

## EXPLORING THE LEGALITY OF THE LUCRATIVE WORLD OF FANTASY SPORTS

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### ABSTRACT

*This paper explores the gambling activities arising from Fantasy Sports Leagues, in particular the laws associated with these activities, and the gambling behavior of college students within these leagues. The paper begins with an investigation into the development of the fantasy sports industry. It then examines the Unlawful Internet Gambling Enforcement Act (UIGEA) which prohibits gambling enterprises from accepting payments (bets) over the Internet that would be unlawful under federal or state law, but specifically excludes fantasy sports under the federal gambling statutes. Because the UIGEA allows states to impose their own restrictions, however, the paper next surveys state laws and examines whether or not wagers on fantasy sports would be illegal. Finally, the paper reports on a survey of college students at a major Southeastern Conference university regarding their Fantasy Sports behavior.*

### INTRODUCTION

*"If you bet on a horse, that's gambling. If you bet that you can make three spades, that's entertainment. If you bet cotton will go up three points, that's business. See the difference?"*  
*Blackie Sherrod, legendary Texas Sports Columnist*

Contrary to popular belief, Fantasy Football was not the first fantasy sport to be played. The first modern fantasy sport to be played was Fantasy Baseball, invented by a group of journalists who wanted to test each other's knowledge of sports in 1980. The league came to be called "The Rotisserie," and employed the same basic principles that comprise leagues today: a league commissioner, a group of participants (players), team names, the drafting of players, and a statistical scoring system. The basic principle behind the league was to create a system to gauge players' sports knowledge throughout the season. This league circulated throughout late 1980s via regional newspapers such as the L.A. Times, N.Y. Daily News and Chicago Sun-Times, prompting readers to create their own fantasy leagues (Holleman, 2006). Through the Internet in the nineties, fantasy players were able to create leagues through online providers, further growing the industry.

While the rules of fantasy leagues can vary greatly, participants (players) generally are set up through an online provider via a league commissioner. Participants join the league and a draft is held prior to the commencement of the season. A league usually has anywhere from eight to sixteen teams. Typically, in season long fantasy, players will be assigned a draft pick and this will determine their order of choosing players. Teams then play each other head to head throughout the season. Each week they submit their starting lineups, strategizing on what players to select for the week based on various factors: what team they are playing, the weather, injury status, etc. Each week the winner is determined by a scoring system that is determined by the player's performances for that week. Towards the end of the fantasy season, the top winning

teams then go to a series of playoff games of single elimination. The winner of this playoff series is crowned the league champion.

Today, there is nearly a fantasy league for most every sport — football, basketball, stock car racing, golf, hockey, and more. Fantasy sports continue to grow yearly and people are spending more and more time playing. The growth of the industry has given way to additional services that players can use to gain an edge. Players can now insure their players through *fantasyplayerprotect.com*, give the league's prize money to *leaguesafe.com* for safekeeping, and seek advice from *rotowire.com*. If there's a dispute, no problem. Go to *Sportsjudge.com* "Where Fantasy League Disputes are Resolved" by real lawyers. FX has even created a comedy called *The League* that follows a group of friends throughout their fantasy season.

To keep things competitive, 46.9% of Fantasy Sports players pay league fees according to the Fantasy Sports Trade Association. For Fantasy Sports, the idea that the winner of a fantasy league will be the one with the most knowledge of sports gives credence to the idea that Fantasy Sports is a game of strategy, not a game of luck; this perspective is also why current regulations in many states allow placing wagers in leagues as long as certain conditions are met.

Over the years, fantasy sports have continued to evolve, with the largest growth coming lately from daily fantasy leagues. The most popular providers, "FanDuel" and "DraftKings" are revolutionizing fantasy sports. Unlike traditional fantasy leagues, daily leagues last a day or a week. They offer the same sports as traditional fantasy leagues, but are governed by different rules. Rather than a typical draft where each player has to wait their turn to draft a player, in daily leagues you choose players based on a salary cap, allowing multiple participants in the league to have the same player. These leagues also differ in the number of entrants: there is no maximum number of players in a given contest; although, per regulations, the prize money must stay the same.

### SIZE OF THE INDUSTRY

Fantasy sports have created a unique way to inspire people to watch their favorite sports with greater interest. Professional leagues also have benefited because sports betting encourages people to follow sports and increases television ratings (Bernard, 2013). Daily sports are enhancing the way sport enthusiasts test their skills against other players. While testing their skills for bragging rights can be exciting, the thrill of taking home a grand prize is even greater, which is why most season-long and daily fantasy leagues have entry fees.

Fantasy sports have experienced substantial growth in the number of users since 2003. The Fantasy Sports Trade Association (FSTA) estimates that 41.5 million people played fantasy sports in the USA and Canada in 2014, up from 500,000 in 1988 and 15.2 million in 2003, or an 11% compounded annual growth over the past twelve years. The FSTA estimates that roughly 46.9% of fantasy sports players spend \$111 per 12-month period. Fantasy players are spending around 8.67 hours per week participating in fantasy sports and 30% of players are using additional websites to obtain information, spending \$656 million a year for informational materials.

This usage supports the notion that players are doing their due diligence as players to formulate a strategy for their fantasy teams, enhancing the idea that fantasy sports is a game of skill and not gambling based on chance. Some statistics from the FSTA reveal valuable insights into the world of the typical fantasy sports player. As one would assume, the most popular fantasy sport is football, capturing 69.4% of total fantasy players. Fantasy sports players are predominately male (80%), educated (78.1% have at least a college degree), Caucasian (89.8%),

and have an average age of 34. They are well-versed in the world of fantasy sports and average 9.51 years in fantasy sports. They are sports fanatics, spending 17.89 hours consuming sports per week.

