587, at *1 (N.D. Ill. Oct. 9, 2013) (discussing the basic manner in which FanDuel daily fantasy sports contests operate); *How It Works*, FANDUEL, <https://www.fanduel.com/how-it-works> (describing how the FanDuel contests operate) (last visited Oct. 2, 2015); see generally Brusteine, *supra* note 2 (discussing some of the various other forms of “daily fantasy sports” contests).

team sports such as baseball, basketball, football, and hockey.⁵⁷ A few “daily fantasy sports” companies such as DraftKings have ventured into individual sports such as golf and mixed martial arts as well.⁵⁸

Several “daily fantasy sports” companies, meanwhile, have begun to adopt business models that allow participants to compete directly against the host site, rather than against other contestants.⁵⁹ 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 select nine Major League Baseball players that they believe will hit a home run on a given day. If all nine players homer, the entrant allegedly wins a \$1 Million prize”—a task with approximate odds of one in two million.⁶⁰ 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.⁶¹

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.⁶² 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.⁶³ These contests market themselves as user friendly and easy

57. See generally Kyle Lytle, *Fake Teams, Real Money for Daily Fantasy Sports Players*, COLORADOAN (Nov. 28, 2013), <http://archive.coloradoan.com/article/20131128/SPORTS/311280087/Fake-teams-real-money-daily-fantasy-sports-players> (explaining generally how “daily fantasy sports” operates).

58. See *DraftKings Signs on as Daily Fantasy Sports Partner to the Pittsburgh Steelers*, BUS. WIRE (Jan. 27, 2015, 9:00 AM), <http://www.businesswire.com/news/home/20150127005214/en/DraftKings-Signs-Daily-Fantasy-Sports-Partner-Pittsburgh#.VgHkzt9Vikp> (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 FANTASY MMA, <http://www.kountermove.com> (last visited Oct. 2, 2015).

59. See *infra* notes 192–96 and accompanying text.

60. See Marc Edelman, *BetAmerica’s Home Run Derby Tests the Outer Limits of Legal Sports Gaming*, FORBES (Jun. 2, 2014, 12:35 PM), <http://www.forbes.com/sites/marcedelman/2014/06/02/betamericas-home-run-derby-tests-the-outer-limits-of-legal-sports-gaming> [hereinafter Edelman, *BetAmerica’s Home Run*]; see generally *BetAmerica Launches FanEx Sports*, BETAMERICA EXTRA (Sept. 12, 2013), <https://www.betamerica.com/extra/racing-sports-wire/betamerica-news-and-press-releases/betamerica-launches-fanex-sports/> (discussing BetAmerica’s entry into the daily fantasy sports marketplace).

61. See Ben Fischer, *Daily Fantasy Sports Takes Step Toward Casinos*, N.Y. BUS. J. (Dec. 15, 2014, 3:01 PM), <http://www.bizjournals.com/newyork/blog/techflash/2014/12/daily-fantasy-sports-takes-step-toward-casinos.html?ana=twl>.

62. See *infra* note 63 and accompanying text.

63. See Aaron Goldstein, *DailyMVP.com Hits the Daily Fantasy Sports Market Minus the Salary Cap*, GAMBLING911 (Nov. 22, 2014), <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 Game Labs Showcases Humorous Side of Tom Brady in New DailyMVP Spot*, PR NEWSWIRE (Dec. 3, 2014), <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).

to enter, even though many “daily fantasy sports” players would acknowledge the skill-to-luck ratio of these games is lowered.⁶⁴

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.⁶⁵ 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.⁶⁶ 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.”⁶⁷

IV. 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.⁶⁸ Nevertheless, not every online “game for money” or “bet on an

64. See Goldstein, *supra* note 63 (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 Game Labs*, *supra* note 63 (discussing the launch of TopLine Games Labs contests via DailyMVP.com).

65. See, e.g., ‘ScoreStreak™’ Aims to Revolutionize the Daily Fantasy Sports Game, MARKETWIRED (May 8, 2014), <http://www.marketwired.com/press-release/scorestreak-aims-to-revolutionize-the-daily-fantasy-sports-game-1908004.htm> (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 *Get Back in the Game: Sports Betting*, BLOOMBERG (Apr. 9, 2014), at 00:14–00:36, <http://www.bloomberg.com/news/videos/b/d781c27a-ef15-4f9f-822e-45acd4df11b2> (describing TradeSports’ trading game based on predictive sport game that includes trading “shares” of teams performing in live sporting contests also as “fantasy sports”). For a transcript of the interview, see *Tradesports.com CEO Ron Bernstein Invd on Bloomberg TV*, BLOOMBERG TV (Apr. 9, 2014), available at 2014 WLNR 9578092.

66. ‘ScoreStreak™’, *supra* note 65; cf. *Up with Steve Kornacki*, *supra* note 52 (quoting Marc Edelman, who 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™’, *supra* note 65.

67. See *Get Back in the Game*, *supra* note 65 (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), <http://www.marketwired.com/press-release/tradesportscom-launches-providing-first-fantasy-sports-experience-where-users-play-real-1904697.htm> (describing TradeSports as an outgrowth of daily fantasy sports based on the “real-time trading” component).

68. See Edelman, *A Short Treatise*, *supra* note 9, at 26 (2012) (discussing the application of state gambling laws generally to fantasy sports).

uncertain outcome” will be found to violate these laws.⁶⁹ 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.”⁷⁰

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),⁷¹ the legality, under state law, of any given “daily fantasy sports” contest generally comes down to whether a court would find the contest to involve “skill” (which is legal) or “chance” (which is not).⁷² The requisite level of “skill” needed for a contest to be legal varies by state.⁷³

B. *Are Daily Fantasy Sports Contests Illegal Gambling? The 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”).⁷⁴ In “daily fantasy sports,” the primary elements of skill are mathematical modeling and prognostication, and these elements of skill arise exclusively through the initial

69. *Id.* For examples of such activities that are seen as legal under state law, *see, e.g.*, MONT. CODE ANN. § 23-5-802 (2014) (permitting certain forms of fantasy sports contests under Montana state law); *S.E.C. v. W.J. Howey 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).

