

NOTE

A FANTASTIC GAMBLE: AN ANALYSIS OF DAILY FANTASY SPORTS UNDER THE UIGEA AND THE PREDOMINANCE TEST

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INTRODUCTION

“This note is brought to you by: DraftKings, the leading site for daily fantasy sports. ‘DraftKings – Welcome to the Big Time.’ Enter promo code BULAW17 to play free this week for a chance to win \$1 million in cash prizes.”

If the sarcasm is not yet apparent, I should make it clear that DraftKings is neither sponsoring nor affiliated in any way with this article. However, I cannot blame anyone for believing that daily fantasy sites may have finally run out of places to advertise and infiltrated legal academia. If you feel like lately there is nothing you can read, watch, or listen to without coming across an advertisement from a daily fantasy sports site, it may not be such a drastic exaggeration. In the summer leading up to the 2015 football season, DraftKings was airing a television commercial, on average, every ninety seconds.¹ During 2015, DraftKings spent over \$155 million on television advertisements alone with FanDuel trailing behind closely at over \$144 million.²

Before the meteoric rise of daily fantasy sports, fantasy football was regarded as a casual pastime shared among friends, family, and maybe even co-workers and focused on seasonal betting where the stakes were relatively low. The best you could hope for was to win a couple hundred dollars and a year of bragging rights. Fantasy sports were more about enjoying a season of fun and friendly competition than about prize money. Compare that image to today’s daily fantasy sports industry, in which players can anonymously compete each week

¹ Dustin Gouker, *DraftKings’ TV Blitz: One Commercial Every 1.5 Minutes; \$82 Million Spent in ‘15*, LEGAL SPORTS REP. (Sep. 2, 2015, 7:20 PM), <http://www.legalsportsreport.com/3483/draftkings-tv-commercial-blitz/> [<https://perma.cc/23TX-DYSR>].

² Suzanne Vranica, *Year in Review: The Best and Worst Ads of 2015*, WALL STREET J. (Dec. 28, 2015, 4:10 PM), <http://www.wsj.com/articles/year-in-review-the-best-and-worst-ads-of-2015-1451262576> [<https://perma.cc/PLG5-QN2G>].

against millions of strangers in an effort to win prizes of up to one million dollars.³ Such an incredible boom could only go unnoticed for so long before attracting the attention of state legislatures. New York, Nevada, and Illinois have already attempted to ban participation in daily fantasy sports outright, declaring that the outcome is too heavily reliant on chance rather than skill.⁴ Seasonal fantasy sports, on the other hand, have not come under the same scrutiny because, under the Unlawful Internet Gambling Enforcement Act (the “UIGEA”), “[a]ll winning outcomes reflect the relative knowledge and skill of the participants.”⁵

This note argues that U.S. courts should find that both daily fantasy sports and seasonal fantasy sports rely equally on skill and, as such, that the states must treat both variants of fantasy sports equally. Part I will provide a brief overview of the daily fantasy sports industry including its history, its rise in popularity, and an explanation of the recent scandal concerning a DraftKings employee. Part II will explain the legal challenges the daily fantasy sports industry faces in states like Nevada, New York, Florida, California, Pennsylvania, and Illinois. Part III will explain the rules and mechanics of traditional seasonal fantasy sports. Part IV will explain how daily fantasy sports are played and how it differs from seasonal fantasy sports. Part V analyzes the legality of internet gambling under the three most relevant regulations: the Interstate Wire Act (the “Wire Act”), the Professional Amateur Sports Protection Act (the “PAPSA”), and the Unlawful Internet Gambling Enforcement Act. Part VI analyzes the legality of fantasy sports under both state law and the UIGEA. Finally, Part VII analyzes how a state would determine whether daily fantasy sports are gambling through an assessment called the “predominance test.”

I. THE DAILY FANTASY SPORTS INDUSTRY

a. History of Fantasy Sports

The earliest forms of fantasy sports began in the 1950s.⁶ Wilfred Winkench, who was a part owner of the Oakland Raiders, a professional football team in California, created some early forms of fantasy sports, including fantasy golf,

³ Neil Green, *How the Winner of DraftKings Millionaire Maker Built his Winning Roster*, THE WASHINGTON POST, (Sep. 21, 2016), https://www.washingtonpost.com/news/fancy-stats/wp/2016/09/21/how-the-winner-of-draftkings-millionaire-maker-built-his-winning-roster/?utm_term=.f359a1a3e8d5 [<https://perma.cc/M3GN-XTQA>].

⁴ Nigel Duara, *States Crack Down on Fantasy Sports, Calling Them Games of Chance, Not Skill*, L.A. TIMES (Jan. 2, 2016, 12:10 PM), <http://www.latimes.com/nation/la-na-ff-fantasy-sports-bans-20160102-story.html> [<https://perma.cc/44FF-SFJJ>].

⁵ 31 U.S.C. § 5362(1)(E)(ix) (2012).

⁶ Andrew Baerg, *Just a Fantasy? Exploring Fantasy Sports*, 19 ELECTRONIC J. OF COMM. (2009), <http://www.cios.org/EJCPUBLIC/019/2/019343.html> (last visited May, 26 2017) [<https://perma.cc/AU8H-6YM7>].

football, and baseball.⁷ In 1962, Winkenbach collaborated with two journalists, Scotty Stirling and George Ross, to create the first fantasy football league.⁸ The popularity of fantasy sports quickly grew and came to include a wide variety of sports.⁹ Before the inception of the Internet, fantasy sports participants had to rely on print media in order to keep track of statistics and make informed decisions regarding their fantasy draft picks.¹⁰ Some participants would even buy supplemental books and newsletters in bookstores or via mail order which contained information about the professional athletes in order to gain an advantage over their competitors.¹¹

After the popularization of the Internet in the mid to late 1990s, the fantasy sports industry exploded, allowing participants to track statistics and host leagues all online.¹² What was once a niche activity quickly grew to become a mainstream hobby for many sports fans.¹³ This boom attracted the attention of larger media firms, such as Yahoo.com, ESPN, and CBS Sports, who then “absorbed a considerable segment of online fantasy sports activity and rendered fantasy sports information nearly ubiquitous.”¹⁴ The fantasy sports industry has enjoyed a steady growth through the 1990s and early 2000s.¹⁵ In the mid 2000s, the industry saw a slight decline, but following the passage of the Unlawful Internet Gambling Enforcement Act, which carved out an exception for fantasy sports, the industry again saw a steady growth.¹⁶ This renewed interest in fantasy sports brought on the pronounced arrival of Daily Fantasy Sports.¹⁷

b. Rise of the Daily Fantasy Sports Industry

The two largest companies in the daily fantasy sports industry are FanDuel, which was founded in 2009, and DraftKings, which was founded in 2012.¹⁸ Since their inceptions, these companies have arguably been the primary cause for the fantasy sports industry’s nearly exponential growth.¹⁹ In 2015 alone, the

⁷ *Id.*

⁸ *Id.*

⁹ *See id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Baerg, *supra* note 6.

¹⁴ *Id.*

¹⁵ Andrew Powell-Morse, *The Unstoppable Rise of Fantasy Sports*, SEATSMART (Nov. 4, 2015), <http://seatsmart.com/blog/fantasy-sports-unstoppable-rise/> [https://perma.cc/6YZA-ZZKT].