According to Zack's Equity Research, the largest providers of traditional fantasy sports are Yahoo (18%), ESPN (13%), and CBS Sports (7%). These providers offer free to play leagues or paid leagues with prizes, provided you are a resident of certain states. For example, CBS offers five different fantasy leagues with various entry fees and prizes. ESPN and Yahoo offer similar paid leagues, both public and private, with cash prizes as well as gift cards in the case of ESPN.

While the traditional fantasy leagues have predominately been seen as a hobby, not a means of making money, the daily leagues have attracted a market segment that is looking to test their knowledge for big money. Relatively new, the daily leagues have created the easiest way for fantasy players to take home large amounts of money in a given week. FanDuel has managed to raise \$88 million in equity with a business model based on fantasy sport wagers. These daily sports sites take in entry fees, give out prizes, and keep the excess as earnings. FanDuel has gone from \$1,356,459 and 3,158 participants in the first quarter of 2011 to \$370 million and 1 million participates in the fourth quarter of 2014, roughly a 42% compounded annual growth rate per quarter since 2011.

FanDuel has paid out \$600 million to date and currently offers 30 thousand daily leagues with \$20 million in weekly contest payouts. While DraftKings does not disclose their financial data, they assert on their website that there will be "over 1 billion guaranteed in prizes this year." What is even more impressive about these daily leagues are the massive tournaments that they host. DraftKings is hosting a \$2 million Fantasy Basketball World Championship in 2015, while FanDuel hosted a \$10 million fantasy football tournament with a \$2 million first prize in Las Vegas. In order to win the big prize money, participants in daily leagues can pay an entry fee ranging from 25 cents to \$5,000. Because of regulations to be discussed subsequently, the prizes for these tournaments are not based on the dollar value of the entry fees or number of participants that have entered.

These daily leagues are being seen as the future of the fantasy sports industry and large providers are recognizing their impact. FanDuel and DraftKings have seen equity investments from traditional fantasy sports providers, receiving capital from ESPN, Yahoo, and NBC. They are also lobbying NFL and NBA teams for sponsorships. For example, the Los Angeles Clippers announced a partnership with DraftKings to help with "engaging our fan base through this new partnership." FanDuel has seen partnerships with the Brooklyn Nets, Chicago Bulls, Dallas Mavericks, New York Knicks, and the Orlando Magic.

When selecting which daily site to use, 48% of players go with the site they trust. This tendency explains why FanDuel and DraftKings continually stress their legitimacy through advertising. DraftKings homepage declares: "DraftKings is based in the USA and is 100% legal" along with "safe 100% secure" and "as featured in... The Wall Street Journal, the Boston Globe, Forbes." Because daily fantasy sports is a new thing, the daily leagues are spending substantial amounts on advertising to establish their legitimacy. FanDuel employs testimonials of various participants to enhance the idea that it is a way for the average person to win money playing fantasy sports. Both DraftKings and FanDuel continuously offer deals to attract customers and increase their market share. DraftKings offers a "Plus 100% deposit bonus" and FanDuel offers a "Money Back guarantee. Love it after your first league or your money back." The main question

that comes to mind with these huge payouts on daily sports, as well as the entry fees in the traditional leagues, is whether or not the wagers are legal.

### THE LAW AND GAMBLING

Historically, gambling contracts were considered illegal bargains and unenforceable as a violation of statutory law or as being against public policy. Public policy generally is discernable from statutory pronouncements; however, courts may strike down agreements as being against public policy in the absence of statutory guidance (*Williams v. Walker-Thomas Furniture Co.*, 1965). The typical concern proffered for why paying consideration for a chance should be an illegal bargain, and for why gambling which is not state sanctioned should be illegal, centers around concerns for morality and the notion that gambling is a vice which can produce societal harms (Towfigh, Glockner & Reid, 2013). One justification for prohibitions on wagering asserts that gambling increases the incidence of crimes that result from compulsive gambling behavior (Davidson, 2002). Additionally, the social and moral questions raised by the spread of gambling include potential increases in personal bankruptcies, along with pathological and underage gambling (Conon, 2009). In general, it is argued that statutes regulating gambling are necessary to protect public morals or to maintain public order (Hollander, 2015).

Given the amount of money that is won/lost playing fantasy sports, it is no wonder people question whether or not the entry fees should be considered illegal gambling. Opponents of fantasy sports argue that betting on fantasy sports is no different than any other form of unlawful wagering. Proponents of fantasy sports argue that fantasy betting is a game of skill, pointing to the expertise of the players and the time spent formulating strategies. Public policy reasons concerning the dangers emanating from gambling such as addiction and the exploitation of the human passion for games are often offered to justify regulation; however, distinguishing between games of chance and games of skill does not necessarily differentiate between dangerous and harmless games (Towfigh, Glockner & Reid, 2013).

Today, federal and state statutory law regulates the gaming industry and provides criminal penalties for violations. On the civil or contract side of the ledger, if the wager on fantasy sports is illegal under those laws, then both fantasy sports leagues and credit card companies would face uncertainty in collecting gambling debts, and fantasy sports contestants might have difficulty collecting if a fantasy sports provider refused to award a prize to a winning contestant (Davidson, 2002). The legality and regulation of online gambling in general, and with sports gambling in particular, remains controversial. Arguably, there are deficiencies in federal law and there is need for a new model for dealing with sports wagering, particularly over the Internet (Cabot, 2010).