70. *See ROSE & OWENS, supra note 27*, at 1 (“The definition of ‘gambling,’ unless changed by statute, consists of any activity with three elements: consideration, chance and prize.”); *see also* Anthony N. Cabot et al., *Economic Value, Equal Dignity and the Future of Sweepstakes*, 1 UNLV GAMING L. J. 1, 2 (2010) (“If you take away any one of the three elements of gambling—consideration, prize, or chance—you have an activity that is lawful in most states.”).

71. *See ROSE & OWENS, supra note 27*, at 9 (explaining that “[g]ames that are completely free, like many online bingo games giving small prizes, are almost universally legal. . .”).

72. Edelman, *A Short Treatise, supra note 9*, at 26–27; *see also* *Valentin v. El Diario La Prensa*, 427 N.Y.S.2d 185, 186 (N.Y. 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); *Geis v. Cont’l Oil Co.*, 511 P.2d 725, 727 (Utah 1973) (explaining that under Utah state law, “the statutory elements of a lottery are: (1) [p]rize; (2) chance; [and] (3) any valuable consideration.”).

73. *See* Edelman, *A Short Treatise, supra note 9*, at 28–29 (“To determine whether a particular 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.”) (internal citations omitted).

74. *See generally id.* at 29 (“A majority of states adopt . . . the ‘predominant purpose test’ as the measure of chance.”); *cf. 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.”).

task of selecting players.⁷⁵ Meanwhile, chance-based elements in “daily fantasy sports” lie within three separate categories.⁷⁶

The first category of chance in “daily fantasy sports” is “systemic chance,” which emerges based on random elements or drawings within a contest itself.⁷⁷ 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.⁷⁸ 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; no other participant would have the opportunity to include this player on his “daily fantasy” team.⁷⁹

A second category of chance in “daily fantasy sports” contests is “imperfect information” chance, which is based on “limitation on analysis that can be undertaken by [a contestant] in assessing the situation” when entering.⁸⁰ The chance of injuries to previously healthy players and thus their absence from parts of real-world sporting events represents one such element of “imperfect information” chance in “daily fantasy sports.”⁸¹ 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.⁸² While game cancellations due to weather conditions may perhaps be predictable for those with an expertise in me-

75. See BONNET, *supra* note 34, at 24 (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).

76. See *infra* notes 77–88 and accompanying text.

77. See Anthony N. Cabot et al., *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) [hereinafter Cabot et al., *Alex Rodriguez*]; see also *Boardwalk Regency Corp. v. Attorney Gen. of N.J.*, 457 A.2d 847, 851–52 (N.J. Super. Law Div. 1982) (finding backgammon to be a game of chance based on the systematic chance factor of rolling a die within the game).

78. See Edelman, *A Short Treatise*, *supra* note 9, at 14 (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).

79. See *id.* at 14, 29–30 (2012) (discussing how a league draft in fantasy sports operates).

80. See Cabot et al., *Alex Rodriguez*, *supra* note 77, at 396–97; see also *Boardwalk*, 457 A.2d at 851–52 (discussing the systematic chance in backgammon).

81. See generally Cabot & Csoka, *The Games People Play*, *supra* note 24, at 218 (discussing injury risk as a factor of chance within fantasy sports contests).

82. See *infra* note 84 and accompanying text.

teorology,⁸³ game cancellations for reasons such as underground water main breaks are simply not predictable to anyone.⁸⁴

A third type of chance in “daily fantasy sports” is “lucky shot” chance.⁸⁵ This is the type of chance that exists where, while a particular success is based on skill, such success almost certainly could not be repeated with additional tries—such as the success of a novice golf player shooting a hole in one on any particular hole.⁸⁶ One can reasonably 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 the low number of iterations in most “daily fantasy sports” contests.⁸⁷ 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.⁸⁸

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.⁸⁹ This is because such an inquiry would rely heavily upon expert testimony and a fact intensive investigation.⁹⁰ In addition, the factual findings pertaining to whether skill or chance predominates in “daily fantasy sports” may

83. See generally Nate Silver, *The Weatherman is Not a Moron*, N.Y. TIMES, Sept. 7, 2012, http://www.nytimes.com/2012/09/09/magazine/the-weatherman-is-not-a-moron.html?_r=0 (discussing how meteorologists predict weather and why they are frequently accurate); but see Doug Kyed, *Bill Belichick Unfazed about Weather, Blasts Meteorologists' Accuracy*, NESN (Oct. 31, 2014, 10:03 AM), at <http://nesn.com/2014/10/bill-belichick-unconcerned-about-weather-blasts-meteorologists-accuracy> (describing an NFL coach criticizing each meteorologist’s ability to predict football game day weather accurately).

84. See Marc Edelman, *Could a Water Main Break Derail The Daily Fantasy Sports Industry?*, FORBES (Aug. 18, 2014, 12:13 PM), <http://www.forbes.com/sites/marcedelman/2014/08/18/could-a-water-main-break-derail-the-daily-fantasy-sports-industry/> (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).

85. See Cabot et al., *Alex Rodriguez*, *supra* note 77, at 399–400.

86. See *id.*

87. See *id.* at 408 (2009) (discussing “[t]he law of large numbers is 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 Edelman, *A Short Treatise*, *supra* note 9, at 30 (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.’”).