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *See id.*

two companies saw growth of 41% and increased the estimated number of U.S. fantasy sports players by 15 million.²⁰ To put that into perspective, “[i]n 2014, 16% of all American adults were playing fantasy sports of some kind. A year later, that number is now 22%. The industry managed to attract 6% of the adult population of the US in a single year.”²¹ If that alone isn’t shocking, in 2013, the NFL produced \$10 billion in revenue, while the fantasy sports industry produced between \$40 billion and \$70 billion, rivaling the casino industry’s \$70 billion revenue.²² “[T]he fantasy sports industry has managed to make more money than the actual sports they’re based on.”²³ Obviously, such revenue figures may not have equal bearing on the respective profits of both industries, but the figures are nevertheless impressive.

To further demonstrate the daily fantasy sports industry’s recent growth, in 2012, the average adult player spent a total of \$80 on fantasy sports during the year.²⁴ Five dollars was spent on daily fantasy sports, \$60 was spent on seasonal fantasy sports, and \$15 was spent on related fantasy materials, such as premium website memberships, magazines, software, and mobile apps.²⁵ In 2015, the average adult player spent a total of \$465 on fantasy sports: \$257 was spent on daily fantasy sports, \$162 was spent on seasonal fantasy sports, and \$46 was spend on related materials.²⁶

One main reason for this incredible growth is an extremely aggressive advertising campaign launched by FanDuel and DraftKings.²⁷ In 2015, DraftKings and FanDuel, combined, spent nearly \$300 million on television advertising.²⁸ The two companies’ massive advertising budgets are actually attributed with adding 0.5% to the total TV advertising industry’s growth in the third quarter of 2015.²⁹

c. The Daily Fantasy Sports Scandal

The rise of the daily fantasy sports industry has not been without controversy.

²⁰ *Id.*

²¹ Powell-Morse, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ *Numbers at a Glance*, FANTASY SPORTS TRADE ASS’N, <http://fsta.org/research/industry-demographics/> (last visited Jan. 27, 2016) [<https://perma.cc/ZNU3-RLXZ>].

²⁵ *See id.*

²⁶ *Id.*

²⁷ *See* Miles Udland, *Fantasy Sports Companies Spend So Much on Commercials They’re Moving the Needle on TV Ad Spending*, BUS. INSIDER (Oct. 6, 2015, 2:56 PM), <http://www.businessinsider.com/draftkings-fanduel-daily-fantasy-sports-advertising-2015-10> [<https://perma.cc/HBT4-JVK8>].

²⁸ Vranica, *supra* note 2.

²⁹ Udland, *supra* note 27.

In October of 2015, a scandal erupted after an employee at DraftKings admitted to inadvertently leaking data before the start of the NFL's third week of regular season games.³⁰ During that same week, the employee won a sum of \$350,000 by playing daily fantasy sports on FanDuel.³¹ The employee's actions have been compared to insider trading, due to the distinctly unfair advantage a player has with early access to such information.³² "A spokesman for DraftKings acknowledged that employees of both companies had won big jackpots playing at other daily fantasy sites."³³ Although both had already prohibited their employees from playing on their own company's sites, FanDuel and DraftKings instituted a temporary policy banning employees from playing on any daily fantasy sports site.³⁴ The information leak has called into question the companies' abilities to regulate themselves in regards to protecting such sensitive information.³⁵ It's possible that this scandal has led to increased scrutiny of daily fantasy sports by state and federal officials.

II. LEGAL CHALLENGES TO DAILY FANTASY SPORTS

a. Nevada

On October 15th, 2015, the Nevada Gaming Control Board issued a cease and desist order to FanDuel and DraftKings.³⁶ The board found that the activity of daily fantasy sports constitutes "sports wagering."³⁷ Board Chairman A.G. Burnett stated, "Since offering daily fantasy sports in Nevada is illegal without the proper license, all unlicensed activities must cease and desist from the date of this notice."³⁸ However, this does not mean that FanDuel and DraftKings cannot eventually operate in Nevada; the Gaming Control Board said that the companies can apply for a Nevada gaming license to operate a sports pool.³⁹

³⁰ Joe Drape & Jacqueline Williams, *Scandal Erupts in Unregulated World of Fantasy Sports*, N.Y. TIMES (Oct. 5, 2015), http://www.nytimes.com/2015/10/06/sports/fanduel-draftkings-fantasy-employees-bet-rivals.html?ref=sports&_r=0 [https://perma.cc/BAS5-B2CD].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ Howards Stutz, *Nevada Gaming Regulators Ban Daily Fantasy Sports from the State*, L.A. REV. J. (Oct. 15, 2015, 6:30 PM), <http://www.reviewjournal.com/business/casinos-gaming/nevada-gaming-regulators-ban-daily-fantasy-sports-the-state> [https://perma.cc/445U-AXKZ].

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

In response, the companies sent emails to their customers to sign an online petition objecting to the board's decision.⁴⁰ "FanDuel criticized the gaming board's decision for only benefiting 'incumbent Nevada casinos,' and DraftKings called it an 'exclusionary approach' against the fantasy sports industry."⁴¹ While the companies could choose to apply for a gaming license to operate in Nevada legally, the process may prove futile or even produce further negative consequences.⁴² Because Nevada views daily fantasy sports as "sports wagering," which is illegal in most states, in order for FanDuel and DraftKings to obtain gaming license, they would have to cease operation in those states which prohibit sports wagering.⁴³ The companies have withdrawn from Nevada and are not expected to apply for gaming licenses.⁴⁴

b. New York

On December 11, 2015, Justice Manuel Mendez, a New York Supreme Court judge, granted a preliminary injunction, filed by Attorney General Eric Schneiderman, to stop DraftKings and FanDuel from operating in the state of New York.⁴⁵ Schneiderman contended that, under New York state law, the companies were operating illegal gambling sites.⁴⁶ FanDuel and DraftKings objected to the ruling, stating that their sites take in entry fees, rather than wagers.⁴⁷ However, the court noted that in determining the illegality of potential gambling sites, "New York State penal law does not refer to 'wagering' or 'betting,' rather it states that a person, 'risks something of value' . . . [T]he payment of an 'entry fee' as high as \$10,600 on one or more contests daily could certainly be deemed risking 'something of value.'"⁴⁸

Despite the ruling, an appellate court judge granted FanDuel and DraftKings an emergency temporary stay from the lower court's decision.⁴⁹ In March of

⁴⁰ J.D. Morris, *What's Next for DraftKings and FanDuel after Nevada Gaming Board's Ruling?*, LAS VEGAS SUN (Oct. 16, 2015, 4:45 PM), <http://lasvegas-sun.com/news/2015/oct/16/draftkings-fanduel-circulate-petition-for-return-t/> [<https://perma.cc/78JJ-BZFD>] (last updated Oct. 16, 2015, 6:29 PM).

⁴¹ *Id.*

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

⁴⁵ Darren Rovell & David Purdum, *New York Supreme Court Judge Rules Against DraftKings, FanDuel*, ESPN (Dec. 11, 2015), http://espn.go.com/chalk/story/_/id/14342458/new-york-supreme-court-judge-bars-draftkings-fanduel-operating-state [<https://perma.cc/2SMF-CVEU>].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Darren Rovell, *DraftKings, FanDuel Granted Emergency Stay to Continue in N.Y.*,

2016, FanDuel and DraftKings each signed settlement agreements with the Attorney General's office, promising to cease all operations in New York until September of 2016.⁵⁰ However, when New York Governor Cuomo signed a bill in August of 2016 formally legalizing and regulating daily fantasy sports, both companies were able to resume operations within the state.⁵¹

c. Possible Future Action

Nevada and New York are by no means the only states to have considered the issue of daily fantasy sports.⁵² Florida, California, Pennsylvania, and Illinois have also introduced legislation to address daily fantasy sports.⁵³ There are ongoing investigations in South Dakota, Washington, and Tennessee.⁵⁴ Some reports indicate that multiple offices of the Department of Justice, including New York City, Boston, and Tampa, are investigating the issue.⁵⁵ Senators Richard Blumenthal and Robert Menendez requested that the Federal Trade Commission investigate daily fantasy sports on consumer protection grounds.⁵⁶

d. Class-Action Lawsuits

Since October 2016, there have been dozens of private class-action lawsuits initiated against FanDuel and DraftKings, including two that additionally named individuals, such as company executives, contest winners, and investors.⁵⁷ “The claims made by the plaintiffs in the cases are varied. Some of the allegations pertain to false advertising, recovery of wagering losses, civil conspiracy, neg-

ESPN (Dec. 12, 2015, 11:01 AM), http://espn.go.com/chalk/story/_/id/14344676/appeals-court-grants-stay-allowing-draftkings-fanduel-continue-operating-new-york [https://perma.cc/2C7P-STWM].

