

IS DAILY FANTASY A FORM OF GAMBLING HIDDEN BY SKILL?

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I. INTRODUCTION

Championship Sunday, December 21, 2014. Reid has not slept due to researching the perfect lineup for his fantasy football team. His preparation listening to podcasts, mock drafts, tanking the previous season and trading for higher draft picks, along with a strong draft and the right pick-ups on the waiver wire have led him to the opportunity of owning the “Brophy”, \$200, and bragging rights over his nine best friends. Across the street, Reid’s neighbor, Charles is preparing for another Sunday of daily fantasy. With little effort, Charles puts together the exact team Reid has been building for years. Charles, simply logs on to the computer and chooses the players he believes will perform the best on that particular day. Throughout the day, Reid refreshes the score on his phone; after the day games concluded Reid was up a point over his opponent. Reid still had Andrew Luck to play and his opponent had no other players left. Reid knew from previous experiences that negative points are always a possibility, and though the temptation of running the score up on his opponent would have made the championship gratifying, his managerial skills told him to remove Andrew Luck and take the win. Andrew Luck ended up scoring negative two fantasy points. Unlike Reid, Charles lost his daily fantasy league even though he had the exact same team as Reid. Charles was playing against 10,000 fantasy players with each one having a different lineup of players. This created a game of “chance” that Charles couldn’t overcome with managerial skills.

This story contrasts the typical weekend of a traditional fantasy player and a daily fantasy player.¹ Fantasy sports is a way

¹ Daily fantasy is similar to how traditional fantasy sports games are played. Players compete one or multiple players by assembling a team of professional athletes, and earn points based on the actual statistical performance of the athlete. The difference is daily fantasy sports are an accelerated format of traditional fantasy sports, which take

for Americans to be involved in a game more than just rooting for their favorite team. Fantasy leagues allow sports fans to be the owners and general managers of their dream team. Today, it is estimated that around 56.8 million people play fantasy sports in America and Canada, which includes 37.9 million males and 18.9 million females.² The Fantasy Sports industry [was estimated to] generate 2.6 billion dollars in entry fees in 2015 through sites like Draft Kings and Fan Duel.³

The days of Reid searching the web for tips or listening to a fantasy podcast to find that fantasy “sleeper” to save his season is becoming a thing of the past.⁴ Weekly fantasy is now available at the click of a mouse, and the ability to win money daily or weekly is appealing to fantasy players. Reid no longer has to stress about “waiver pickups,”⁵ “bye weeks,”⁶ or a torn ACL to his star running back. Weekly leagues allow Reid the ability to pick any athlete and compete for the most points for one particular week.

Does this accelerated format of daily fantasy remove the skill factor that traditional fantasy seasons contain and create a higher level of chance? A deeper analysis needs to be made to answer the question if daily fantasy sports are removing aspects of skill

place over a week or single day of competition, as opposed to an entire season. Louis Bien, *Everything you ever wanted to know about daily fantasy sports and why they're getting sued*, <http://www.sbnation.com/2015/11/24/9791608/draftkings-fanduel-daily-fantasy-sports-lawsuit-new-york-internet-gambling> (last visited December 1, 2016).

² *Industry Demographics*, Fantasy Sports Trade Association, <http://www.fsta.org/research/industry-demographics/> (last visited December 21, 2016).

³ Darren Heitner, *The Hyper Growth Of Daily Fantasy Sports Is Going To Change Our Culture And Our Laws*, Forbes, <http://www.forbes.com/sites/darrenheitner/2015/09/16/the-hyper-growth-of-daily-fantasy-sports-is-going-to-change-our-culture-and-our-laws/#2d86df4c5f25> (last visited December 21, 2016).

⁴ The term “sleeper” is typically a late-round pick or waiver-wire selection that exceeds statistical expectations and becomes a prominent option in fantasy leagues. Fantasy Football Glossary, NFL Fantasy, <http://www.nfl.com/fantasyfootball/help/fantasyglossary> (last visited December 18, 2016).

⁵ Waiver wire means: “the list of free-agent players within a fantasy league. Most free agents are subject to a waiver process, as a player is placed on waivers after the kickoff of the first game of the week or during a designated period (24 hours) after being released from a team. Waivers help to ensure that all teams have the opportunity to claim the best free agents, resulting in more balanced, competitive leagues.” *Id.*

⁶ A bye week is when a team gets an off week from having to play a game. *Id.*

required in season long fantasy football and moving closer to sports betting.

This article reviews how daily fantasy is able to hide a game of chance behind the illusion of skill. The only federal law that explicitly protects fantasy sports is the UIGEA, however, there is debate as to whether this would extend to daily fantasy. First, the paper will investigate the role of the federal government in gambling and how states differ in determining a game as gambling. Second, an analysis will be made on how daily fantasy could be hiding behind the skill of traditional fantasy sports. Lastly, a conclusion will be determined on the legality of daily fantasy sports.