Some observers claim that online gambling should be legalized because of the potential tax revenue available for state and federal governments. While the advent of online gambling should not strip the states of the ability to determine if legal gambling occurs within their borders, the federal government may be in a better position to establish a national framework and regulate the market (Warshaw, 2014). Additionally, commentators assert that because tax revenue from Internet gambling is tempting to states, federal regulation is needed to clarify existing federal law to set forth minimum standards and establish procedures for the licensing of Internet gambling (Miller, 2014). Other critics of the current system contend that clearly defining unlawful Internet gambling and broadening the criminalization of the activity to reach both operators and participants is a preferable approach to proposals that call for regulation and

taxation (Conon, 2009). The following sections details current federal and state laws regulating wagering.

### FEDERAL REGULATION OF THE GAMING INDUSTRY

There are several federal laws that affect the gaming industry and fantasy sports that providers must consider. For example, the *Interstate Wire Act of 1961* declares it is illegal for a business to assist or transmit illegal wagers and sets forth the penalties for the transmission of wagering information. Specifically, the Act provides that people engaged in the business of betting or wagering who knowingly use “a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both” (18 U.S. Code § 1084(a) (2015)). Because wire communications include the Internet, a fantasy sports provider which was deemed to be conducting unlawful gambling could be subject to the fines and penalties under the Act. In 2011 the Department of Justice issued an opinion stating that the Wire Act applies only to bets on sports events and races, thereby allowing state to authorize intra-state online games providing that gambling is legal under state laws (Rose, 2013).

The *Illegal Gambling Business Act of 1970* is broader than the Wire Act of 1961 in that it includes any illegal gambling activity whereas the Wire Act only includes illegal gambling activities that use wire communications. It declares that “whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both... (2) “gambling” includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein” (18 U.S. Code § 1955(a) & (b)(4) (2015)). The Act describes an illegal gambling business as one in which it: “(i) is a violation of the law of a State or political subdivision in which it is conducted; (ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and (iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day” (18 U.S. Code § 1955(b) (2015)). This Act exempts businesses that do not have gross revenues over \$2,000 in any single day, and most fantasy providers would meet that threshold. If the providers were found to violate state gambling laws, they would be subject to prosecution under the Illegal Gambling Business Act of 1970, as well.

The *Professional and Amateur Sports Protection Act (PASPA)*, was passed after lobbying efforts from the professional sports industry. PASPA makes it is illegal for a business to conduct gambling activities that are based on amateur or professional athletes. PASPA declares that it is unlawful for a governmental entity or 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... on one or more competitive games in which amateur or professional athletes participate...” (28 U.S.C. § 3702 (2015)). While the law has been criticized as an invalid regulation of interstate commerce by Congress (Roeske, 2014) the Act was upheld by the U.S. Court of Appeals for the Third Circuit in a challenge brought by New Jersey (*NCAA v. New Jersey*, 2013). If a fantasy provider’s league was deemed to meet the elements to be considered gambling or wagering, it could be

subject to prosecution under the statute. Because daily leagues place such a high emphasis on entry fees and payouts, they could be at more risk to be considered wagering and be subject to sanction.

The *Travel Act of 1961* sets forth fines and punishments for violations of unlawful activities. The Act provides criminal penalties for using any facility of interstate or foreign commerce to “(1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity (18 U.S.C. §1952(a) (2015)). The Act further declares gambling to be an unlawful activity if federal or state laws are violated (18 U.S.C. §1952(b) (2015)). Under the Travel Act, fantasy providers need to be careful in accepting and distributing interstate/foreign league proceeds as well as transmitting information that facilitates illegal gambling activities, such as conducting leagues for participants to illegally gamble. If fantasy leagues were found to be gambling activities, providers would be violating the Travel Act when distributing the proceeds, and for facilitating unlawful activity. Because providers use preseason reports, weekly reports, player rankings, fantasy statistics and more, they could be considered facilitating illegal gambling activities in violation of the Travel Act. For example, in *United States v. Miller* (1967), a federal appeals court found that tickertape and blackboards used in an establishment were facilitating illegal gambling operations, even though the establishment did not create and operate the illegal gambling pools. The court stated that the ticker need not be essential to the gambling operation; it need only facilitate an illegal gambling operation.

Finally, the *Interstate Transportation of Wagering Paraphernalia Act of 1961* makes it illegal for an entity to knowingly conduct interstate gambling. The Act declares: “Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event...shall be fined and/or imprisoned for not more than five years or both” (18 U.S. Code § 1953(a) (2015)). Fantasy providers could be in violation if their gambling activities are illegal. However, the act provides an exceptions in states where gambling is legal. Also, fantasy providers would be exempt if state statutes do not consider fantasy leagues to be gambling.

All of these federal statutes potentially impact fantasy sport operations. However, the federal law most pertinent to fantasy sports is the *Unlawful Internet Gambling Enforcement Act* (UIGEA). This statute was passed in 2006 to prohibit gambling businesses from accepting payments (bets) that involves the use of the Internet and that is unlawful under any federal or state law (31 U.S. Code § 5362 (10)(a)). Regulations promulgated pursuant to the Act require participants in payment systems to have controls in place to prevent the processing of prohibited transactions (31 C.F.R. Part 132).