⁵⁰ Chris Grove, *FanDuel, DraftKings Reach Settlement with New York Attorney General*, LEGAL SPORTS REP. (Mar. 21, 2016, 9:00AM), <http://www.legalsportsreport.com/9130/fanduel-draftkings-reach-ny-settlement/> [https://perma.cc/GL9L-P3NS].

⁵¹ Dustin Gouker, *Daily Fantasy Sports are Back in Business in New York: Gov. Cuomo Signs Bill*, LEGAL SPORTS REP., (Aug. 3, 2016, 1:53PM), <http://www.legalsportsreport.com/10890/ny-enacts-dfs-law/> [https://perma.cc/6XWJ-6AMW].

⁵² Ryan Rodenberg, *Biggest Issues for Daily Fantasy After New York Rulings*, ESPN (Dec. 11, 2015), http://espn.go.com/chalk/story/_/id/14342581/daily-fantasy-new-york-rulings-biggest-issues-dfs-industry [https://perma.cc/HS7C-2T3W].

⁵³ *Id.*; Ryan Rodenberg, *Daily Fantasy Sports State-by-State Tracker*, ESPN (Aug. 27, 2016, 2:38 PM), http://www.espn.com/chalk/story/_/id/14799449/daily-fantasy-dfs-legalization-tracker-all-50-states [https://perma.cc/787H-CKJJ].

⁵⁴ Rodenberg, *supra* note 52.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

ligence, fraud, unjust enrichment, misuse of inside information and illegal gambling under various laws.”⁵⁸ While all the lawsuits are at very preliminary stages, FanDuel and DraftKings will very likely “argue that many of the lawsuits are barred because of the presence of mandatory arbitration clauses in the DFS operators’ terms and conditions.”⁵⁹

III. HOW TO PLAY SEASONAL FANTASY SPORTS

To properly understand the differences between daily fantasy sports and seasonal fantasy sports, a quick guide explaining each mode will be provided. Since fantasy football is by far the most popular fantasy sport, it will be the main focus of this article’s comparison.⁶⁰

Seasonal fantasy football is a game in which players take on the role of a “general manager of your own football team. . . You select a roster of NFL athletes for your team and use their real-life statistics in order to compete against other” team managers.⁶¹ A league may consist of between four and thirty managers, with an average of about twelve.⁶² Twelve is an ideal size for a seasonal fantasy league because “each team ends up with a nice mix of talent;” meaning that every team has a few star athletes, but users also need to put in effort to find less obvious athletes to fill out the rest of their roster.⁶³

Team managers choose athletes for their teams through an event called a draft.⁶⁴ There are multiple types of draft methods for leagues to utilize in picking their teams.⁶⁵ The most common draft mode is called a “snake draft,” in which the managers are arranged in a set order, and then managers take turns picking athletes until their rosters are full.⁶⁶ For example, Manager 1 picks one athlete, then Manager 2, then Manager 3 and so on until the last team in the order picks their team’s first athlete, which completes the first “round” of the draft.⁶⁷ To

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Pras Subramanian, *5 Surprising Stats About Fantasy Sports*, YAHOO! FIN. (Sept. 4, 2013), <http://finance.yahoo.com/blogs/breakout/5-surprising-stats-fantasy-sports-154356461.html?nf=1&bypass=true>. [<https://perma.cc/9HYG-7GTQ>].

⁶¹ A.J. Mass, *How to Play Fantasy Football*, ESPN (June 24, 2014), http://espn.go.com/fantasy/football/story/_page/nfldk2k14intro/first-timer-guide [<https://perma.cc/E9KM-9R8Y>].

⁶² *See id.*

⁶³ *See id.*

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ *See id.*

begin the second round, the order is reversed.⁶⁸ After the second round is complete, the order is again reversed, so that the teams remain balanced.⁶⁹ The order is reversed for each subsequent round, creating a serpentine-like pattern, which gives the “snake-draft” its name.⁷⁰

Another way managers can choose their athletes is through an auction process.⁷¹ “In an auction format, teams all start with the same amount of fantasy money to bid with and take turns nominating [an athlete]. The highest bid on a nominated [athlete] wins, but of course, the winning [manager] now has less money left to bid on subsequent [athletes].”⁷² This incentivizes managers to budget their money wisely in order to have a well-balanced team.⁷³

After the managers have assembled their teams and the NFL season begins, they then start to compete with the other managers in their league.⁷⁴ While there are many different ways in which managers can compete, the most popular is called “head-to-head.”⁷⁵ In a head-to-head league, a manager will be matched up with a different opposing manager each week of the regular football season.⁷⁶ The team with the most cumulative points at the end of each week will be declared the winner for that week.⁷⁷ Near the end of the NFL regular season, “the top teams in the league in terms of wins and losses will face each other in a single-elimination playoff format, with the last team standing being declared the champion.”⁷⁸

Team managers are awarded points when the NFL athletes in their lineup perform well in their games.⁷⁹ Team managers defeat their opponents by scoring more cumulative points in a given week.⁸⁰ Scoring is determined based on the league’s predetermined point allocation settings.⁸¹ While some leagues only award an individual NFL athlete points for scoring a touchdown, others are more comprehensive and reward athletes for actions like gaining yardage or catching a pass and subtract points for actions like throwing interceptions or fumbling the

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Id.*

⁷² *See id.*

⁷³ *See id.*

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.*

⁷⁹ *See Mass, supra note 61.*

⁸⁰ *See id.*

⁸¹ *See id.*

ball.⁸²

Once team managers have drafted their teams, they are required to supervise and control their rosters throughout the season.⁸³ The main way team owners manage their rosters is by “setting their lineups” each week.⁸⁴ Team owners set their lineups by choosing, from all of their team’s athletes, which athletes to “start” and which athletes to “sit.”⁸⁵ Only points generated by athletes who are chosen to “start” count towards a team owner’s cumulative point total for the week.⁸⁶ Team managers may only “start” a limited number of athletes each week and must “sit” the remaining athletes on their roster.⁸⁷ In many leagues, team managers are allowed to “start” one quarterback, two running backs, two wide receivers, one tight end, one team defense, one kicker, and one flex position, which can be either an additional running back, wide receiver, or tight end.⁸⁸ Team managers fill these slots with the athletes they wish to “start” and the team’s remaining athletes will “sit.”⁸⁹

Some of the most important decisions a team manager can make occur when adding or dropping athletes from a team’s roster.⁹⁰ If an athlete becomes injured or the manager no longer has confidence in an athlete’s ability to score points, the manager can drop that athlete and add a different athlete who is not already on another manager’s team.⁹¹ An athlete who is not already on a team is called a “free agent.”⁹² If more than one team manager wishes to add the same free agent to their team in a given week, the “waiver wire” will determine which manager ultimately acquires the free agent.⁹³ The waiver wire is an ordering system of all the teams in a league that is based on the teams’ performances thus far in the season.⁹⁴ In most leagues, the waiver wire is ordered from worst to

⁸² *See id.*

⁸³ *See* Alex Gelhar, *How to Play Fantasy Football: A Beginner’s Guide*, NFL (Aug. 31, 2016, 02:16 PM), <http://www.nfl.com/fantasyfootball/story/0ap3000000692955/article/how-to-play-fantasy-football-a-beginners-guide> [<http://perma.cc/DM5R-5MD3>].