II. THE FEDERAL GOVERNMENTS AND STATES ROLE IN GAMBLING

*“Gambling is primarily a matter of state law, reinforced by federal law in instances where the presence of an interstate or foreign element might otherwise frustrate the enforcement policies of state law.”*⁷

A. Federal Government’s Role in Gambling

The federal government has passed many laws serving to reinforce State laws regulating gambling.⁸ Four federal statutes impact Internet gambling: (1) Illegal Gambling Business Act, (2) the Wire Act, (3) the Travel Act, and (4) the Unlawful Internet Gambling Enforcement Act.⁹

Though some of the following laws do not specifically address fantasy sports, they play a role in understanding how the courts, States, and Congress can work together in clarifying the legality of daily fantasy.

⁷ Charles Doyle, Cong. Research Serv., 97-619, Internet Gambling: An Overview of Federal Criminal Law (2012).

⁸ *Id.* at 1.

⁹ *Id.* at 8, note 56.

The Illegal Gambling Business Act (IGBA),¹⁰ The Wire Act¹¹ and The Travel Act¹² did not address Internet gambling explicitly but could be used to prosecute daily fantasy.¹³

The Unlawful Internet Gambling Enforcement Act (UIGEA) differs from the other three Acts mentioned above by explicitly banning Internet gambling and related activity.¹⁴ The UIGEA forbids any person from engaging in a gambling business to accept payments related to unlawful Internet gambling.¹⁵ Congress's intent of passing the UIGEA was to prevent Internet gaming in the United States.¹⁶ However, the UIGEA carved out an exception for fantasy sports.¹⁷

The UIGEA creates the first exemption for fantasy sports in a federal anti-gambling statute.¹⁸ Although Congress passed this exemption, daily fantasy was nonexistent when the UIGEA was passed.¹⁹ Former Rep. Jim Leach, a drafter of UIGEA, said, "lawmakers, had no idea daily fantasy would 'morph into today's caldron of daily betting.'"²⁰ Rep. Leach further argued that the UIGEA does not provide daily fantasy sites with immunity against other federal and state laws that limit daily fantasy activities.²¹ Daily fantasy sites probably are safe from prosecution under the UIGEA even though the exemption is tailored more for traditional fantasy sports. However, daily fantasy sites should be cautious

¹⁰ 18 U.S.C. § 1955 (2012).

¹¹ 18 U.S.C. § 1084 (2012).

¹² 18 U.S.C. § 1952 (2012).

¹³ For more detail on how these acts could be used to prosecute fantasy sports see, Anthony N. Cabot & Louis V. Csoka, *Fantasy Sports: One Form of Mainstream Wagering in the United States*, 40 J. Marshall L. Rev. 1195, 1199 (2007).

¹⁴ See Doyle, *supra* note 7, at 16.

¹⁵ 31 U.S.C. 5363 (2012).

¹⁶ H.R. 4411, 109th Cong. (2006).

¹⁷ See Doyle, *supra* note 7, at 18 n. 124.

¹⁸ Jon Boswell, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, and Now Explicitly Legal Under Federal Law*, 25 Cardozo Arts & Ent. L.J. 1257 (2008).

¹⁹ *The evolution of the daily fantasy sports industry*, Roto Grinders, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited December 20, 2016).

²⁰ Tim Dahlberg, *Former congressman says DFS is "cauldron of daily betting*, Associated Press, <http://bigstory.ap.org/article/7b3af0d8b0c04f059e8b301adf8b1784/former-congressman-says-dfs-cauldron-daily-betting> (last visited January 19, 2017).

²¹ *Id.*

about believing the UIGEA provides total protection.²² After all, this is “merely exempting fantasy from one specific law enforcement mechanism, but not from the broad sweep of law itself.”²³

B. The role of the State in gambling

The States are in almost total agreement in defining gambling as a game involving the three elements of (1) chance, (2) prize, and (3) consideration.²⁴ However, the major problem with deciding if daily fantasy is considered a form of gambling is the diversity in how States write their anti-gambling statutes.

A state like New York defines gambling simply by:

A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.²⁵

In comparison, Mississippi bans all betting on games (other than dog fights).^{26,27} Mississippi then inserts specific carve-outs and specific information.²⁸ Mississippi’s main definition of betting, gaming or wagering is:

If any person shall encourage, promote or play at any game, play or amusement, other than a fight or fighting match between dogs, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting of any money or other valuable things, upon any game, play, amusement...²⁹

²² Ira Boudway, *How will the Government Change the Game for Daily Sports?*, Bloomberg Business, <http://www.bloomberg.com/news/articles/2015-10-15/how-will-the-government-change-the-game-for-daily-fantasy-sports-> (last visited December 20, 2016).

²³ See Dahlberg, *supra* note 37.

²⁴ R.M. Weddle, *Promotional Schemes of Retail Stores as Criminal Offenses Under Anti-Gambling Laws*, 29 A.L.R.3d 888 (1968).

²⁵ N.Y. Penal Law § 225.00 (2007).

²⁶ Miss. Code Ann. § 97-33-1 (1972).

²⁷ Mississippi provides a separate statute that provides harsher penalties for betting on dog fights. See Miss. Code Ann. § 97-41-19 (1972).