Simply stated, Congress chose to prohibit financial institutions from allowing payment through their systems for prohibited activities, that is, internet gambling. This control method was recommended by the National Gambling Impact Study Commission, which found that internet gambling was causing debt collection problems for insured depository institutions and the consumer credit industry, and that new mechanisms for enforcing gambling laws were necessary, traditional law enforcement mechanisms being found inadequate. Section 5364 of the U.S. Code requires participants to have policies and procedures in place to identify and prevent restricted transactions, such as credit cards, electronic fund transfers, checks, or the proceeds

from any other transaction. Civil remedies for violations of the Act include injunctive relief, while criminal penalties include fines and imprisonment. The UIGEA has been upheld against a challenge of unconstitutional vagueness (*Interactive Media Entertainment & Gaming Association v. United States*, 2009). However, arguably the Act imposes excessive burdens on financial institutions and fails to take into account that online gambling providers may relocate overseas beyond the reach of regulation (Moran, 2010-11).

The Act specifically spelled out what is considered a bet or a wager. A bet or wager means staking or risking something of value upon the outcome of chance with the understanding that the person or another person will receive something of value in the event of a certain outcome, including the purchase of a chance to win a lottery or other prize that is predominately subject to chance (31 U.S. Code § 5362(1)). Finally, the definition also includes any instructions or information that results in the movement of funds by the “bettor or customer in, to, or from an account with the business of betting or wagering” (31 U.S. Code § 5362(1)(d)). The UIGEA specifies that transactions, including those involving fantasy sports, would not be considered a bet or wager as long as: 1) the prizes are determined before the games and not determined by the fees collected; 2) there is a method for assessing the knowledge and skills of the players, which is determined by a statistical scoring system across multiple sporting events; and 3) no winning outcome is based on the score of any one team or a single athlete.

Thus, providers have attempted to design their services to meet the requirements of the UIGEA. First, they have created leagues where the prizes are determined in advance. For example, as mentioned previously, CBS predesigned leagues have specific league champ prizes.

These prizes do not change, are not influenced by the number of entrants, and are disclosed in advance. Thus, the “Elite League” will have a league champ prize of \$5,000 no matter what transpires with registrants. But how can the leagues guarantee a piece of the pie if they cannot change the entry fees charged or the prize given? For example, if a provider creates a fantasy league that guarantees a \$25,000 payout, what guarantees that they will have enough entrants/entrance fees to cover the prize?

In the case of the traditional providers, the leagues are often quite small, usually just ten teams. However, the daily leagues have varying tournaments with small or large prizes and an unlimited number of participants. Therefore, the daily leagues are much more reliant on enrolling a sufficient number of participants to ensure that they cover the prizes of their leagues. If the leagues pass the breakeven point between entry fees and prizes, the overage will be profit because they are legally obligated not to change the prize money after the creation of the league. Most fantasy league players are oblivious to this regulation and wonder why there are \$20,000 in entry fees but only \$10,000 in prizes, but in essence the provider is rewarded for taking the risk that there will not be enough entries for a given tournament.

Secondly, the UIGEA requires that there be a method of assessing the knowledge and skills of the players that is determined by a statistical scoring system across multiple sporting events. For this reason Fantasy Leagues employ precise scoring systems in order to determine points. The stipulation that the scoring system should be across multiple sporting events can be illustrated by the daily leagues. Both FanDuel and DraftKings were unable to create a daily tournament for the Superbowl because it is a single scoring event. If they had created a daily league for the big event, it would have violated the requirement that the outcome be dependent on multiple sporting events.

Finally, the third requirement is that no winning outcome is based on the score of any single team performance or any single performance of an individual athlete. The first part of this

requirement is why a fantasy player cannot draft his fantasy team from a single real-world team, i.e., players cannot have their entire team composed of the Dallas Cowboys, because this configuration would result in the outcome being based solely on the performance of the Dallas Cowboys. The second part of the requirement is why fantasy leagues have a diversified lineup of players. The typical fantasy football lineup has 1 quarterback, 2 running backs, 2 wide receivers, 1 flex RB/WR/TE, 1 tight end, 1 kicker, and one defense (although this lineup can change with varying league rules). This setup allows for the outcome of a fantasy match to be the culmination of the efforts of individuals, not actual teams. If a fantasy league with an entry fee were created that required teams to have only one player, then this requirement would be violated. Nevertheless, daily fantasy sports leagues appear to be more analogous to sports betting than to traditional fantasy sports leagues because chance, as opposed to skill, seems to be the dominant factor when deciding a winner, which could make participation a form of sports betting illegal under the UIGEA (Trippiedi, 2014).

### REGULATION BY STATES

Some states track the spirit of the UIGEA in regulating fantasy sport leagues. For example, in 2015, the Kansas legislature excluded fantasy sports leagues from the definition of a "bet" if the league meets certain conditions. To be excluded "(1) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants; (2) all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events; and (3) no winning outcome may be based on the score, point spread or any performance or performances of any single real-world team or any combination of such teams or solely on any single performance of an individual athlete in any single real-world sporting event" (Kan. Stat. Ann. §21-6403(d) (2015)).

Nevertheless, state law does not need to adopt the paradigm established under federal law. Although the UIGEA excludes fantasy sports from violating federal gambling statutes, states can still impose their own restrictions. The UIGEA specifically provides that "the term 'unlawful internet gambling' means to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State laws in State or Tribal lands in which the bet or wager is initiated, received, or otherwise made" (31 U.S. Code § 5362(10)(A) (2015)).