⁸⁴ *See id.*

⁸⁵ *See id.*

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See* Jeff Gray, *NFL Waiver System Explained*, SBINATION.COM (Feb. 3, 2014, 1:43pm), <http://www.sbnation.com/nfl/2014/2/3/5351372/2014-nfl-waiver-wire-how-it-works-guide> [<http://perma.cc/EQJ8-3EZW>].

best, meaning that the teams with the fewest number of wins are high in the order and the teams with the most number of wins are low in the order.⁹⁵ This is done in an attempt to allow managers who may not have drafted the best athletes initially to stay competitive with the top teams in their league and to prevent the top teams from acquiring even more of the best athletes.⁹⁶

The other way that managers can control their team's roster is through trades.⁹⁷ Team managers can communicate with one another and propose trades for their athletes.⁹⁸ The key to making trades is ensuring that both team managers are getting a fair deal.⁹⁹ To ensure that trades are fair, many leagues require that when two team managers wish to trade athletes, the other managers in the league have to vote either to approve or veto a trade depending on the deal's fairness.¹⁰⁰

The betting or gambling aspect of seasonal fantasy football is very simple.¹⁰¹ Most seasonal fantasy football leagues that compete for money have their members pay league dues before the start of each season.¹⁰² At the end of the season, the dues are then given to the league's winner or winners, depending on how the league is organized.¹⁰³ For example, a league may have twelve members and each member pays dues of ten dollars per season.¹⁰⁴ If the league decides to only reward the top team manager, the winner of that league would then win a total of \$120 at the end of the season.¹⁰⁵ However, many leagues decide to reward more than one of the top team managers.¹⁰⁶ For example, if a league has twelve members and each member pays dues of ten dollars, the winning member might receive \$60; the second place manager would receive \$40; and the third place team would receive \$20.

⁹⁵ *Id.*

⁹⁶ See *Fantasy Football Glossary*, NFL, <http://www.nfl.com/fantasyfootball/help/fantasyglossary> (last visited May 26, 2017) [<http://perma.cc/J22G-UA8V>].

⁹⁷ Mass, *supra* note 61.

⁹⁸ Gelhar, *supra* note 83.

⁹⁹ See Mass, *supra* note 61.

¹⁰⁰ *Id.*

¹⁰¹ *Fantasy Sports Betting*, GAMBLINGSITES.ORG, <http://www.gamblingsites.org/sports-betting/beginners-guide/fantasy/> (last visited Feb. 3, 2016) [<https://perma.cc/C296-QZ4A>].

¹⁰² See Philip Michaels, *ESPN Fantasy Football leagues can collect dues through crowdfunding site Tilt*, PCWORLD, <http://www.peworld.com/article/2462887/espn-fantasy-football-leagues-can-collect-dues-through-crowdfunding-site-tilt.html> (last visited May 25, 2017) [<https://perma.cc/BNQ5-8YBR>].

¹⁰³ See Brad Perniciaro, *Creating and Collecting Fantasy Football League Fees*, CHEATSHEET WAR ROOM (Mar. 3, 2017), <http://www.cheatsheetwarroom.com/blog/post/establish-fantasy-football-league-fees.aspx#.WLmmCBIRK34> [<https://perma.cc/DNQ4-9P97>].

¹⁰⁴ See Mass, *supra* note 61.

¹⁰⁵ See *id.*

¹⁰⁶ See Michaels, *supra* note 102.

IV. HOW TO PLAY DAILY FANTASY SPORTS

Similar to seasonal fantasy football, the daily fantasy football participant takes on the role of a team manager and competes against other team managers.¹⁰⁷ However, unlike seasonal fantasy football, in which the competition takes place over an entire NFL season, each daily fantasy football contest, as they are called, takes place over only one week.¹⁰⁸ Daily fantasy football also differs from seasonal fantasy football in the respect that participants do not need to compete each week if they do not wish to.¹⁰⁹ Since contests are offered weekly, participants can decide each week whether they want to enter a contest or not.¹¹⁰ This is one of the reasons why daily fantasy has become so popular. As opposed to seasonal fantasy football, in which participants can either win or lose for the entire season, a daily fantasy football participant can win one week, lose the next, not participate the following week, or enter four contests the following week if they wish.¹¹¹ Since each participant pays a fee to enter the weekly competitions, the high frequency of contests makes daily fantasy football considerably more lucrative than seasonal fantasy football for the sites who operate them.¹¹² In addition, whereas the typical size of a seasonal fantasy football league is around twelve members, daily fantasy football contests can involve up to close to half a million entrants.¹¹³

While both variants of fantasy football revolve around the manager drafting a team of athletes, there are significant differences in the way teams are drafted and structured.¹¹⁴ In daily fantasy sports, the most popular type of contest gives managers a set “salary cap” from which to build a team.¹¹⁵ The NFL athletes are

¹⁰⁷ See *Daily Fantasy Football 101*, DAILY FANTASY SPORTS 101 (Sept. 16, 2016), <http://www.dailyfantasysports101.com/football/> [<https://perma.cc/A6JQ-QW9A>].

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See Mike Davis, *Seasonal vs. Daily/Weekly Fantasy Football*, FF TODAY (July 2, 2014), http://www.fftoday.com/articles/davis/14_q&a_seasonal_daily.html [<https://perma.cc/8Q9P-QXTP>].

¹¹² See Drew Harwell, *The Rise of Daily Fantasy Sports, Online Betting's Newest Empire*, WASH. POST (July 28, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/?utm_term=.5ee8ec82fa5d [<https://perma.cc/59GM-555W>].

¹¹³ See *Daily Fantasy Football 101*, *supra* note 107; *The Beginner's Guide to Fantasy Football*, HOGS TROUGH, <http://www.hogstrough.com/how-to-play-fantasy-football/> (last visited May 26, 2017) [<https://perma.cc/M8YK-A6FD>].

¹¹⁴ See *Fantasy Football Overview: Daily Fantasy Football vs. Season Long*, DK LEGENDS (Sept. 12, 2016), <https://dklegends.com/fantasy-football-overview-daily-fantasy-football-vs-season-long/> [<https://perma.cc/AK9Z-4TY7>].