²⁸ *Id.*

²⁹ *Id.*

The best approach to determine daily fantasy's legality is to decide how an individual State defines daily fantasy, which will create options of prosecution on the federal level.³⁰ Daily fantasy went through a defining moment in the year 2016. New York's state Attorney General Eric Schneiderman decided to rule daily fantasy as illegal online gaming.³¹ However, Governor Andrew Coumo five months later signed legislation that made daily fantasy a "game of skill."³² This legislation has allowed residences of New York to legally play daily fantasy and for the state to regulate the daily fantasy sites.³³ Other states, however, are not as kind to daily fantasy and some have banned daily fantasy entirely.³⁴ FanDuel and DraftKings announce in the "terms of use" that a resident of Alabama, Arizona, Delaware, Hawaii, Idaho, Iowa, Louisiana, Montana, Nevada, Texas, and Washington is eligible to create an account, but not eligible to play in games that offer prizes.³⁵ Not only does this suggest that State law decides the legality of daily fantasy, but daily fantasy sites are beginning to take notice that their "games of skill" may also be a game of chance.

States test for gambling in different ways, which could provide daily fantasy different classifications in each state. The test used by a majority of States is the "Predominant Purpose Test."³⁶ This test simply determines if the outcome of the game is determined more by the player's skill or overwhelming chance.³⁷

This creates complications when trying to analyze if daily fantasy is a game of chance or skill. For example, chess has been

³⁰ See Doyle, *supra* at note 8.

³¹ Brent Schrontenboer, *New York Legalizes Daily Fantasy USA TODAY* (2016), Brent Sports - <http://www.usatoday.com/story/sports/2016/08/03/daily-fantasy-sports-fanduel-draftkings-legal-new-york/88039822/> (last visited January 18, 2017).

³² *Id.*

³³ *Id.*

³⁴ Scholarly research indicates that there are nine states that consider daily fantasy illegal or banned; sixteen states have laws or reviews being considered; and twenty-three states consider daily fantasy legal. Jason Breslow, *Is It Gambling? How States View Daily Fantasy Sports*, Frontline, <http://www.pbs.org/wgbh/frontline/article/is-it-gambling-how-states-view-daily-fantasy-sports/> (last visited January 15, 2017).

³⁵ Terms of Use, Draftkings, <https://www.draftkings.com/help/terms> (last visited January 20, 2016); Terms of Use, FanDuel, <https://www.fanduel.com/terms> (last visited January 20, 2017).

³⁶ Boswell, *supra* note 19, at 1264.

³⁷ *Id.*

determined to be a game of complete skill.³⁸ However, courts disagree on games like black gammon and poker being predominantly skill or chance.³⁹ Further, courts consider betting on sports a game of chance.⁴⁰ Daily fantasy complicates the predominant factor test by being a subject of sports but adding components of choosing players and making moves like chess.

Some states have narrow anti-gaming laws prohibiting games that have a tremendous amount of skill.⁴¹ The “Any Chance Test” approach prevents games that include any form of chance from being bet or wagered on.⁴² Considering there is some form of chance in daily fantasy and traditional fantasy, both could be banned from being wagered on in a state that applies the “Any Chance Test.”

Other states apply the “Material Element Test”, which can find a game as chance even if 51% or more of the game has an element of skill.⁴³ States that apply the “material element test” could find daily fantasy illegal if the court subjectively finds one material element of chance. However, the Material Element Test most likely would be considered second-rate to other tests because it relies on subjective analysis with no real benchmarks in determining what is a material element in fantasy sports.⁴⁴

³⁸ *Id.* at 1204 n. 59.

³⁹ *Id.* at 1204 n. 61. “See, e.g., *Charnes v. Cent. City Opera House Ass’n.*, 773 P.2d 546, 551 (Colo. 1989) (holding that, in Colorado, poker is an illegal gambling game of chance); see also Colo. Op. Att’y Gen. No. 93-5 (Apr. 21, 1993) (opining that, in Colorado, poker is a game of skill, but, nevertheless, illegal under specific statutory language); *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding that, in Massachusetts, video poker is a lottery in which chance predominates). But see *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406-7 (Mass. App. Ct. 1991) (holding that, in Massachusetts, video poker games are games of skill).”

⁴⁰ Emanuel V. Towfigh, *Article: Dangerous Games: The Psychological Case For Regulating Gambling*, 8 Charleston L. Rev. 147, 163 (2013).

⁴¹ Kaitlyn Dunphy, *Following Suit with the Second Circuit: Defining Gambling in the Illegal Gambling Business Act*, 79 Brooklyn L. Rev. 1295 (2014).

⁴² *Id.*

⁴³ See *United States v. DiCristina*, 726 F.3d 92, 98 (2d Cir. 2013) (defining a game 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’”); See also, *Thole v. Westfall*, 682 S.W.2d 33, 37 n.8 (Mo. Ct. App. 1984) (explaining “chance must be a material element in determining the outcome of a gambling game. It need not be the *dominant* element”).