Most states define gambling similar to the definition declared by Article VI of the Utah Constitution: "Gambling means risking anything of value for a return or risking anything of value upon the outcome of a contest, game, gaming scheme, or gaming device when the return or outcome is based upon an element of *chance* and is in accord with an *agreement* or understanding that someone will receive *something of value* in the event of a certain outcome" (emphasis added). Therefore, to be considered gambling in the majority of states, three elements must be satisfied: exchange of consideration, reward, and chance.

Consideration can be defined as "quid pro quo," meaning something for something, or a mutuality of obligation (Restatement (Second) of Contracts § 71). In the context of gambling, most courts have defined consideration as providing something valuable (i.e., money) for the chance of greater winnings, while a minority of courts have found consideration to involve any legal detriment for the chance to win a prize (Edelman, 2011). The element of reward can be



viewed as the prize of winning a bet, generally a tangible item. The third element, chance, is where state laws differ from federal law when it comes to fantasy sports. Chance is something that happens unpredictably. Courts have ruled that a game of chance is “such a game as is determined entirely or in part by lot or mere luck, and in which judgment, practice, skill or adroitness have honestly no office at all, or are thwarted by chance,” whereas a game of skill “is one in which nothing is left to chance, but superior knowledge and attention, or superior strength, agility and practice gain the victory” (State v. Eisen, 535, 1972). In other words, chance can be considered the luck element. But states differ on how significant the element of chance/luck must be. The four tests that are generally used to test for chance are: the predominance test, the material element test, the gambling instinct test, or the any chance test (Cabot & Csoka, 2007).

The “predominance test,” used by most states, declares an activity to satisfy the chance element if greater than fifty percent of the result is derived from chance. The predominance test leads to somewhat predictable results and is more objective than the other tests (Okerberg, 2014). In applying this test, fantasy players assert that the outcomes of fantasy games are through hours of strategizing rather than mere luck. The “material element test” looks to whether or not chance has a material effect on the outcome. This test may or may not be the same as the predominance test, depending on whether one believes that material means more than fifty percent. The material element test is subjective because the meaning of “material” is not uniformly defined and applied. (Okerberg, 2014).

The “gambling instinct test” satisfies the chance element if it “appeals to the player’s gambling instinct.” It is unclear exactly how this test can be applied in practice. “The gambling instinct test is problematic given its subjective nature” (Okerberg, 28, 2014). Finally, under the “any chance test” an activity satisfies the chance element “if a particular game contains any chance that influences the outcome of the game.” Under this test all forms of betting on any aspect of a sporting event would be considered gambling, as chance is an inevitable factor in all sporting activities. In the words of University of Texas legendary football coach Darrell Royal, “Breaks balance out. The sun don’t shine on the same ol’ dog’s rear end every day.”

Providers of fantasy sports have argued that their leagues are skill based in order to pass the chance test that exists in many of the states. Since most states use the predominance test, if providers can prove that fantasy sports involve a greater percentage of skill than chance they can successfully refute the argument that fantasy sports constitute gambling. In order to create the perception that fantasy sports involve more skill than luck, providers explicitly advertise them as games of skill. FanDuel’s *Terms of Use*, adamantly declare that “FanDuel is a game of skill,” stating “winners are determined by the individuals who use their skill and knowledge of relevant professional sports...” Advertising as games of skill can be further seen through ESPN, Yahoo’s, and CBS’s tools that are available to participants. Each offers analysis software and expert advice in order to help fantasy players create the best strategies.

To further enhance the perception that fantasy sports are a game of skill, one can look to the nature of the games. Three skill elements are found in a fantasy league: drafting, playing, and trading players (Cabot & Csoka, 2007). Fantasy players must strategize on which players to draft based on past performance and future expectations; to do this, they can use the analysis packages and expert advice offered by their fantasy providers. Refuting the skill argument to some extent is the fact that in traditional fantasy leagues a player can only be chosen once, and participants need to pick players based on the other participant’s choices. Thus, in the traditional leagues, the participant that gets first draft choice has a leg up on the other participants by being able to choose first, creating an element of chance in the draft process.

Moreover, if a league employs the “auto-draft” option, the draft selection will be entirely based on chance and under the predominance test could be considered gambling. On the other hand, in daily leagues, participants need to maximize the output of their players that is restricted by a salary cap; in other words, they need to strategize and draft the players that will optimize the amount of salary they have available to spend. But since daily leagues span a short time-frame, there is more that is left open to chance in the short-term; a player can have an off day or the weather conditions can affect a game. Daily leagues also do not have other strategies characteristic of the traditional leagues. Choosing which players to play every week can be seen as a skill in traditional games that is not available in daily leagues, where only one line-up is chosen for a league. Also, in traditional leagues where players must use their skills to negotiate in trading players with other teams, daily leagues have no interactions between fantasy teams. Therefore, while in daily leagues the research is done before the league and ceases after the commencement of the league, traditional league participants must continually research their players throughout the length of the season.

While these attributes provide justification that fantasy sports are a game of skill, there are still elements of chance in any league just as there are elements of chance in any sport. For example, the risk of injury, adverse weather conditions, suspensions, and other contingencies are the result of chance to a degree. Fantasy providers need to defend their positions that fantasy sports are predominately skill in order to show that the chance element is absent, and hence the activity is not gambling as defined in the majority of states. Some observers contend that luck is a significant factor for success in daily games; however, long-term statistics arguably validate the fact that more skilled players who devote more time to research and other planning consistently outperform other players, thus showing their skill (Ehrman. 2015).