88. See *supra* note 60 and accompanying text (discussing the operation of BetAmerica’s Home Run Derby contest).

89. See *infra* notes 91–93 and accompanying text.

90. See ROSE & OWENS, *supra* note 27, at 15–16 (explaining that the determination of whether a contest is one of skill or chance today “often come[s] down to a battle of experts”); Cabot et al., *Alex Rodriguez*, *supra* note 77, at 401. See generally *People v. Mason*, 68 Cal. Rptr. 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. Ch. Div. 1952) (explaining the court’s consideration of expert testimony from mathematicians at elite universities to consider whether a particular game involves predominantly skill).

vary based on the specific nature of each individual contest.⁹¹ 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.⁹²

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.⁹³ In *Humphrey*, the U.S. District Court for the District of New Jersey opined that:

The 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.⁹⁴

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.⁹⁵

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.”⁹⁶ In Florida, a 1991 advisory opinion concluded that it is illegal to participate “in a fantasy sports league whereby contestants pay an entry fee for the opportunity to select actual professional sports players. . . .”⁹⁷ Its reasoning was that “[w]hile the skill of the individual contestant picking the members of the fantasy team is involved, the 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.⁹⁸

Meanwhile, in Kansas, the state’s Racing & Gaming Commission has opined that “chance predominates over skill in fantasy sports” con-

91. See generally *Mason*, 68 Cal. Rptr. at 21 (explaining how some pinball machines might be found to be skill based while others may be found to involve predominantly chance).

92. See *supra* note 72 and accompanying text.

93. 2007 WL 1797648, at *2–6 (D. N.J. June 20, 2007).

94. *Id.* at *2.

95. See *id.*; cf. Nat’l Collegiate Athletic Ass’n v. Christie, No. 12-4947, 2012 WL 6698684, at *8 n.2 (D. N.J. Dec. 21, 2012) (providing an example of 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. . .”).

96. See *infra* notes 97–100 and accompanying text.

97. See Fla. Op. Attorney Gen., AGO 91-3 (1991), available at 1991 WL 528146 (opinion also available on Florida’s Attorney General webpage, <http://www.myfloridalegal.com/ago.nsf/Opinions/9ADEF3B402960199852562A6006FB71E>); cf. *Faircloth v. Cent. Fla. Fair, Inc.*, 202 So. 2d 608, 608 (Fla. Dist. Ct. App. 1967) (noting that Florida allows individuals to wager on contests of skill in which they participate, but disallows wagering on the activities of skill of third parties).

98. See Fla. Op. Attorney Gen., *supra* note 97, at *2.

tests.⁹⁹ Reason being, according to the Kansas Racing & Gaming Commission:

[A fantasy sports] manager leaves to chance a number of things, including: (1) how a 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.¹⁰⁰

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.¹⁰¹ Among these many stricter tests for skill, states such as Missouri and New York apply a “material element test.”¹⁰² 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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ In

99. See *Are Fantasy Sports Leagues Legal?*, KANSAS RACING & GAMING COMMISSION, <http://www.krgc.ks.gov/index.php/component/content/article/2-uncategorised/113-fantasysportsillegal> (last visited Oct. 2, 2015).

100. *Id.*

101. See *infra* notes 102–110 and accompanying text.

102. See *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 in a material degree upon an element of chance, notwithstanding that skill of contestants may be a factor therein’”); *People v. Turner*, 629 N.Y.S.2d 661, 662 (N.Y. 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.’”) (internal citations omitted).

103. See, e.g., *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 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”) (internal citations omitted).

104. *People ex rel. 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).

105. See ARIZ. REV. STAT. § 13-3301(4) (2014) (defining 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); TENN. CODE ANN. § 39-17-501 (2014) (defining “gambling,” subject to a number of generally irrelevant ex-

these states, “daily fantasy sports” contests of any type—as long as they include entry fees and prizes—would seem to violate state gambling laws.¹⁰⁶ The reason for this conclusion is because “even the most intricate fantasy sports game involves at least some level of chance with respect to weather conditions and player injuries.”¹⁰⁷

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.¹⁰⁸ Meanwhile, states such as Hawaii forbid contests that encourage a gambling instinct.¹⁰⁹ 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.¹¹⁰

V. LEGAL RISKS FOR DAILY FANTASY SPORTS UNDER FEDERAL GAMBLING LAW

In addition to complying with state gambling laws, “daily fantasy sports” contests also must comply with at least four pertinent federal gambling laws.¹¹¹ In some instances, the federal gambling laws may be

ceptions to fantasy sports, as “risking anything of value for a profit whose return is to any degree contingent on chance. . .”); *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 finds it irrelevant whether a particular game is predominantly based on chance or skill); *but see generally* *State v. Am. Holiday 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. . .”).

106. See Edelman, *A Short Treatise*, *supra* note 9, at 31–32 (2012) (explaining that all forms of fantasy sports contests seem to be illegal in “any chance states”); *see also* ROSE & OWENS, *supra* note 27, at 12 (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 selection of the team or individual players . . . is not dispositive of the issue of whether the activity constitutes gambling’”).

107. Edelman, *A Short Treatise*, *supra* note 9, at 33.

108. See MONT. CODE ANN. § 23-5-112 (2010); *cf.* ROSE & OWENS, *supra* note 27, at 213 (describing Louisiana as another such state that disallows all forms of Internet gaming).

109. *State v. Prevo*, 361 P.2d 1044, 1050–51 (Haw. 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 it 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 id.* For two other states that seem to differentiate between contests featuring experts and novices, *see* *Redd v. Simmons*, 167 So. 65, 67–68 (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); *see also* *Ellison*, 71 N.E. at 755–56 (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”).