⁴⁴ Jeffrey C. Meehan, *The Predominate Goliath: Why Pay-to-Play Daily Fantasy Sports are Games of Skill Under the Dominant Factor Test*, 26 Marq. Sports L. Rev. 5 (2015).

Montana's approach to dealing with fantasy sports seems to be a Statute that States could look to for guidance. Montana allows fantasy leagues that do not place wagers by telephone or the Internet.⁴⁵ The statute allows friends and families to play traditional fantasy leagues but bans daily fantasy from taking place.⁴⁶ Further, Montana allows for traditional leagues to play for money because they are not placing bets on the Internet or telephone.⁴⁷ These traditional leagues would also be able to play NFL and ESPN fantasy apps because they are not placing their wagers by telephone or the Internet. Traditional leagues usually pay money directly to a league manager voted on by the league that will hold on to the money until the end of the season. Daily fantasy sites seem to take Montana's law seriously because Montana residents are banned from participating in pay to play fantasy games on daily fantasy sites.⁴⁸ One important note is Montana's lottery does have a weekly fantasy league that can be accessed from specific taverns, which raises money for the struggling horse racing market in Montana.⁴⁹

III. IS DAILY FANTASY HIDING GAMBLING BEHIND SKILL?

The main focus of this section will be towards the States that have not explicitly blocked daily fantasy sports. The main issue is that States, Congress, and courts need to come to a conclusion about the legality of daily fantasy. The reason this conclusion needs to be made is that FanDuel and DraftKings continue to contend their games are skill rather than illegal games of chance.⁵⁰

First, to decide if daily fantasy is gambling one must determine what courts look for in deciding if a game is "skill" or "chance." The character of the game determines the chance or skill

⁴⁵ Mont. Code Ann. § 23-5-802 (2011).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Terms of Use, *supra* note 49.

⁴⁹ Fantasy Football, Montana Lottery, <http://www.montanalottery.com/FantasyFootball> (last visited January 19, 2017).

⁵⁰ Erik Matuszewski, *Fantasy Sports Luring Wall Street in Its Fastest-Growing Sector*, Bloomberg Businessweek, <http://www.businessweek.com/news/2014-01-05/fantasy-sports-luring-wall-street-in-its-fastest-growing-sector> (last visited January 18, 2017).

element not the skill of the player.⁵¹ This means that for skill to predominate chance it is measured by the average skill of a majority of players likely to play the game, not by standards of experts or a limited class of people.⁵²

The best way to determine if daily fantasy is a game of skill is to compare and contrast it between traditional fantasy sports. Daily Fantasy seems to be the target in most states, not traditional fantasy, which makes traditional fantasy a benchmark for States to look at when determining the legality of daily fantasy.⁵³

A. *Traditional Fantasy vs. Daily Fantasy*

Daily fantasy players use the same argument as traditional fantasy players; that they take in an abundance of variables when choosing a fantasy lineup. A lobbyist for the Fantasy Sports Trade Association even made the argument in front of the New Jersey committee that daily fantasy is more skilled based than traditional fantasy.⁵⁴ The lobbyist argued that because more information must be gathered in a shorter time to create a team that this creates a higher level of skill.⁵⁵ Further, the argument was made that season-long fantasy is chess and daily fantasy is speed chess.⁵⁶

However, traditional fantasy leagues are set up completely different than daily fantasy leagues. The debate of daily fantasy being like traditional fantasy comes from four distinct differences:

⁵¹ 38 Am Jur 2d Gambling § 4 (2nd 2015).

⁵² *Id.*

⁵³ Attorney General Eric T. Schneiderman sent a cease and desist letter to FanDuel and Draft Kings describing traditional fantasy's legality since 1980. *Schneiderman: Daily Fantasy Sports is Neither Victimless or Harmless*, New York State Attorney General, <http://www.ag.ny.gov/press-release/ag-schneiderman-issues-cess-and-desist-letters-fanduel-and-draftkings-demanding> (last visited November 19, 2016). Texas Attorney General Ken Paxton position is that traditional fantasy sports are legal under Texas state law. Darren Heitner, *Texas Attorney General Says Daily Fantasy Sports Is Prohibited*, *Gambling*, *Forbes*, <http://www.forbes.com/sites/darrenheitner/2016/01/19/texas-attorney-general-says-daily-fantasy-sports-is-prohibited-gambling/#7786b503107a> (last visited December 20, 2016).

⁵⁴ *FSTA Lobbyist: Season Long Fantasy Involves Less Skill Than DFS*, Legal Sports Report, <http://www.legalsportsreport.com/6014/less-skill-in-seasonlong-fantasy/> (last visited December 27, 2016).

⁵⁵ *Id.*

⁵⁶ *Id.*

(1) the duration of the contest, (2) type of competition, (3) how players are selected and (4) prizes.

1. Duration of the Contest

The main subject of every debate involving daily fantasy begins with the length of the game.⁵⁷ Traditional fantasy is usually set up between ten or twelve players each owning a team made up of drafted professional athletes.⁵⁸ Throughout the season, teams are matched up in a head-to-head scenario in a rotating schedule.⁵⁹ The teams with the top records will then match up accordingly in a playoff-style format.⁶⁰

Daily fantasy differs from traditional fantasy by allowing a player to draft a new team each day.⁶¹ This allows the player the opportunity to play when he wants instead of a grueling week-to-week management of players.⁶² Daily fantasy still has the same goal as season long fantasy, which is to accumulate the highest point total for the day or week.⁶³ The difference is once the day or week is completed so is the player's team.