Taking the UIGEA and state laws into account, fantasy providers have carefully placed restrictions on who can participate in their prize leagues. CBS Fantasy Sports Prize leagues restrict residents of Arizona, Iowa, Louisiana, Montana and Washington. FanDuel restricts residents of Arizona, Iowa, New York, Louisiana, Montana, Nevada and Washington. DraftKings restricts residents of Arizona, Iowa, Louisiana, Montana, Nevada and Washington from participation for prizes. Yahoo excludes residents of Florida in addition to Arizona, Iowa, Louisiana, Montana, Nevada and Washington. ESPN restricts residents of North Dakota and Tennessee, in addition to Arizona, Iowa, Louisiana, Montana, Nevada and Washington. Residents of the restricted states are allowed to participate in the paid leagues, but are ineligible to win a prize. All of the providers listed require participants to be at least eighteen years old or the age of majority in their state at the time of the entry.

### **States Restricted by All of the Major Providers**

Fantasy sports contests may qualify as gambling under a number of states’ statutory definition of the term (Davidson, 2002). Nevertheless, the providers’ terms of use highlight the fact that some states are stricter than others on fantasy sports. To analyze the state gambling laws that pertain to fantasy sports, it is easiest to consider the states that the providers explicitly prohibit from participating. States in which the major providers do *not* do business because state laws prohibit fantasy sports include Arizona, Iowa, Louisiana, Montana, and Washington.

Arizona employs the predominance test, so gambling is allowed to a certain extent. However, the reason that fantasy providers choose to restrict Arizona residents from participating comes from the restriction that only players can benefit from social gambling activities, not the providers. Arizona law excludes social gambling from the prohibition,

providing that no other person may receive “any benefit, directly or indirectly, from the gambling activity, including benefits of proprietorship, management or unequal advantage or odds in a series of gambles” (Ariz. Rev. Stat. Ann. § 13-3301(7) (2015)). Therefore, providers cannot receive a fee for hosting the league. They can only receive payment if they actually participate in the league and win, assuming they don’t have favorable rights. Since the main providers take the excess of the entry fees over the prizes given out, they violate this stipulation. Residents of Arizona are still allowed to play in the leagues, but providers would not be able to allow them to win a prize in a league where a portion of the fees is taken from the entry fees.

Under the statutes and court rulings in Iowa, the chance element has been interpreted to be satisfied if there is “any chance.” The Iowa Supreme Court previously declared that whether the game is one of skill or chance was immaterial because the statute provided that playing at any game for any sum of money or other property of any value constituted gambling (Parker-Gordon Importing Company v. Benakis, 1931). As a result, fantasy providers would violate the state gambling laws in Iowa since there is some chance involved in fantasy games: weather conditions, injuries, etc. However, there is hope for the future of fantasy sports in Iowa; recently, a bill was sent to the state senate floor to legalize prizes from fantasy sports leagues.

Louisiana defines gambling as “the intentional conduction, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit” (La. Rev. Stat. Ann. § 14:90 A (1)(a) (2015)). The Code goes further to expand the definition of gambling to include “the Internet, World Wide Web, or any part thereof by way of any computer, computer system, computer network, computer software, or any server” (La. Rev. Stat. Ann. § 14:90.3 (B) (2015)). Because fantasy sports participants are not operating “as a business,” they would not violate the gambling laws in Louisiana. However, the fantasy leagues would violate gambling Louisiana law since they are conducting leagues as a business and the participants are risking a loss in order to realize a profit.

Montana explicitly regulates fantasy sports gambling in its statutes. The Montana Code makes it lawful “to conduct or participate in a fantasy sports league, including a fantasy sports league that is operated under a pari-mutuel system of wagering” regulated under state law and also makes it unlawful to wager on a fantasy sports league by telephone or by the Internet (Mont. Code Ann. § 23-5-802 (2015)). This prohibition makes it almost impossible for providers to allow Montana residents to participate in fantasy leagues unless they somehow find a way to circumvent the Internet and telephone restrictions. The Code also restricts on the portion of entry fees that providers can take for administrative expenses, requiring that the total value of payouts to all league members to equal the amount collected for entrance, administrative, and transactions fees, minus payment for administrative expenses, and limiting the administrative fee collected for conducting a fantasy sports league to not more than 15% of the amount charged as a participant's entrance fee (Montana Code Ann. § 23-5-805 (2015)). These restrictions makes it far less profitable to operate a league in Montana.

The Washington state constitution prohibits all gambling except that expressly permitted by statute (Wash. Const art. II, § 24). The state Gambling Act authorized 100 square sports pool boards as the sole type of sports betting allowed (Wash. Rev. Code Ann. § 9.46.0335 (2015)); as a result, bracket pools, office sports pools, and fantasy sports have never been authorized as gambling activities in Washington State and are illegal. Judging from the restriction of residents from Washington by most providers, it seems they have heeded the advice from the Washington

State Gambling Commission which warns that all gambling on the Internet is illegal, including all types of sports betting.