110. See *supra* notes 101–09 and accompanying text.

111. Edelman, *A Short Treatise*, *supra* note 9, at 34–38; *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”) (emphasis in original).

more stringent than the state gambling requirements.¹¹² Meanwhile, in other instances, the federal gambling requirements may be less stringent.¹¹³

A. *Wire Act*

The first of the four federal statutes pertaining to “daily fantasy sports” is the Interstate Wire Act of 1964 (“Wire Act”).¹¹⁴ This act prohibits individuals and entities from engaging in the business of betting or wagering through the knowing use of “a wire communication facility for the transmission in interstate or foreign commerce. . . .”¹¹⁵ The Wire Act was recommended as law by U.S. Attorney General Robert Kennedy “to crack down on organized crime members using the telegraph to get results on horse races.”¹¹⁶ However, the U.S. Department of Justice also on occasion has used this act to prosecute professional gamblers.¹¹⁷

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. . . .”¹¹⁸ Although Congress’ passing of the Wire Act predat-

112. See *infra* notes 140–54 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).

113. See *infra* notes 155–65 and accompanying text (discussing the “fantasy sports carve-out” to the Unlawful Internet Gambling Enforcement Act that, according to some, 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).

114. 18 U.S.C. 1084 (2012).

115. *Id.* § 1084(a); see also *id.* § 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 ROSE & OWENS, *supra* note 27, at 36 (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 Int’l 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. ROSE & OWENS, *supra* note 27, at 128–29 (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 gambling laws”).

116. See Whitman, *supra* note 27 (discussing Robert Kennedy’s passing of the act); see also I. Nelson Rose, *The DOJ Gives States a Gift*, 4 UNLV GAMING L. J. 1, 1 (2013) [hereinafter Rose, *The DOJ Gives*] (“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.”); I. Nelson Rose, Remarks at the Richmond Journal of Global Law and Business Symposium: Online Vice: Legal Issues in Online Gambling (Mar. 19, 2008), in 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.”).

117. See generally *United States v. Donaway*, 447 F.2d 940, 944 (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); *Cohen v. United States*, 378 F.2d 751, 756–57 (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”).

118. 18 U.S.C. 1081 (2012).

ed 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.¹¹⁹ For instance, the U.S. Court of the Appeals for the First Circuit held in *United States v. Lyons* 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."¹²⁰ The court further noted that even though the Wire Act predated the Internet, its definition of wire communications "so accurately describes it."¹²¹

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.¹²² Nevertheless, the Department of Justice's past reluctance to prosecute any "daily fantasy sports" company does not mean there will be no legal challenges in the future.¹²³ 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 2013.¹²⁴ Thus, the Department of Justice's historic inattention to "daily fantasy sports" may emerge more from its lack of knowledge about the

119. See, e.g., *United States v. Lyons*, 740 F.3d 702, 716 (1st Cir. 2014) (noting "[t]he Wire Act's evident applicability to the internet. . ."); *United States v. Cohen*, 260 F.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); *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 internet gambling, notwithstanding the fact that internet gambling appears to be quite widespread in this country"); *Vacco v. World Interactive Gaming Corp.*, 185 Misc.2d 852, 860 (N.Y. Sup. Ct. 1999) (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 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.") (internal citations omitted).

120. *Lyons*, 740 F.3d at 716.

121. *Id.*

122. See Aaron Stanley, *Daily Fantasy Games, Legal or Not, Rise in The World of Fantasy Sports*, CDC GAMING REPORT (Oct. 20, 2013, 11:07 PM), <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).

123. Edelman, *A Short Treatise*, *supra* note 9, at 35 (citing *United States v. Bergland*, 209 F. Supp. 547, 548 (E.D. Wis. 1962)); see also *Corrar*, 512 F. Supp. 2d at 1286 ("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.'").

124. See *Filing of Incorporations*, *supra* note 35; see also BONNET, *supra* note 34, at 15 (reiterating that no such thing as "daily fantasy sports" existed prior to 2007).

industry than from any formal policy or presumption about the industry's legality.¹²⁵

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.¹²⁶ 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.¹²⁷ Reason being, these contests stray most dramatically from the traditional notions of fantasy sports.¹²⁸

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”).¹²⁹ The Gambling Act, in pertinent part, states that “[w]hoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.”¹³⁰ The statute thereafter defines an “illegal gambling business” as any gambling business which:

(i) is a violation of the law of a State or 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 operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day.¹³¹

“In certain respects, the Gambling Act encompasses a broader range of conduct than does the Wire Act.”¹³² “For example, the Gambling Act prohibits certain gambling activities even if they occur without the use” of a wire communication.¹³³ In addition, the Gambling Act may outlaw certain activities that are predominantly skill based if these activities are operated within states that apply a definition of skill that is strict-

125. See BONNET, *supra* note 34, at 15 (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).

126. See *infra* note 127 and accompanying text.

127. See *Get Back in the Game*, *supra* note 65 (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*, *supra* note 67 (describing TradeSports as an outgrowth of daily fantasy sports based on the “real-time trading” component).

128. See *infra* notes 155–65 and accompanying text (discussing the traditional notions of fantasy sports recognized in the Unlawful Internet Gambling Enforcement Act).

129. 18 U.S.C. § 1955 (2012).

130. *Id.*

131. *Id.* § 1955(b)(1).

132. Edelman, *A Short Treatise*, *supra* note 9, at 35.

133. *Id.* (citing 18 U.S.C. § 1955 (2012)).

er than the “predominant purpose test.”¹³⁴ Nevertheless, in other respects, the Gambling Act is far narrower than the Wire Act.¹³⁵ For example, the Gambling Act only targets “illegal gambling activities” of “major proportions.”¹³⁶ At the same time, sole proprietorships with few, if any, employees are not subject to legal challenge under the Gambling Act.¹³⁷

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.¹³⁸ Nevertheless, it is possible that if a “daily fantasy sports” business constructs a contest that allows individuals 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.¹³⁹

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”).¹⁴⁰ 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.¹⁴¹ 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 partic-

134. See *United States v. DiCristina*, 726 F.3d 92, 100–01 (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).

135. Edelman, *A Short Treatise*, *supra* note 9, at 36.

136. *United States v. Riehl*, 460 F.2d 454, 458 (3d Cir. 1972).