There seem to be consensuses that fantasy sports leagues lasting the length of a season involve skill and knowledge.⁶⁴ However, no court has directly addressed daily fantasy's much shorter duration as meeting the same test.⁶⁵ *Langone v. Kaiser & FanDuel* was a case brought to challenge the legality of daily fantasy and many had hoped this would bring a broad legal

⁵⁷ Cabot & Csoka, *supra* note 14, at 1211.

⁵⁸ Jim McCormick, *So you want to play fantasy football?*, ESPN, <http://espn.go.com/fantasy/football/ffl/story?page=nfldk2k10howtoplay> (last visited December 14, 2016).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Stephen Perez, *Daily Fantasy Strategy: How to play 50/50, H2H, GPP contests*, Sporting News, <http://www.sportingnews.com/fantasy-nba-news/4635471-daily-fantasy-sports-dfs-strategy-how-to-play-5050-h2h-gpp-win-cash-prizes-one-day-draft-kings-tips> (last visited December 19, 2016).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Lawsuit Has the Potential to Provide a Landmark Ruling for Fantasy Sports*, Klein, Moynihan, and Turco, <http://www.kleinmoynihan.com/lawsuit-has-the-potential-to-provide-a-landmark-ruling-for-fantasy-sports/> (last visited December 19, 2016).

⁶⁵ *Id.*

standard impacting the legality of daily fantasy.⁶⁶ Unfortunately, the case was dismissed under Federal Rule of Civil Procedure 12(b)(6) because the plaintiff failed to make a specific claim.⁶⁷

One way of proving that daily fantasy is more chance based than traditional fantasy is by using “law of large numbers” theorem.⁶⁸ The theory sets out that as, “number of trials of process increases, the percentage difference between the expected and actual values goes to zero.”⁶⁹ Simply, a player of skill will unlikely have a decided advantage if there is a small number of games being played that are a high percentage of chance. For example, a traditional skilled fantasy player can overcome injuries to an athlete because he has the ability to use skill and knowledge to win games later in the season.⁷⁰ However, daily fantasy players do not have the same opportunity to use their skill or knowledge due to the short duration of the game.⁷¹

The contrast of traditional and daily fantasy is similar to day trading and investing. Day traders use some amount of skill, but similarly to daily fantasy players, daily traders must analyze the market for one day.⁷² This is different than investing, which requires an investor to use his skill to analyze the future market.⁷³ Further, investors are able to use their skill to sell and trade stocks to create financial gains if an investment begins to perform poorly.⁷⁴ The duration of daily fantasy seems to remove enough skill to align closer to a game of chance.

2. Type of Competition

Comparing the various competitions of traditional fantasy and daily fantasy is another way to differentiate the amount of skill.

⁶⁶ *Id.*

⁶⁷ *Langone*, supra note 31.

⁶⁸ See Anthony N. Cabot, Glenn J. Light & Karl F. Rutledge, *Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define the Legality of Games of Mixed Skill and Chance*, 57 Drake L.Rev. 383, 408 (2008)

⁶⁹ *Id.*

⁷⁰ Cabot & Csoka, supra note 14, at 1210.

⁷¹ *Id.*

⁷² Michael A. Tselnik, *Note: Check, Raise, or Fold: Poker and the Unlawful Internet Gambling Enforcement Act*, 35 Hofstra L. Rev. 1617, 1654 (2007).

⁷³ *Id.* at 1655.

⁷⁴ *Id.*

The three most common traditional leagues are (1) the re-draft league (2) keeper leagues, and (3) dynasty leagues.⁷⁵ Traditional fantasy leagues have a better argument for being a game of skill due to the strategy involved with each league.⁷⁶

Re-draft leagues start with a new team each season.⁷⁷ Though re-draft leagues are similar to daily fantasy the factors that have to be considered in a re-draft league are different.⁷⁸ Keeper leagues and dynasty leagues allow for the fantasy player to keep players or a whole team for years. These three leagues add more skill than daily fantasy by evaluating players that can contribute to a player's fantasy team for seventeen games or multiple years.⁷⁹ One bad move can seriously hurt a player's team for a season or years, unlike a daily league where you get a whole new team of players the next day.⁸⁰

Skilled traditional fantasy players start their season as soon as the previous season ends. Transactions never stop taking place in the real sports world, which directly affects fantasy sports. One example is a running back becoming part of a pass first offense versus a run first offense could affect his stats.⁸¹ Other variables affecting a player's stats could be the offensive line the team has, coaching, free agents, and even the type of grass the team will play in eight games out of the year. There is also a skill factor of knowing how to evaluate a player in order to know when to play, bench,

⁷⁵ Alex Welch, *Fantasy football 101: Different types of leagues*, SB Nation, <http://www.sbnation.com/fantasy/2013/8/19/4618590/fantasy-football-101-standard-ppr-keeper-leagues-rules> (last visited December 21, 2016).