¹¹⁵ *Daily Fantasy Football 101*, *supra* note 107.

assigned “salaries,” which vary each week depending on their predicted performance.¹¹⁶ The managers then must decide how to spend their budget in order to fill their roster with the best possible athletes, given their budget restrictions.¹¹⁷ For example, the most common budget for a DraftKings contest is fifty thousand dollars, with which the manager can draft nine athletes.¹¹⁸ If the manager chooses some of the NFL’s top athletes, whose salaries are expensive compared to other NFL athletes, the manager must then fill the rest of his team with athletes whose salaries are considerably lower, and are less likely to perform well.¹¹⁹ Therefore, the key to succeeding in daily fantasy football contests becomes the ability to recognize value.¹²⁰ NFL athletes who have been assigned a low salary but whom the manager believes will perform well are called “sleepers.”¹²¹ As will be explained later, these athletes become crucial to finding success in daily fantasy football.¹²²

Another way in which daily fantasy football differs from seasonal fantasy football is that athletes can be drafted to more than one team.¹²³ In seasonal fantasy football, if a manager drafted an athlete, that athlete would then be unavailable for other managers to draft onto their teams.¹²⁴ However, in a daily fantasy football contest, there are no restrictions on how many teams an athlete can be drafted to.¹²⁵ Hypothetically, the same athlete could be drafted onto every team in a daily fantasy football contest.¹²⁶

While you might think this aspect of daily fantasy football would make daily fantasy football more reliant on chance, it is in fact the opposite. Many contest

¹¹⁶ See Chris Reilly, *Daily Fantasy Sports are Exploding and Changing the Way People Watch Sports in America*, DAILY ROTO, <http://thedailyroto.com/daily-fantasy-sports-is-exploding-and-changing-the-way-people-watch-sports-in-america/> [https://perma.cc/CR6D-V3ST].

¹¹⁷ *Daily Fantasy Football 101*, *supra* note 107.

¹¹⁸ See *Managing Weekly Fantasy Football Salary Caps*, FOX SPORTS (Aug. 8, 2014, 1:15 PM), <http://www.foxsports.com/fantasy/football/story/managing-weekly-fantasy-football-salary-caps-080814> [https://perma.cc/NNA3-5YNQ].

¹¹⁹ *See id.*

¹²⁰ *Daily Fantasy Football 101*, *supra* note 107.

¹²¹ ESPN Fantasy Staff, *Fantasy Football Sleepers, Busts, and Breakouts for 2015*, ESPN (Aug. 6, 2015, 3:06 PM), http://www.espn.com/fantasy/football/story/_/id/13063822/identifying-sleepers-breakouts-busts-2015-season-fantasy-football [https://perma.cc/3PD4-BL5K].

¹²² *Daily Fantasy Football 101*, *supra* note 107.

¹²³ Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV GAMING L.J. 201, 209 (2015).

¹²⁴ *See Mass*, *supra* note 61.

¹²⁵ Trippiedi, *supra* note 123, at 220.

¹²⁶ *Id.*

participants fill their rosters with the athletes who are predicted to perform well.¹²⁷ However, the exact lineup that is statistically predicted to perform well very seldom turns out to match the exact lineup with the most cumulative points.¹²⁸ Therefore, some strategies dictate adding at least one sleeper to a roster in order to “pull away from the pack.”¹²⁹ Having described how the two variants of fantasy sports differ from one another it is time to turn to the legal issues at the heart of this note.

V. LEGALITY OF INTERNET GAMBLING

At the federal level, there are three laws that regulate sports betting:¹³⁰ the Interstate Wire Act (“Wire Act”),¹³¹ the Professional and Amateur Sports Protection Act (“PASPA”),¹³² and the Unlawful Internet Gambling Enforcement Act (“UIGEA”).¹³³ Under these three acts fantasy sports have, thus far, been widely considered legal.¹³⁴ However, each act has a unique impact on Internet gambling and sports betting.¹³⁵

a. The Interstate Wire Act

The Wire Act was passed in 1961 in an attempt to weaken the influence of organized crime in America by prohibiting illegal sports betting.¹³⁶ The act states that:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers . . . which entitles the recipient to receive money or credit as a result of bets or wagers . . . shall be fined under this title or imprisoned not more than two years, or both.¹³⁷

¹²⁷ See Knup, *FanDuel GPP Tournament Tips*, DAILY FANTASY SPORTS 101 (Nov. 14, 2014), <http://www.dailyfantasysports101.com/fanduel-gpp-tournament-tips/> [<https://perma.cc/HHC6-SNNZ>].

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Trippiedi, *supra* note 123, at 210.

¹³¹ Interstate Wire Act, 18 U.S.C. § 1084 (2012).

¹³² Professional & Amateur Sports Protection Act, 28 U.S.C. §§ 3701–04 (2012).

¹³³ Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361–67 (2012).

¹³⁴ Jon Boswell, Note, *Fantasy Sports: A Game of Skill that is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 CARDOZO ART & ENT. L.J. 1257, 1260-62 (2008).

¹³⁵ See Trippiedi, *supra* note 123, at 210.

¹³⁶ *Id.* at 203.

¹³⁷ Interstate Wire Act, 18 U.S.C. § 1084 (2012).

Because the act was not intended to completely prevent the public from gambling, it only prohibited businesses from taking bets over wires.¹³⁸ As such, gambling became popular online shortly after the invention of the Internet.¹³⁹ While the Second Circuit held in 2001 that the Wire Act prohibited Internet gambling,¹⁴⁰ the Fifth Circuit held in 2002 that the Wire Act only “concerns gambling on sporting events or contests.”¹⁴¹ Further, in 2011, the Department of Justice declared that the Wire Act only prohibits sports betting activities.¹⁴²

b. The Professional and Amateur Sports Protection Act

The Professional and Amateur Sports Protection Act was passed in 1992 as a response to rise in the legalization, and in some cases promotion, of sports betting among certain states.¹⁴³ The act states that:

It shall be unlawful for – (1) a government entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.¹⁴⁴

At the time, numerous states were considering state sponsored sports lotteries,¹⁴⁵ many of which involved picking a group of winning teams.¹⁴⁶ While professional sports leagues, such as the NFL, sought congressional assistance due to concerns that such sports lotteries could threaten their businesses,¹⁴⁷ Congress’ main concern was maintaining the integrity of the sports.¹⁴⁸ Senator Bill Bradley, a former NBA basketball player, feared that “children attracted to

¹³⁸ *See id.*

¹³⁹ *E.g.*, *United States v. Cohen*, 260 F.3d 68, 70 (2d Cir. 2001).

¹⁴⁰ *Id.* at 74-75.

¹⁴¹ *In re Mastercard Int’l Inc.*, 313 F.3d 257, 262 (5th Cir. 2002).

¹⁴² Tony Batt, *DOJ’s Wire Act Ruling Lights Fire for Federal Regulation*, GAMBLINGCOMPLIANCE, https://law.uark.edu/documents/gallini/gallini-doj-wire_act_ruling_lights_fire_for_federal_regulation.pdf [<http://perma.cc/AG7Z-TKYW>].

¹⁴³ Anthony N. Cabot & Robert D. Faiss, *Sports Gambling in the Cyberspace Era*, 5 CHAP. L. REV. 1, 4-5 (2002).

¹⁴⁴ 28 U.S.C. § 3702 (1992).

¹⁴⁵ Cabot & Faiss, *supra* note 143, at 5.

¹⁴⁶ Trippiedi, *supra* note 123, at 212.