137. See 18 U.S.C. § 1955(b)(1)(ii) (2012) (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 of part of [a gambling] business. . .”).

138. Cf. Edelman, *A Short Treatise*, *supra* note 9, at 35–36 (comparing the Wire Act with the Gambling Act).

139. See *id.* (noting that the Gambling Act may encompass conduct immune from the Wire Act based on lack of the involvement of a wire).

140. 28 U.S.C. § 3701 (1972).

141. See Edelman, *A Short Treatise*, *supra* note 9, at 36 (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 *Nat’l Collegiate Athletic Ass’n 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 point-spread”) (internal citations and quotations omitted); 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 Arizona Senator Dennis DeConcini introduced [PASPA]. . . in response to the concerns from public sports organizations.”).

ipate. . .”¹⁴² The statute further grants standing to America’s four major professional sports leagues, as well as the National Collegiate Athletic Association (“NCAA”), to bring suit against any state or individual that operates such a wagering scheme.¹⁴³

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.¹⁴⁴ 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.¹⁴⁵

In recent years, numerous legal scholars have described PASPA as “controversial” based on the unusual power it grants to U.S. professional sports leagues.¹⁴⁶ 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.¹⁴⁷ Nevertheless, recent attempts by the State of New Jersey to

142. 28 U.S.C. § 3702 (1972). The original language in 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 clarified 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); Cabot & Csoka, *Fantasy Sports*, *supra* note 55, at 1215 (“[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.”); Rose & Bolin, *supra* note 141, at 686 (“PASPA in its modern incarnation now has haphazard exceptions including jai alai from PASPA definitions, likely fantasy sports from UIGEA’s loopholes, and the gray area of some state’s Calcutta pools.”). *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).

143. 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).

144. *See* I. Nelson Rose, *The DOJ Gives*, *supra* note 116, at 2 (“With the exception of PASPA, no act of Congress makes illegal any form of gambling that is legal under state law.”).

145. 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”).

146. *See* Marc Edelman, *Controversial Sports Gambling Law Turns 22*, *FORBES* (Oct. 28 2014, 8:00 AM), <http://www.forbes.com/sites/marcedelman/2014/10/28/controversial-u-s-sports-gambling-law-turns-22-today> (discussing controversial nature of PASPA).

147. *See* Rose, *The DOJ Gives*, *supra* note 116, at 6 (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 Ass’n. 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 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 216–17 (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

invalidate PASPA have failed.¹⁴⁸ Thus, at the moment, PASPA remains binding law on all states and individuals.¹⁴⁹

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.¹⁵⁰ 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.¹⁵¹ 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.¹⁵² The risk of a legal challenge under PASPA seems greatest among college-related “daily fantasy sports” contests, given that the NCAA acts in a manner especially fearful of online gambling.¹⁵³ 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.¹⁵⁴

also ‘grandfathered’ gambling schemes in individual states to the extent that the scheme was conducted by that State between 1976 and 1990.”) (internal quotations omitted); cf. *Nat’l Football League v. State of Delaware*, 435 F.Supp. 1372 (D. Del. 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).

148. See, e.g., *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 239 (upholding constitutionality of PASPA).

149. See *supra* notes 140–48 and accompanying text.

150. See generally *infra* notes 151–54 and accompanying text (explaining that it is generally the pro sports leagues that directly attempt to enforce PASPA).

151. See *Christie’s Move to Legalize Sports Gambling May Be a Longshot, Experts Say*, L. MONITOR WORLDWIDE (Sept. 9, 2014), available 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.”); cf. *Nat’l Collegiate Athletic Ass’n*, 730 F.3d at 223 n.4 (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 Law”).

152. See generally *supra* notes 146–51 and accompanying text.

153. See Marissa Lankester, *Time to End 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 F. Crowley, *Cashing in on Online Gambling*, ALBANY TIMES UNION (July 7, 2014), <http://www.timesunion.com/local/article/Cashing-in-on-online-gambling-5603226.php> (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 1 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).

154. See *National Hockey League Memorandum in Opposition to Legalized Sports Gambling in New Jersey*, available at <http://www.parl.gc.ca/Content/SEN/Committee/411/lcjc/PDF/Briefs/C290/NHL-EN.pdf> (last visited Oct. 2, 2015) (explaining that National Hockey League’s greatest concern

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.”¹⁵⁵ For purposes of the UIGEA, Congress defines “unlawful Internet gambling” as to “knowingly transmit a bet or wager by any means . . . of the Internet where such bet or wager is unlawful” under the laws of the place where the wager is “initiated, received, or otherwise made.”¹⁵⁶ 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.”¹⁵⁷

The primary purpose of the UIGEA is to supplement “traditional [gambling] law enforcement mechanisms” and to simplify the enforcement of “gambling prohibitions or regulations on the Internet, especially where such gambling crosses State or national borders.”¹⁵⁸ In other words, the Act serves to crackdown on foreign companies that were providing online sportsbooks and poker to U.S. residents by making it risky for payment processing companies to process credit transactions related to these types of contests.¹⁵⁹

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)(III) (2006); *see also infra* notes 160–65 and accompanying text.

155. 31 U.S.C. §5363 (2012).

156. *Id.* §5362(10)(A) (2006); *see also* Edelman, *A Short Treatise*, *supra* note 9, at 37.