⁷⁶ Michael Trippiedi, *Daily Fantasy Sports Leagues: Do You Have the Skill to Win at These Games of Chance?*, 5 UNLV Gaming L.J. 201, 208 (2014).

⁷⁷ *Id.*

⁷⁸ Edelman, Marc, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law*, 2016 U. Ill. L. Rev. 117 (2016).

⁷⁹ *How To Play Fantasy Football Traditional Season Long Leagues*, Fantasy Footballers, https://fantasyfootballers.org/how-to-play-fantasy-football/traditional-season-long-leagues/#League_Types (last visited December 18, 2016).

⁸⁰ One example from a real life experience is the legal troubles Adrian Peterson experienced in 2014 affected traditional fantasy teams including my own after deciding to give up my first round draft pick for the opportunity to keep Adrian Peterson. This drastically crippled my team to start the season, but I was able to trade and pickup players to compete in the championship game.

⁸¹ *Michael Turner faces diminished role*, Associated Press, http://espn.go.com/nfl/trainingcamp12/story/_id/8297078/atlanta-falcons-pass-first-offense-limit-michael-turner-carries (last visited December 21, 2016).

release, or trade a player. A fantasy player's job is comparable to a general manager of a sports team.⁸² In comparison, daily players only have to pick a team for that particular day, which means the totality of the components involved in traditional fantasy is not present in daily fantasy.⁸³

Daily Fantasy type games are much different than traditional fantasy. The three type of games are: (1) Head-to-Head, (2) 50/50s or double ups, and (3) Guaranteed Prize pools.⁸⁴ The head-to-head matchup is similar to season long fantasy where a player is matched up against one other player.⁸⁵ 50/50's contains a large group of people playing in a league for the day and if a player's team is above the 50th percentile that person wins a prize.⁸⁶ Guaranteed Prize Pools (GPP) pay out large amounts of prizes to the top ten percent players.⁸⁷

There is major disagreement considering daily fantasy games as skill. A lawyer for Fantasy Sports Trade Association made the argument in front of New Jersey Assembly Committee that skill is even more important to the outcome of daily fantasy than season long contests.⁸⁸ Further, in *People vs. FanDuel, Inc.*,⁸⁹ an affidavit by an MIT Professor laid out three key points as to why daily fantasy is based on skill: (1) what the player does have a direct effect on the contest, (2) skilled well-informed players are more likely to do better than non-skilled players within a set period of games, and (3) a player can get better the more he plays.⁸⁹

⁸² *Id.*

⁸³ *Schneidermann*, supra note 52.

⁸⁴ Steve Buzzard, *Analyzing the Different Types of Games in Daily Fantasy Sports*, Football Guys, http://subscribers.footballguys.com/apps/article.php?article=14Buzzard_DFS_Game_Types (last visited December 20, 2016).

⁸⁵ *Id.*

⁸⁶ Stephen Perez, *Daily Fantasy Strategy: How to play 50/50, H2H, GPP contests*, Sporting News, <http://www.sportingnews.com/fantasy-news/4635471-daily-fantasy-sports-dfs-strategy-how-to-play-5050-h2h-gpp-win-cash-prizes-one-day-draft-kings-tips> (last visited December 12, 2016).

⁸⁷ *Id.*

⁸⁸ Dustin Gouker, *FSTA Lobbyist Tells Lawmakers: Season Long Fantasy Involves Less Skill Than Daily Fantasy Sports*, Legal Sports Report, <http://www.legalsportsreport.com/6014/less-skill-in-seasonlong-fantasy/> (last visited December 21, 2016).

⁸⁹ *People v. Fanduel, Inc.*, 2015 NY Slip Op 32332(U) (Sup. Ct. 2015). Affidavit provided:

Marc Edelman (the author of *A Short Treatise on Fantasy Sports and the Law* and *Navigating the Legal Risks of Daily Fantasy Sports*) argues that the issue of whether fantasy sports are gambling lies between clearly legal and explicitly illegal.⁹⁰ The variety of games and laws in each State creates no magical “one size fits all” answer.⁹¹ This is why Daily sites are hiring counsel, not operating in certain States, and a lengthy “terms of use” page is easily accessible on sites like FanDuel and DraftKings.⁹²

3. Drafting

Drafting is one of the largest aspects of owning a fantasy team. Three types of drafts are used for traditional fantasy: (1) Snake Draft, (2) Straight Draft, (3) Auction draft.⁹³ Each type of draft requires an aspect of knowledge and skill to build a championship quality team.

One difference between daily fantasy and traditional fantasy is that once a player is chosen in traditional fantasy leagues that player is no longer available. In daily fantasy, multiple teams are allowed to have the same players, which creates less strategy as a traditional player.⁹⁴ A traditional player selects fantasy players to fill starter positions, along with backups to fill in for players based on bye weeks and bad match ups against an opponent during the season. Also, when drafting in traditional fantasy a player must take into account, which opponents are in their division.⁹⁵ The reason for this is most leagues set up two matches throughout the season with divisional opponents. This could mean if a team has the

https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=hA6u1Mg3E4vZGP_PLUS_XLAb9Ow==&system=prod (last visited December 20, 2016).