¹⁴⁷ *Id.*

¹⁴⁸ Cabot & Faiss, *supra* note 143, at 6.

sports would soon associate sports with gambling, rather than with personal achievement or sportsmanship.¹⁴⁹ Congress was also concerned that sports betting could lead to athletes attempting to fix games by altering their performances based on wagers being made.¹⁵⁰

c. The Unlawful Internet Gambling Act

Since 1998, Congress had been considering some form of Internet gambling legislation.¹⁵¹ Despite polls showing that the approximately eighty-six percent of Americans did not believe that the government should prohibit Internet gambling, Republican congressmen made numerous attempts to pass legislature to prohibit online gambling.¹⁵² Just before the Democrats took control of both the House and the Senate in 2006, Republican lawmakers successfully passed the UIGEA by pushing it through the legislature “as an add-on to a completely unrelated Homeland Security bill destined to sail through the Senate with any real opposition.”¹⁵³

The UIGEA prohibits gambling businesses from accepting any sort of monetary payment “in connection with the participation of another person in unlawful Internet gambling.”¹⁵⁴ Note, however, that because the act only prohibits receiving monetary payments, there are no penalties for private citizens who deposit money in order to gamble online.¹⁵⁵ “The government’s prohibitions on electronic fund transfers or wires are virtually unenforceable. Due to the millions of transactions processed per day, it is almost impossible for banks to seed through all these transactions to search for fraudulent ones.”¹⁵⁶

Although the act proved largely ineffective, some still opposed any such regulation.¹⁵⁷ In September 2009, a non-profit gaming industry trade association called the Interactive Media Entertainment & Gaming Association challenged

¹⁴⁹ *Id.* at 5-6.

¹⁵⁰ *Id.* at 6.

¹⁵¹ Lawrence G. Walters, *On Second Thought . . . What Does the UIGEA Really Mean for Internet Gambling?*, WALTERS L. GROUP, <http://lawrencewalters.com/uiega/#ref8> (last visited May 26, 2017) [<https://perma.cc/X2ZG-F9U8>].

¹⁵² *See id.*

¹⁵³ *Id.*

¹⁵⁴ 31 U.S.C. § 5363 (2012).

¹⁵⁵ Joe Falchetti, *UIGEA, 6 Years Later*, CALVINAYRE.COM (Oct. 15, 2012), <http://calvinayre.com/2012/10/15/business/unlawful-internet-gambling-enforcement-act-2006/> [<http://perma.cc/J8MG-74PB>].

¹⁵⁶ *Id.*

¹⁵⁷ *See Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 114-15 (3d Cir. 2009).

the constitutionality of the UIGEA by bringing suit against the Attorney General, claiming that the statute was too vague.¹⁵⁸ The Third Circuit upheld the law, finding that “the Act clearly provides a person of ordinary intelligence with adequate notice of the conduct that it prohibits.”¹⁵⁹

The court did, however, offer some useful insight into how the act should be interpreted.¹⁶⁰ The court stated that the “Act prohibits a gambling business from knowingly accepting certain financial instruments from an individual who places a bet over the Internet if such gambling is illegal at the location in which the business is located or from which the individual initiates the bet.”¹⁶¹ In other words, because the UIGEA prohibits accepting financial instruments only in connection with *unlawful* Internet gambling, the UIGEA does not prohibit Internet gambling if it is legal where the individual makes the bet.¹⁶² For example, the UIGEA does not prohibit a gambling business from accepting a bet from an individual from Delaware because Internet gambling is lawful under Delaware state law.¹⁶³ Conversely, the UIGEA prohibits a gambling business from accepting a bet from an individual in Nevada because Internet gambling is unlawful under Nevada state law.¹⁶⁴

Although the Interactive Media Entertainment & Gaming Association technically lost the case, they and other gambling businesses saw the court’s ruling as a victory.¹⁶⁵ “At the time of the verdict, only six out of fifty U.S. states had laws that specifically outlawed online gambling.”¹⁶⁶ Therefore, the UIGEA could only prohibit accepting bets from individuals in those six states.¹⁶⁷

VI. THE LEGALITY OF FANTASY SPORTS

a. Fantasy Sports under State Law

In *Federal Communications Commission v. American Broadcasting Co., Inc.*, the Supreme Court held that “there are three essential elements of a ‘lottery, gift enterprise, or similar scheme’: (1) the distribution of prizes; (2) according to

¹⁵⁸ *Id.* at 115.

¹⁵⁹ *Id.* at 116.

¹⁶⁰ *See id.*

¹⁶¹ *Id.*

¹⁶² *See id.*

¹⁶³ *See Interactive Media Entm’t & Gaming Ass’n v. Att’y Gen. of U.S.*, 580 F.3d 113, 116 (3d Cir. 2009).

¹⁶⁴ *See id.*

¹⁶⁵ Falchetti, *supra* note 155.

¹⁶⁶ *See id.*

¹⁶⁷ *Id.*

chance; (3) for consideration.”¹⁶⁸ Almost every state has adopted this test in their anti-gambling statute.¹⁶⁹

One must look to state court interpretations of various anti-gambling statutes in order to ascertain the legality of fantasy sports in a specific state. Since *consideration* and *prize* elements are present in a typical fantasy league, where participants pay an entry fee with the understanding that they will win a prize if they win their league, under most state laws, the legality of such leagues turns on whether the leagues’ outcomes depend on the requisite level of chance.¹⁷⁰

“In order to determine whether a contest is one of skill or chance, most states rely on the ‘dominant factor test,’ or ‘predominance test.’”¹⁷¹ In determining whether the card game bridge was a game of chance, the Supreme Court of California stated “[t]he test is not whether the game contains an element of chance or an element of skill, but what is the dominating factor that determines the result of the game.”¹⁷² While most states use the dominant factor test,¹⁷³ some states, including Arizona, Arkansas, Florida, Hawaii, Illinois, Louisiana, Maryland, and Tennessee,¹⁷⁴ “have taken an even stronger anti-gambling stance, choosing to prohibit even those games whose outcomes are primarily determined by skill.”¹⁷⁵

While the factors of the predominance test may seem well defined, it is unclear how a court should apply the test to a particular game, in order to determine whether it is dominated by chance or skill.¹⁷⁶ However, the Wisconsin anti-gambling statute provides a definition of “skill,” which may be helpful for our understanding:

“[S]kill” means, within an opportunity provided for all players fairly to obtain prizes or rewards of merchandise, a player’s

¹⁶⁸ Fed. Commc’ns Comm’n v. Am. Broad. Co., 347 U.S. 284, 290 (1954).

¹⁶⁹ Boswell, *supra* note 134, at 1263.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1264.

¹⁷² *In re Allen*, 377 P.2d 280, 281 (Cal. 1962).

¹⁷³ *People v. Settles*, 78 P.2d 274, 277 (Cal. App. Dep’t. Super. Ct. 1938); *Boies v. Bartell*, 310 P.2d 834, 837 (Ariz. 1957); *State v. Hahn*, 72 P.2d 459, 461 (Mont. 1937); *Baedar v. Caldwell*, 56 N.W.2d 706, 709 (Neb. 1953); *State v. Stroupe*, 76 S.E.2d 313, 316-17 (N.C. 1953); *D’Orio v. Startup Candy Co.*, 266 P. 1037, 1038-39 (Utah 1928); *Longstreth v. Cook*, 220 S.W.2d 433, 437 (Ark. 1949); *State v. Wiley*, 3 N.W.2d 620, 624 (Iowa 1942); *Adams v. Antonio*, 88 S.W.2d 503, 505 (Tex. Civ. App. 1935); *Brown v. Bd. of Police Comrs.*, 136 P.2d 617, 620 (Cal. Dist. Ct. App. 1943).

¹⁷⁴ Boswell, *supra* note 134, at 1264.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1265.

precision, dexterity or ability to use his or her knowledge which enables him or her to obtain more frequent rewards or prizes than does another less precise, dextrous [sic] or knowledgeable player.¹⁷⁷

Some courts have ruled that gambling on the outcomes of football games is dominated by chance.¹⁷⁸ In one such ruling, the Superior Court of Pennsylvania noted that “[n]o one knows what may happen once the game has begun.”¹⁷⁹ However, no state court has ever directly applied the dominant factor test to fantasy sports.¹⁸⁰

b. Fantasy Sports under the UIGEA

Under the UIGEA, a bet or wager is defined as:

[T]he staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome.¹⁸¹

The Act notes that a bet or wager also “includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance).”¹⁸² However, the Act specifies that a bet or wager does not include:

(ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

(I) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

(II) All winning outcomes reflect the relative knowledge

¹⁷⁷ WIS. STAT. § 945.01(3)(b)(3) (2015).