157. Edelman, *A Short Treatise*, *supra* note 9, at 37 (citing Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S., 580 F.3d 113, 116 (3d Cir. 2009)); *see also* United States v. Elie, 2012 WL 383403, at *2 (S.D.N.Y. Feb. 7, 2012) (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).

158. Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S., 580 F.3d 113, 116 (3d Cir. 2009) (internal citations omitted).

159. *Cf.* Catherine Holahan, *Neteller Arrests Bode Ill for Online Gaming*, BLOOMBERG BUSINESSWEEK (Jan. 17, 2007), <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); *Elie*, 2012 WL 383403, 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.¹⁶⁰ 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:

(1) 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.

(2) 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.

(3) 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.¹⁶¹

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.¹⁶² 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 based on the performance of either teams in a team sport or individual athletes in an individual sport.¹⁶³

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.¹⁶⁴ 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” con-

160. 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).

161. *Id.* § 5362(1)(E)(ix)(I)–(III).

162. See BONNET, *supra* note 34, at 16 (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).

163. 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.* § 5362(1)(E)(ix)(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.”).

164. See *id.* § 5362(10)(A) (1992) (noting that no UIEGA violation could exist if the contest is legal in all states in which bets are made); *cf.* ROSE & OWENS, *supra* note 27, at 62.

tests might still be found in full compliance with the UIGEA if the contest itself is found to be sufficiently skill based.¹⁶⁵

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

Based on the foregoing, it would be difficult—if not impossible—to reduce the legal risks associated with operating “daily fantasy sports” contests down to zero.¹⁶⁶ Nevertheless, this does not mean that all companies operating “daily fantasy sports” contests incur high legal risks, or even that all companies incur equal risks.¹⁶⁷ To the contrary, there are eight “best practices” that all “daily fantasy sports” companies could implement to minimize their legal risks under both federal and state gambling laws.¹⁶⁸

A. *Avoid Operating in States with Elevated Legal Risk*

The first way for a “daily fantasy sports” company to curb its legal risks is by limiting the states in which it operates to only those states that adopt the “predominant purpose test” or one of the less restrictive versions of the “material element test.”¹⁶⁹ While most “daily fantasy sports” businesses prohibit their users from entering pay-for-play contests in five states (Arizona, Iowa, Louisiana, Montana, and Washington), this list is under inclusive of the full universe of states that maintain elevated legal risks for operating “daily fantasy sports” under state gambling laws.¹⁷⁰ Among the additional states where “daily fantasy sports” companies should avoid conducting business include, at an absolute minimum, Arkansas and Tennessee—both states that fall under the traditional definition of “any chance states.”¹⁷¹

B. *Avoid Adding Game Features that Increase Systematic Chance*

A second strategy for “daily fantasy sports” businesses to reduce their legal risk is to remove all elements of “systematic chance” from their contests.¹⁷² One way to remove “systematic chance” is by ensuring that the initial allocation of players in each “daily fantasy sports” contest

165. See *supra* note 160 and accompanying text.

166. See *supra* notes 160–64 and accompanying text (discussing the most relevant federal and state gaming laws).

167. See *supra* notes 53–55 and accompanying text.

168. See *infra* notes 196–97 and accompanying text.

169. See *supra* notes 95–111 and accompanying text (discussing many of the states where such risks are elevated); see also ROSE & OWENS, *supra* note 27, at 211 (“For gambling, prosecutors take the position that the bet occurs both where the bettor is as well as where the bet is received. The U.S. Department of Justice has expressly stated the Internet gambling occurs in both jurisdictions.”).

170. See Terms of Use, FANDUEL, <https://www.fanduel.com/terms> (last updated Sept. 10, 2015).

171. See *supra* notes 105–06; see also Edelman, 7 *Legal Risks*, *supra* note 53. This list, of course is meant to be illustrative, and not exhaustive of the full list of dates with elevated legal risk.

172. See *supra* notes 77–80 and accompanying text.

affords each participant an equal opportunity to select each real-world player.¹⁷³ Allocating players to fantasy teams by a “snake draft” is legally problematic under the doctrine of “systematic chance” because whichever contestant receives the first draft pick (an event decided entirely by chance) automatically enjoys disproportionately favorable odds of winning.¹⁷⁴ By contrast, contests in which all participants have an equal opportunity to select each real-world player do not include such “systematic chance” because the player selection process affords all participants an equal opportunity to select each real-life player without regard to any random event.¹⁷⁵

C. Avoid Creating Draft Lists that Assign Player Salaries “Too Perfectly”

A third strategy to reduce the legal risks of “daily fantasy sports” is to ensure that, if the contest allows for player selection based on draft lists, these draft lists do not perfectly correlate in-game player salaries with players’ expected statistical output.¹⁷⁶ The imperfect correlation of player salaries with their expected fantasy output is important because, as the creator of “daily fantasy sports,” Kevin Bonnet, explained in his recent book, if the pricing used in selecting “daily fantasy sports” players becomes too perfect, “then all fantasy teams drafted that used the full cap amount would have the same projected fantasy score and all skill would be removed from the game.”¹⁷⁷ Given that the primary skill-based element of “daily fantasy sports” is indeed mathematical, making all player selections into near mathematical equivalents to one another would dissipate the game’s skill component.¹⁷⁸

D. Avoid Creating Draft Lists that Are So Short They Invite Accidental Winners

A fourth strategy to minimize the legal risk in “daily fantasy sports” is to require participants to select from a list of players that is long enough to ensure that there is a very low chance of any participant randomly picking a perfect team.¹⁷⁹ Contests such as HotRoster that allow participants to select players from lists of as few as two players bear a

173. See *supra* notes 77–78 and accompanying text.

174. See *supra* notes 78–79 and accompanying text; see also Edelman, *A Short Treatise*, *supra* note 9, at 30 (discussing the legal risk of player drafts in the context of full-season fantasy sports contests).