⁹⁰ Marc Edelman, *Some Daily Fantasy Sports Are Legal, Others Not So Much*, US News, <http://www.usnews.com/debate-club/are-daily-fantasy-sports-gambling/some-daily-fantasy-sports-are-legal-others-not-so-much> (last visited December 17, 2016).

⁹¹ *Id.*

⁹² *Id.*

⁹³ Definitions of these type of drafts are available at: *Fantasy Football 101: Types of Drafts*, SB Nation, <http://www.windycitygridiron.com/2011/3/1/2022378/fantasy-football-101-types-of-drafts> (last visited December 21, 2016).

⁹⁴ *Entering the Same Team Multiple Times: Is it a Good Play?*, Roto Grinders, <https://rotogrinders.com/articles/entering-the-same-team-multiple-times-is-it-profitable-103881> (last visited December 21, 2016).

⁹⁵ Boswell, *supra* note 19 at 1264.

quarterback for the New Orleans Saints that player may want to draft the top wide receiver for the Saints to equal out points if the quarterback is throwing touchdowns. This type of strategy is not present in most daily fantasy games due to playing against thousands of players at one time.⁹⁶

Daily fantasy's strongest argument for having a high level of skill comes from games that involve auction/salary cap drafts. The auction/salary cap aspect creates skill by introducing an economic analysis. The fantasy player has to strategize the value of real life players to the amount of salary cap he has available. This is different from valuing players based on draft spots, which could be argued as increasing the amount of skill due to the financial analysis being made.

The fantasy player has multiple strategies when creating a fantasy team through auction drafts. The fantasy player may decide to choose a few high priced players and add low priced players to fill out the rest of his roster.⁹⁷ Another strategy is to choose a team of all average priced players.⁹⁸

The argument for daily fantasy having an aspect of skill in drafting players is present, but it still does not have the element of micromanaging a team on a weekly basis.⁹⁹ If a player gets hurt in a game or the player doesn't perform well that week it is not going to affect traditional fantasy players over a seventeen-week period.¹⁰⁰

4. Prizes

Prizes are an important factor in determining the legality of daily fantasy. In the past fantasy sports was a way for a group of friends to get together and compete similar to the story in the introduction. The money aspect of traditional fantasy is usually just

⁹⁶ Joshua Brustein, *You Aren't Good Enough to Win Money Playing Daily Fantasy Football*, *Bloomberg Business*, <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football> (last visited December 21, 2016).

⁹⁷ Dr. Renee Miller, *Strategies for playing daily fantasy football*, ESPN, http://espn.go.com/fantasy/football/story/_id/13090670/best-strategies-how-play-daily-fantasy-football (last visited December 10, 2016).

⁹⁸ *Id.*

⁹⁹ Boswell, *supra* note 19 at 1264.

¹⁰⁰ Cabot & Csoka, *supra* note 14, at 1211.

an added bonus to increase the thrill of playing.¹⁰¹ Before Daily fantasy existed, the argument was made that the money involved in fantasy sports was so minimal that these games could only have a substantial negative effect on the crime rate and economy if every participant were to compete in a great number of fantasy games.¹⁰²

Fast-forward to today, fantasy sports is a fifteen-billion-dollar industry with over fifty million players. People are even becoming professional daily fantasy players. There are prizes of over one million dollars being paid out to players, which is more than the twenty-five dollars a team of ten traditional fantasy players will pay for a league spanning seventeen weeks.¹⁰³ Daily fantasy supporters make the argument that daily fantasy would never reach the level of traditional betting, and only small groups of players consistently play in high-level games.¹⁰⁴ Further, they argue one to ten dollar games are available along with free games if players choose to participate.¹⁰⁵

However, the true purpose of daily fantasy is to win money. There is no companionship created with daily fantasy because you are playing against thousands of people. Even if you play in a head to head matchup you never communicate with your opponent. The passionate connection a season-long player has with his team is never able to form because he is moving on to a hotter fresh team the next week. States may want to look at how they have handled online poker versus social poker to allow for traditional fantasy while regulating daily fantasy.¹⁰⁶

Another problem with daily fantasy is the fact that the top 1 percent of bettors, also pay lots of entry fees, enter a variety of games, and enter diverse lineups, which allows them to pull in 91

¹⁰¹ Boswell, *supra* note 19 at 1264.

¹⁰² Michael J. Thompson, *Give Me \$ 25 on Red and Derek Jeter for \$ 26: Do Fantasy Sports Leagues Constitute Gambling?*, 8 Sports Law. J. 21, 25 (2001).

¹⁰³ *Recapping this week's two million dollar winner*, DraftKings, <http://playbook.draftkings.com/nfl/recapping-this-weeks-two-million-dollar-winner/> (last visited December 20, 2016).

¹⁰⁴ Brustein, *supra* note 95.