### **Additional States Restricted by Some Providers**

In addition to the states mentioned previously, ESPN further restricts residents of two states, Tennessee and North Dakota, from participating in its fantasy sports leagues. Tennessee restricts gambling based on the “any-chance” restriction, concluding that “(1) Gambling is contrary to the public policy of this state and means risking anything of value for a profit whose return is to any degree contingent on chance, or any games of chance associated with casinos, including, but not limited to, slot machines, roulette wheels and the like...” (Tenn. Code Ann. § 39-17-501 (2015)). Since fantasy sports have some degree of chance, they would be illegal gambling activities.

North Dakota also employs the “any-chance” restriction. Its statute defines gambling as “risking any money, credit, deposit, or other thing of value for gain, contingent, wholly or partially, upon lot, chance, the operation of gambling apparatus, or the happening or outcome of an event, including an election or sporting event, over which the person taking the risk has no control,” clarifying that it does not include “lawful contests of skill, speed, strength, or endurance in which awards are made only to entrants or to the owners of entries...” (N.D. Cent. Code § 12.1-28-01 (2015)). Although North Dakota allows contests of skill, fantasy sports would not be legal since it is based partially on chance. Online gambling is prohibited under the state's Constitution, regardless of the amount wagered, and gambling may be conducted only by licensed non-profit organizations. ESPN restricts residents of North Dakota, although the other major providers allow them to participate.

Yahoo alone excludes residents of Florida. The Florida Attorney General concluded in 1991 that the operation of a fantasy sports league would violate state law (Advisory Legal Opinion, AGO 91-03.849.14). Even though Florida uses the predominance test, a Florida statute declares that it is “unlawful to bet on result of trial or contest of skill, etc.—whoever states, bets or wagers any money or other thing of value upon the result of any trial or contest of skill...shall be guilty of a misdemeanor” (Fla. Stat. Title 46 § 849.14 (2015)). Therefore, since a fantasy sports league can be considered a contest, arguably it would be illegal to bet or wager anything of value on fantasy sports.

Given the recent explosive growth of fantasy sports, states across the country are weighing additional regulations for daily fantasy sports (Rott, 2015). In November, the New York Attorney General issued cease-and-desist letters to daily fantasy sports wagering sites DraftKings and FanDuel, ordering both companies to immediately stop accepting wagers inside New York following an investigation by his office that found DraftKings and FanDuel were in violation of New York State law against illegal gambling. In response, FanDuel restricted residents of New York. Similarly, in October the Nevada Gaming Control Board banned unlicensed pay-to-play daily fantasy sports leagues from providing their services to Nevada residents, concluding that the activity constitutes illegal gambling under state law. Yahoo, ESPN, DraftKings and FanDuel now restrict Nevada residents from playing for prizes.

## FANTASY SPORTS AND COLLEGE STUDENTS





As the recent actions by the attorney General in New York and the Gaming Board in Nevada demonstrate, more states officials are questioning the need for increasing regulatory control (Heitner, 2015). For example, the Massachusetts State Attorney General recently proposed regulations to prohibit people under the age of twenty-one from playing paid fantasy sports games, as well as to ban fantasy competitions based on college sports, prohibit promotions of paid fantasy sports on high school and college campuses and bar professional athletes, agents and others connected to pro sports from taking part in paid fantasy contests related to their sports. Opponents of college fantasy sports argue that it commercially exploits student-athletes (Gerton, 2009). Is participation by people under the age of twenty-one in fantasy sports leagues widespread and problematic?

To better understand the mentality of fantasy sports participants in that age group, college students at the University of Arkansas were surveyed. Although none of the providers restrict residents of Arkansas, the Arkansas statute is extremely broad, providing that "If a person bets any money or any valuable thing on any game of hazard or skill, upon conviction he or she is guilty of a violation and shall be fined in any sum not less than ten dollars nor more than twenty five dollars" (Ark. Code § 5-66-113 (2015)). Long ago the Arkansas Supreme Court stated that "the rising of money, between two or more persons, on a contest or chance of any kind, where one must be the loser and the other the gainer" constitutes gambling (Portis v. State, 362, 1872).

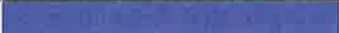
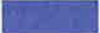





Presumably because gambling is illegal in the state, a game that involves a "chance of any kind" would also be illegal; thus, fantasy sports leagues with entry fees should be illegal. What is interesting under Arkansas law is that the law allows a losing party in a gambling transaction to recover his or her loss, provided such person files suit within 90 days after the paying of the money or property lost (Arkansas Code § 16-118-103). Since traditional leagues last longer than 90 days, the ability of fantasy participants to recover their entry fees is problematic at best. Daily leagues, on the other hand, could be subject to litigation for the recovery of lost fees since the time between when the entry fee is paid and the end of the competition is much shorter.

The Qualtrics™ survey was sent through the Walton College of Business Listserv at the University of Arkansas and reported 313 responses. A breakdown of the students surveyed reveals that the majority of participants were male (57%), while the class ranking was somewhat evenly spread.

#	Answer	Are you:	Response	%
1	Male		175	57%
2	Female		134	43%
	Total		309	100%

#	Answer	What is your current classification in school?	Response	%
1	Freshman		72	23%
2	Sophomore		65	21%
3	Junior		77	25%
4	Senior		96	31%
5	Graduate Student		0	0%
	Total		310	100%

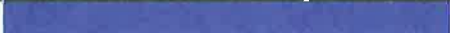






When asked: “How often do you gamble on a sporting event,” the majority of the participants responded never (65%). Eighty-two percent of people who never gambled did not participate in a fantasy league this past season. Of those that reported some gambling, 77% participated in a fantasy sports league over last season. Regarding gender, 93% of females did not participate in a fantasy sports league this past season and 88% said they never gamble on a sporting event.