175. See *supra* notes 77–79 and accompanying text; see generally Edelman, *A Short Treatise*, *supra* note 9, at 29–30 (noting that “fantasy sports leagues that initially allocate players via traditional auction are probably legal because the results of these games are driven primarily based on skill,” meanwhile draft leagues are more likely to be characterized as games of chance because “the ‘draft’ method of initially allocating players includes an additional element of chance with respect to a participant’s selection order in the fantasy league’s draft”).

176. See *infra* notes 178–79 and accompanying text.

177. BONNET, *supra* note 34, at 50.

178. See *supra* notes 75, 90 and accompanying text.

179. See *infra* notes 180–81 and accompanying text.

reasonable risk that some participants would pick the perfect roster simply by guessing—a result that makes it less likely the contest would be regarded by law as a game of skill.¹⁸⁰ Indeed, save for the fact that HotRoster does not involve bets on actual game results (which would be a clear violation of PASPA), there is a very thin line separating HotRoster’s purported “against the house” “daily fantasy sports” contests from those parlay betting contests that were offered by offshore sportsbooks in the United States before the passing of the UIGEA.¹⁸¹

E. Include Sufficient Statistical Iterations

A fifth legal strategy to reduce the risk of operating “daily fantasy sports” contests is to ensure that each contest includes enough statistical iterations that a single randomized event in a real-life sporting event would not substantially impact the contest’s overall result.¹⁸² In full-season fantasy sports contests, the number of statistical iterations in each contest is generally high enough that a single random event such as a water main break is unlikely to have much impact on the contest’s final results.¹⁸³ By contrast, in many “daily fantasy sports” contests, a single fluke event of this nature would have substantial influence given the limited number of total iterations.¹⁸⁴ While it may be infeasible for a “daily fantasy sports” contest to increase its number of iterations to that of a full-season fantasy sports contest, even increasing roster sizes and the number of different point-earning events somewhat within a daily contest would help to reduce the likelihood that a single randomized event would play a determinant role in a contest’s final outcome.¹⁸⁵

180. See Fischer, *supra* note 61 (discussing the HotRoster game format).

181. See *Parlay Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/parlay> (last visited Oct. 2, 2015) (defining the term “parlay” in the gambling context as “a series of two or more bets so set up in advance that the original stake plus its winnings are risked on the successive wagers; broadly: the fresh risking of an original stake together with its winnings”); see also Allen Moody, *Sports Betting: How To Bet Parlays*, ABOUT SPORTS, <http://sportsgambling.about.com/od/advancedtheory/a/parlays.htm> (last visited Oct. 2, 2015) (defining the term “parlay” in sports betting and how parlay bets operate); see also *supra* note 27–32 and accompanying text (providing examples of sportsbooks that have faced criminal charges in the United States for taking a wide range of bets, including parlays); cf. Eddie Pells, *Legal Questions Arise for Fantasy Day Game Business*, ST. AUGUSTINE RECORD (St. Augustine, Fl.), Sept. 2, 2014, available at 2014 WLNR 24271716 (quoting gaming attorney Tony Cabot comparing a growing number of the newer, purported daily fantasy sports contests to “parlay cards”).

182. See *infra* notes 183–86 and accompanying text.

183. See Cabot et al., *Alex Rodriguez*, *supra* note 77, at 408 (discussing “[t]he law of large numbers. . .”).

184. See *supra* notes 83–84, 183 and accompanying text (discussing how fluke events such as game cancellations for reasons such as underground water main break could actually affect the result of a “daily fantasy sports” contest with low iterations).

185. See *supra* notes 85–88 and accompanying text (discussing how a low number of iterations in a “daily fantasy sports” contest could increase the level of “lucky shot chance” in the contest and thus reduce the overall ratio of skill to chance); see generally Marc Edelman, *Will New Lawsuit Help to Clarify the Legal Status of Daily Fantasy Sports?*, FORBES (Feb. 19, 2013, 9:33 AM), <http://www.forbes.com/sites/marcedelman/2013/02/19/will-new-lawsuit-help-to-clarify-the-legal-status-of-daily-fantasy-sports> (explaining that the higher the number of iterations in a fantasy sports game, the less the impact of a single act of randomness of the game’s results).

F. Take UIGEA Requirement of Multiple Players Across Multiple Real-World Teams Seriously

A sixth legal strategy for “daily fantasy sports” companies is to ensure that all hosted contests are truly based on the performance of real-world players across a significant range of real-world teams, and a significant range of real-world events.¹⁸⁶ Although the UIGEA’s technical requirement simply states that “no simulation sports team [be] based on the current membership of an actual team” or of two teams competing in a single game, it would seem to violate the spirit of the rule to allow fantasy teams consisting exclusively of members of an actual team except for just one player.¹⁸⁷ Indeed, a fantasy football team that is composed of all members of the New England Patriots, save for the team’s kicker, might be viewed as *de facto* betting on a real-world team.¹⁸⁸ Furthermore, contests based on individual sporting events such as DraftKings’s “daily fantasy golf” may likewise violate the UIGEA carve-out because arguably a single tournament of golf is just one event and thus a “daily fantasy golf” contest such as the one offered by DraftKings is not determined predominantly by accumulated statistical results . . . “*in multiple real-world sporting or other events.*”¹⁸⁹

G. Serve as a Contest Operator, and Not a Participant.

A seventh legal strategy is for “daily fantasy sports” companies to operate exclusively as the host sites and not as direct participants.¹⁹⁰ In other words, “daily fantasy sports” businesses should never structure games where participants bet “against the house.”¹⁹¹ There are numerous legal risks associated with operating “daily fantasy sports” contests in which participants compete “against the house,” rather than against each other.¹⁹² Most significantly, the UIGEA’s limited carve out for fantasy

186. See generally Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix) (2012) (stipulating this requirement to fall under the act’s limited fantasy sports carve-out).