¹⁷⁸ *Commonwealth v. Laniewski*, 173 Pa. Super. 245, 250 (1953); *see also* *Nat’l Football League v. Governor of Del.*, 435 F.Supp. 1372, 1385-86 (1977) (emphasizing the element of chance regarding the outcome of a football game).

¹⁷⁹ *Laniewski*, 173 Pa. Super. at 250.

¹⁸⁰ *Boswell*, *supra* note 134, at 1265.

¹⁸¹ 31 U.S.C. § 5362(1)(A) (2012).

¹⁸² 31 U.S.C. § 5362(1)(B) (2012).

and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

(III) No winning outcome is based—

(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.¹⁸³

Because the Act's definition of a wager requires that the outcome of a contest be subject to chance, the carve-out exception for fantasy sports participation seems to suggest that Congress considers fantasy sports to be dominated by skill.¹⁸⁴

VII. APPLYING THE PREDOMINANCE TEST TO DAILY FANTASY SPORTS

Since the UIGEA does not prohibit fantasy sports, each state must individually determine whether to allow daily fantasy sports.¹⁸⁵ Most states determine whether an activity is considered gambling by applying the predominance test.¹⁸⁶ Therefore, this argument will rely on an application of the predominance test to both seasonal fantasy sports and daily fantasy sports and a comparison of the respective balances that both chance and skill have on each activity's outcome.

a. Statistical Evidence in Support of Skill Dominating Daily Fantasy Sports

Research conducted by McKinsey & Company shows that the majority of winnings from daily fantasy baseball go to only 1.3 percent of players, indicating that skill is actually so dominant in determining the outcome, it threatens to make the sites less appealing to recreational players.¹⁸⁷ According to the study, the average return on investment for the top 1.3% of players is 27%; whereas, for the remaining players, the average return is roughly -51%.¹⁸⁸ If DFS is based on

¹⁸³ 31 U.S.C. § 5362(1)(E)(ix) (2012).

¹⁸⁴ *See id.*

¹⁸⁵ Boswell, *supra* note 134, at 1264.

¹⁸⁶ *Id.*

¹⁸⁷ *See* Ed Miller & Daniel Singer, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, MCKINSEY & COMPANY (Sept. 2015), <http://www.mckinsey.com/industries/media-and-entertainment/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill> [<https://perma.cc/SB8K-PULX>].

¹⁸⁸ *Id.*

chance, how could these top players be so lucky? One reason could be that they enter significantly more contests and risk more money than the average player does.¹⁸⁹ Another study showed that the world's top eleven daily fantasy football players paid an average of two million dollars in entry fees.¹⁹⁰ The remaining top 1.3 percent of players paid an average of \$9,100.¹⁹¹ Meanwhile, 80 percent of fantasy football players pay an average of only \$49 in entry fees.¹⁹²

The contrast becomes even clearer when comparing these two groups' profits and losses.¹⁹³ The top eleven players made an average profit of more than \$135,000.¹⁹⁴ The remaining top 1.3 percent of players made an average profit of \$2,400.¹⁹⁵ However, the 80 percent of players who paid an average of only \$49 in entry fees actually lost an average of twenty-five dollars.¹⁹⁶

One analyst explains this tremendous difference by making an analogy to poker players¹⁹⁷ There is obviously a "skill gap" between a professional poker player and an average, casual player.¹⁹⁸ However, these two types of players seldom compete against one another.¹⁹⁹ The professional poker player would likely be playing at high-stakes tables, surrounded by other players of a similar skill level.²⁰⁰ However, the casual player would likely be playing at tables where the buy-in is more affordable, and are therefore full of other casual players.²⁰¹ This kind of separation can be seen in most other games of skill; you do not typically see an NFL team competing against pee-wee football teams or chess grandmasters playing against someone who has just learned the rules. In fact, when playing many modern multiplayer video games, players are assigned a rank based on their skill level so that the game does not become overly difficult

¹⁸⁹ *The Lucrative and Growing Fantasy Football Industry*, SPORTS MANAGEMENT DEGREE HUB (2015), <http://www.sportsmanagementdegreehub.com/fantasy-football-industry/> [<https://perma.cc/FUT5-SMF6>].

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Miller & Singer, *supra* note 187.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

for less skilled players.²⁰²

However, there is no such segregation for players of daily fantasy sports.²⁰³ Therefore, the absolute best daily fantasy sports players are competing against players of all skill-levels, giving them a lucrative advantage.²⁰⁴ What this really means is that although daily fantasy sports are skill-based, the vast majority of players have very little chance of winning.²⁰⁵ This further demonstrates that skill is likely the predominant factor in determining a fantasy sport contest's outcome.²⁰⁶

b. Comparing the Mechanics of Seasonal and Daily Fantasy Sports

There are many important ways in which the mechanics of seasonal fantasy sports and daily fantasy sports differ.²⁰⁷ But there are also many ways in which the mechanics of both games are similar.²⁰⁸ In this section, I will analyze the aspects of both games that have the greatest impact on their outcomes and compare them to determine whether they make skill or chance more determinative of the overall contest's result.

i. Injuries

Some athletes are more prone to injuries than others because past injuries can often make an athlete more likely to sustain an injury again in the future.²⁰⁹ In both seasonal and daily fantasy sports, a skilled and knowledgeable fantasy player would be aware of an athlete's susceptibility to injury and plan accordingly.²¹⁰ However, injuries which do not occur as a result of a pre-existing weakness are more random and difficult to predict.

Injuries are more detrimental to a seasonal fantasy sports owner because they

²⁰² See Tom Minka, *TrueSkill Ranking System: Details*, MICROSOFT RES. (Nov. 18, 2005), <http://research.microsoft.com/en-us/projects/trueskill/details.aspx> [<https://perma.cc/VG8R-LDHL>].

²⁰³ Miller & Singer, *supra* note 187.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Daily Fantasy Football 101*, *supra* note 107.

²⁰⁸ *Id.*

²⁰⁹ Jessica Fulton et al., *Injury Risk is Altered by Previous Injury: A Systematic Review of the Literature and Presentation of Causative Neuromuscular Factors*, 9 THE INT'L J. OF SPORTS PHYSICAL THERAPY 583, (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4196323/pdf/ijsp-10-583.pdf> [<https://perma.cc/7QLA-V8GP>].