#	Answer	How often do you gamble on a sporting event?	Response	%
1	Never		202	65%
2	Less than Once a Month		58	19%
3	Once a Month		17	5%
4	2-3 Times a Month		13	4%
5	Once a Week		7	2%
6	2-3 Times a Week		7	2%
7	Daily		9	3%
Total			313	100%

The majority of respondents reported playing fantasy football (94%). Respondents also reported playing fantasy basketball (21%) and baseball (14%). Other fantasy sports respondents reported playing less often were soccer, women’s tennis, women’s badminton, hockey, and golf.

#	Answer	What fantasy sports did you play?	Response	%
1	Football		115	94%
2	Baseball		14	11%
3	Auto Racing		2	2%
4	Basketball		26	21%
5	Other		15	12%

ESPN was a dominant favorite as a provider with 79% of students saying they had an ESPN league; Yahoo was a distant second. Eleven and five percent of respondents used daily leagues FanDuel and DraftKings, respectively.

	Answer	Through which provider was your league set up?	Response	%
1	ESPN		96	79%
2	NFL.com		19	16%
3	Yahoo		29	24%
4	CBS		7	6%
5	Fanduel		13	11%
6	Draftkings		6	5%
7	Other		8	7%

Of the 122 students that reported playing fantasy sports, 53% said there was an entrance fee for the league. The majority of these students reported an entrance fee of \$10-49. Eleven

percent of students reported spending over \$100 on their entrance fees. When asked if they would consider the entrance fee a gamble, 74% said yes while 26% said no. This result suggests that while participants may consider fantasy sports a game of skill, they also recognize that there is still some chance element of fantasy sports leagues and that it would constitute a gambling activity.

#	Answer	What was the cost of the entrance fee?"	Response	%
1	\$0-9		3	5%
2	\$10-49		46	71%
3	\$50-99		7	11%
4	Over \$100		9	14%
	Total		65	100%

#	Answer	Would you consider the entrance fee a gamble (i.e., a bet)?	Response	%
1	Yes		48	74%
2	No		17	26%
	Total		65	100%

In sum, several observations may be made about college students and their fantasy sports behavior. The majority of students surveyed that said they participated in a fantasy league were male. Students that report some gambling are far more likely to participate in a fantasy league as well. Surprisingly, 65% of students said they never gamble on a sporting event and very few said they gamble multiple times a week. On the other hand, 63% of males said they participated in a fantasy sports league this past season and yet 47% said they never gamble on a sporting event. Fifty-three percent of respondents reported paying an entrance fee for a league, with some paying over \$100. What is interesting, is that of those students who said that they never gambled on a sporting event, 27% said they paid an entry fee for a fantasy league, implying that they do not think fantasy leagues count as wagering. Thus, many students did not consider their entry fees to be a gambling activity, which is the impression fantasy sports providers want to convey.

## CONCLUSION

Fantasy sports have become a widespread way for fans to test their skills and knowledge of sports. Available for almost any sport, fantasy sports have come a long way since its creation in the eighties. Daily fantasy leagues now allow participants to test their skills for big money. The UIGEA gave rise to the legitimacy of paid fantasy leagues. For fantasy paid leagues to remain legal, providers will need to meet three specific requirements of the UIGEA. They must ensure that 1) their fantasy league prizes are determined before the games and not by the fees collected; 2) there is a method of assessing the knowledge and skills of the players which is determined by a scoring system that spans multiple events; and 3) the winning outcome of a league is not based on the score of any one team or a single athlete.

While a fantasy league may pass the requirements of the UIGEA, it still must consider applicable state regulations, as the UIGEA makes it illegal for a fantasy provider to accept any financial instrument from unlawful internet gambling as defined by state law. States vary on what they consider gambling, but three elements are common amongst all states: consideration,

reward, and chance. In terms of gambling, consideration can be taken as providing something of value for the chance of greater winnings. Reward can be interpreted as the prize from winning a bet. The third element, chance, is something that happens unpredictably. Chance is the main issue to consider when determining whether or not paid leagues are illegal in a state. Most states use the predominance test, which declares an activity to satisfy the chance requirement if it is predominately based on chance (more than 50%). In these states, it is necessary for providers to provide factual evidence that fantasy sports is a game of skill, not chance. In states that use a different test for chance, or any of the other elements, fantasy providers must review statutes carefully to determine whether or not they could be subject to litigation.

Recently, state officials seem to be taking a harder look at fantasy sports, particularly the daily leagues. As the survey confirms, many participants are convinced that they are playing a legal game of skill and not one of chance; however, in essence state legislatures may be less concerned with the moral corruption of players in the daily leagues, and more interested in the potential revenue generation if fantasy sports leagues are regulated and taxed. Arguably, the profit margin is not sufficiently wide enough to withstand taxation at the level of casinos (Boudway & Brustein, 2015). Some commentators argue for more federal regulations and a licensing scheme for online fantasy sports leagues to protect participants from fraud and assure players of some measure of legitimacy (Lee, 2008-09). The continued viability of fantasy sports, particularly the daily leagues, ultimately may depend on whether or not state officials are willing to prosecute the fantasy sport companies, whether or not the leagues can lobby for favorable regulations and whether or not the leagues can incite their participants to petition their lawmakers to keep the games legal and accessible.

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