187. *Id.*

188. See generally ROSE & OWENS, *supra* note 27, at 61 (raising the issue under the UIGEA about how a court would interpret a fantasy league team that is almost but not entirely composed of players on a single real-world team).

189. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix)(II) (emphasis added).

190. See *infra* notes 191–95 and accompanying text.

191. See *supra* notes 114, 179–81 and accompanying text (discussing the numerous legal issues related to such gaming formats. The more subtle issues with respect to “against the house” games appear exclusively within the following footnote).

192. See *supra* notes 114, 179–81 and accompanying text (discussing the Unlawful Internet Gambling Act issues pertaining to operating “daily fantasy sports” contests “against the house”). Other issues with “daily fantasy sports” contests played “against the house” may include the lack of sufficient funds to pay the winners if an unexpectedly large share of the entrants win their contest on a particular day, and the increased susceptibility to disgorgement of the host site’s profits under *qui tam* statutes or loss recovery statutes because where a “daily fantasy sports” contest is played directly against “the house,” “the house” can be seen as a contest winner rather than a mere operator and thus is subject to disgorgement under certain state gambling laws. See *Langone v. Kaiser*, No. 12 C 2073, 2013 WL 5567587, at *6–7 (N.D. Ill. Oct. 9, 2013) (explaining that “Illinois courts have held that ‘the winner and not the keeper of the house is liable to the loser,’ unless the keeper of the house also risks money in

sports contests only applies to those contests where “winning outcomes reflect the *relative* knowledge and skill of the participants.”¹⁹³ *Merriam-Webster Dictionary* defines the term “relative” as “a thing having a relation to or connection with or necessary dependence on another thing.”¹⁹⁴ Thus, one could reasonably conclude that the UIGEA’s “fantasy sports carve-out” only applies to contests in which participants are competing against other participants, and not against a host site.¹⁹⁵

H. Implement Bona Fide Mechanisms for Keeping Prohibited Participants from Operating the Website

Finally, an eighth legal strategy for “daily fantasy sports” companies to reduce their legal risk is to use appropriate technology to keep individuals of impermissible ages and locations from entering pay-for-play contests.¹⁹⁶ Use of age and location verification software is critical in this regard, and some of the more reputable fantasy sports contests are already beginning to do as much.¹⁹⁷ Along the same vein, “daily fantasy sports” companies should take precautions against allowing those with “insider information” to enter their contests, either directly or through third-party intermediaries.¹⁹⁸

the gambling activity,” and thus FanDuel’s style of “daily fantasy sports” contests where it is a mere operator does not place it at risk of disgorgement under the statute) (internal citations omitted). See generally *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 WL 1797648, at *9–10 (D. N.J. June 20, 2007), (concluding that defendant companies that host daily fantasy sports contests in exchange for a fixed fee but cannot make either more or less money than that fixed fees are not gambling winners under New Jersey’s *qui tam* statute).

193. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix)(II) (2012) (emphasis added).

194. See *Relative Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/relative> (last visited Oct. 2, 2015).

195. See generally Edelman, *BetAmerica’s Home Run*, *supra* note 60 (calling into doubt whether contests played against the host site can fall within the fantasy sports carve-out to the Unlawful Internet Gambling Enforcement Act).

196. See, e.g., *Star Fantasy Leagues Partners with Industry Leader, IDology, to Help Improve Player On-Boarding and Deliver the Ultimate Online Fantasy Gaming Experience*, GLOBE NEWSWIRE (July 16, 2013), <http://www.globenewswire.com/news-release/2013/07/16/560343/10040525/en/Star-Fantasy-Leagues-Partners-with-Industry-Leader-IDology-to-Help-Improve-Player-On-boarding-and-Deliver-the-Ultimate-Online-Fantasy-Gaming-Experience.html> (explaining that to “meet compliance regulations” the fantasy sports host site Star Fantasy “confirm[s] an identity and age in real-time” while “protect[ing] player privacy. . .”); Edelman, 7 *Legal Risks*, *supra* note 53 (discussing the importance of “Internet Protocol Tracking Technology” to keep potential users of less than a certain age or based in impermissible states from entering play-for-cash daily fantasy sports contests).

197. See *Star Fantasy Leagues Partners*, *supra* note 196 (discussing company’s approach to age and jurisdictional verification); cf. Adam Silver, Editorial, *Legalize and Regulate Sports Betting*, NEW YORK TIMES, Nov. 13, 2014, http://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html?_r=0 (suggesting that the successful legalization of sports gambling in the United States hinges upon implementing “minimum-age verification measures; geo-blocking technology to ensure betting is available only where it is legal. . .” and other similar mechanisms).

198. Cf. ROSE & OWENS, *supra* note 27, at 50 (explaining that “Nevada books once could take bets on future events, like elections and the Academy Awards [but] Nevada regulators realized that individuals might have insider information; for example, someone at the accounting firm counting up the votes for Best Picture has to know who the winner is, or the film name could not get into the envelope that is opened on-stage during the Oscars. Worse, powerful or corrupt insiders could rig an event.”); *id.* at 74 (explaining that “[v]enality and corruption” are generally the acts that lead to back-

VII. 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” company may legally operate its business in all fifty states. To the contrary, the 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 its contests are deemed to be “games of skill” in the states in which it operates. To achieve this end, “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

lash against forms of gambling and the establishment (or reestablishment) of Puritanical laws that shutdown certain forms of gambling).

continue to treat “daily fantasy sports” contests differently from generally illegal businesses such as online sportsbooks and poker websites.