¹⁰⁵ Ehrman, *Supra* note 100 at 108.

¹⁰⁶ A compilation of the legality of social games in each State is available at: *Home Poker Law*, Home Poker Games, <http://www.homepokergames.com/homepokerlaw.php> (Last visited December 4, 2016).

percent of profits.¹⁰⁷ Meanwhile, the casual bettor pays an average of \$49 in entry fees but loses half of the time.¹⁰⁸ Nigel Eccles, the chief executive of FanDuel, believes this gives evidence that daily fantasy is skill.¹⁰⁹ However, the technique top bettors are using is similar to buying a lottery ticket. A person who buys enough tickets and diversifies the combination of numbers, at least increases the chances of winning relatively more than buying one ticket.¹¹⁰ Daily fantasy's structure allows for a greater return than the lottery because 22 percent of contestants will win every game.¹¹¹ Skill may play some factor in the top 1 percent of daily fantasy players winning 91 percent of profits, but if daily fantasy were pure skill the major bettors would not need multiple attempts at joining a daily fantasy game.¹¹²

Further, Timothy Fong the co-director of the gambling studies program at UCLA agrees there is emerging evidence showing daily fantasy as skill, but the issue is not players getting better with experience.¹¹³ Fong argues that the issue is the classification of the game.¹¹⁴ Poker is also a game of skill, but when it is played for cash prizes it is tightly regulated in the United States and generates small revenues, unlike daily fantasy.¹¹⁵

¹⁰⁷ Drew Harwell, *All the reasons you (probably) won't win money playing daily fantasy sports*, The Washington Post, <https://www.washingtonpost.com/news/the-switch/wp/2015/10/12/all-the-reasons-you-probably-wont-win-money-playing-daily-fantasy-sports/> (last visited January 5, 2016)

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Jeff Barker, *Statisticians question logic of buying multiple lottery tickets as jackpot rises to \$1.5 B*, Baltimore Sun, <http://www.baltimoresun.com/business/bs-bz-powerball-maryland-odds-20160111-story.html> (last visited December 5, 2016).

¹¹¹ See Harwell, *Supra* note 116.

¹¹² For example a daily fantasy game consisting of 740 players with an entry fee of \$300 will award a prize to the top 155 finishers. The prizes of first place to 155th place range from \$30,000 to \$600. A player that enters multiple lineups will be able to increase his relative chances of at least being in the 155th spot. The risk in daily fantasy seems to be worth more than playing at the casino because there is a guarantee that 155 entries will return at least double of the entry fee. Draft Kings, <https://www.draftkings.com/lobby#/featured> (last visited January 5, 2016).

¹¹³ Timothy Fong, *Daily Fantasy Sports Games Are Clearly Gambling*, US News, <http://www.usnews.com/debate-club/are-daily-fantasy-sports-gambling/daily-fantasy-sports-games-are-clearly-gambling> (last visited December 21, 2016).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

With daily fantasy giving prizes to participants, this satisfies the consideration and prize elements of the common law definition of gambling.¹¹⁶ Traditional fantasy also meets these requirements.¹¹⁷ However, Daily fantasy is taking money off the top of these bets and creating larger revenues than online poker.¹¹⁸ The determination as to whether daily fantasy is gambling will be left for the court to decide if the duration, type of contest, and the way players are drafted satisfy enough skill to overcome the amount of chance involved.

IV. CONCLUSION

This article reviewed how daily fantasy is able to hide a game of chance behind the illusion of skill. The only federal law that explicitly protects fantasy sports is the UIGEA, however, there is debate as to whether this would extend to daily fantasy.

The true test of the legality of daily fantasy will come from individual state statutes. This creates a great deal of difficulties in determining if daily fantasy is gambling. The majority of state statutes most likely would not determine daily fantasy as illegal gambling.

States that are looking to ban daily fantasy, while still keeping traditional fantasy should look to adopting a similar statute as Montana. Further, Montana running a weekly fantasy system through their lottery helps the argument that daily fantasy is a game of chance.

Ultimately, daily fantasy leagues align closer to sports betting than traditional fantasy leagues. Daily fantasy does have some attributes that make traditional fantasy sports leagues a game of skill. However, daily fantasy does not incorporate the totality of skill that it takes to run a traditional fantasy sports league, which ultimately makes it a game of chance. The freedom that sites like DraftKings and FanDuel have experienced will most likely be threatened as States take a more aggressive approach to regulating

¹¹⁶ Anthony N. Cabot & Louis V. Csoka, *Games People Play: Is it Time for a New Legal Approach to Prize Games?*, 4 NEV. L. J. 197, 216 (2004).

¹¹⁷ *Id.*

¹¹⁸ Eric Chemi, *Online poker vs. daily fantasy: Which creates more winners?*, CNBC, <http://www.cnbc.com/2015/10/02/online-poker-vs-daily-fantasy-which-creates-more-winners.html> (last visited December 19, 2016).

daily fantasy. Though direct legal action has been rare, legislation is beginning to be brought that could hurt the profit of these sites. These sites can only hide behind the “skill” element for so long before the “chance” element begins to reveal itself.