²¹⁰ Gelhar, *supra* note 83.

affect an owner's entire season, not just one week.²¹¹ If the owner wishes to stay competitive in his seasonal league, he must find a replacement athlete.²¹² However, if the replacement athlete does not perform as well as the injured athlete, the fantasy owner's season could suffer greatly.²¹³

In contrast, injuries have far less impact on a daily fantasy sports owner.²¹⁴ While there is always a chance that one of the athletes he has picked for the week could get injured, an injury would only affect him for that one week.²¹⁵ The next week, he would simply not add the injured athlete to his lineup.²¹⁶ As I have demonstrated that injuries are more a result of chance than skill and that injuries affect a seasonal fantasy owner more than a daily fantasy owner, it appears that injuries make seasonal fantasy sports more dominated by chance than skill in this respect.

ii. Salary Cap

As I explained in Part IV, the Salary Cap feature of daily fantasy sports assigns values to athletes based on their expected point production for the week.²¹⁷ Therefore, if a daily fantasy player wishes to have an advantage over other players, he should look for athletes whose assigned values are lower than their true worth.²¹⁸ In other words, if Athlete X costs \$50 and Athlete Y costs \$25, but the daily fantasy owner expects both athletes to score the same amount of points that week, he would be wise to add Athlete Y to his lineup, giving him an additional \$25 to spend towards another, more expensive, athlete.²¹⁹ This feature clearly rewards knowledgeable players who can recognize an athlete's true worth and makes daily fantasy sports more dominated by skill.

iii. Auto-pick Drafting and Scoring Projections

Some sites which host seasonal fantasy leagues make suggestions during the draft as to which athlete the fantasy player should add to their roster upon their

²¹¹ *Daily Fantasy Sports vs. Season Long Leagues*, GAMBLINGSITE.COM, <https://www.gamblingsites.com/daily-fantasy-sports/daily-vs-season-long-leagues/> [<https://perma.cc/68LB-7EX4>].

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *See Daily Fantasy Football 101*, *supra* note 107.

²¹⁸ *Id.*

²¹⁹ *See Id.*

turn.²²⁰ In fact, if a fantasy player does not want to draft their own team manually, some sites have an auto-pick function, allowing the player to draft an entire team based on the default rankings generated by the host site.²²¹ Additionally, when setting your weekly lineup, some host sites provide projections, which are estimates generated by the host site, of how many points each athlete will score that week.²²² On one hand, these features allow fantasy players to draft and maintain a well-balanced team, even if they do not have time to participate in their league's scheduled draft or set their weekly lineups.²²³ On the other hand, it allows less skilled fantasy players to draft competitive teams and set optimal lineups each week with minimal effort.²²⁴ These automation features greatly decrease the skill-gap between players and mitigate the advantage skilled players would otherwise have over the rest of their league.²²⁵ In contrast, it would be impossible to draft an optimal lineup in daily fantasy sports because, by choosing all the athletes with the highest projected points, you would exceed the salary cap.²²⁶ The absence of automated features in daily fantasy sports means that the "skill-gap" is wider and therefore skill more greatly dominates the outcome than in seasonal fantasy sports.²²⁷

iv. Trades

Trades are another aspect of seasonal fantasy sports which increase their reliance on chance as opposed to skill.²²⁸ Trades allow for the possibility of collusion which, according to one seasonal fantasy sports site, "occurs when one team

²²⁰ See John O'Hearn, *Fantasy Football 101 - A How to video for ESPN Fantasy Football 2015*, YOUTUBE (Aug. 16, 2015), <https://www.youtube.com/watch?v=aXV7a9xGeqk> [<https://perma.cc/EC73-VKBV>].

²²¹ See *Rules: Autopick Draft*, ESPN (2016), <http://games.espn.com/ffl/content?page=fflrulesautopickdraft> [<https://perma.cc/BRJ7-4ZJB>].

²²² See Kevin Coyne, *Fantasy Football Basics Using the ESPN Portal*, YOUTUBE (Sep. 6, 2016), <https://www.youtube.com/watch?v=CBglZwU-1qw> [<https://perma.cc/A8BL-TTAA>].

²²³ See O'Hearn, *supra* note 220; *Rules: Autopick Draft*, *supra* note 221; Coyne, *supra* note 222.

²²⁴ See O'Hearn, *supra* note 220; *Rules: Autopick Draft*, *supra* note 221; Coyne, *supra* note 222.

²²⁵ See O'Hearn, *supra* note 220; *Rules: Autopick Draft*, *supra* note 221; Coyne, *supra* note 222.

²²⁶ See *Daily Fantasy Football 101*, *supra* note 107.

²²⁷ See *id.*

²²⁸ See *Fantasy Football Collusion: How to Deal with it and Cheating Owners*, ROTOPICKS (2013), <http://www.rotopicks.com/nfl/collusion.php> [<https://perma.cc/L2A7-VD2H>]; *Fair Play and Conduct*, ESPN (2016),

makes moves to benefit another team, without trying to improve its own position.”²²⁹ Collusion becomes more likely as the season progresses because players who realize they are unlikely to progress to the playoffs become less invested in their teams and will make less advantageous trades, giving their trading partner an unfair advantage over the rest of the league.²³⁰ Daily fantasy sports do not have this problem because there are no trades or seasons.²³¹ Therefore there is no possibility for collusion and no disinterested owners.²³² Each contest is separate, leaving owners to rely only on their skill and knowledge.²³³

v. Waiver Wire

In a seasonal fantasy league, managers may add athletes to their team.²³⁴ However, as an athlete can only be added to one manager’s team, if two or more fantasy managers wish to add the same athlete to their team, a system called the waiver wire determines which manager gets to add the athlete to their team.²³⁵ Every week, the fantasy managers’ teams are ranked, based on their total wins and losses, from worst to best, which determines the waiver order.²³⁶ The worst teams get to pick from the available athletes first, meaning that the worse your team is doing, the better your waiver order priority will be.²³⁷ Because the waiver wire can improve the rosters of a poorly performing team, it narrows the “skill-gap” between seasonal fantasy sports players.²³⁸ In fact, the waiver wire actually punishes skilled players by reducing their ability to add talented athletes to their

<http://games.espn.com/ffl/resources/help/content?name=fair-play-and-conduct> [<https://perma.cc/N6EC-A4F2>].

²²⁹ *Fair Play and Conduct*, *supra* note 228.

²³⁰ *See Fantasy Football Collusion*, *supra* note 228; *Fair Play and Conduct*, *supra* note 228.

²³¹ *See Daily Fantasy Football 101*, *supra* note 107.

²³² *Id.*

²³³ *Id.*

²³⁴ *See Gray*, *supra* note 94. *See also What are waivers?*, ESPN (2016), <http://games.espn.com/ffl/resources/help/faq?name=what-are-waivers> [<https://perma.cc/87N6-G4Y8>]; *How is waiver order determined?*, ESPN (2016), <http://games.espn.com/ffl/resources/help/faq?name=how-is-waiver-order-determined> [<https://perma.cc/V2T6-34U6>].

²³⁵ *See Gray*, *supra* note 94. *See also What are waivers?*, *supra* note 234; *How is waiver order determined?*, *supra* note 234.

²³⁶ *See Gray*, *supra* note 94. *See also How is waiver order determined?*, *supra* note 234.

²³⁷ *See Gray*, *supra* note 94. *See also How is waiver order determined?*, *supra* note 234.

²³⁸ *See Gray*, *supra* note 94.

roster, thereby increasing the dominance of chance over skill.²³⁹ Daily fantasy sports lack any such feature, forcing players to rely solely on their skill and knowledge to fill their roster.²⁴⁰

CONCLUSION

Daily fantasy sports, under current federal law, is legal due to the carve-out exception for fantasy sports in the UIGEA.²⁴¹ Therefore, each state must individually determine whether to allow daily fantasy sports.²⁴² Applying the predominance test, this note argues that there is sufficient evidence to support the conclusion that daily fantasy sports is also a game dominated by skill, rather than chance.²⁴³ Therefore it deserves the same legal treatment as that of seasonal fantasy sports, it should be considered legal in states that currently allow seasonal fantasy sports.

²³⁹ *Id.*

²⁴⁰ See *Daily Fantasy Football 101*, *supra* note 107.

²⁴¹ 31 U.S.C. § 5362(1)(E)(ix) (2012).

²⁴² Boswell, *supra* note 134, at 1264.

²⁴³ See *In re Allen*, 377 P.2d 280, 281 (Cal. 1962).