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**Daily Fantasy Sports: Confronting the Frontier of Legal Gambling**

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Staying Ahead of the Curveball: The Legal Landscape of Daily Fantasy Sports

## **Daily Fantasy Sports: Confronting the Frontier of Legal Gambling**

Scanning sports television networks even for ten minutes,<sup>1</sup> one cannot help but notice an arms race between two companies – DraftKings and FanDuel – promoting the possibility that any “Average Joe” can win hundreds, thousands, or even millions of dollars in a single day simply by placing an entry fee as low as \$1 to select a customized fantasy roster.<sup>2</sup> Such daily fantasy companies will also either match deposits made by new daily fantasy players on their sites<sup>3</sup> or offer free entry into lucrative contests,<sup>4</sup> practically paying people to play fantasy sports and win cash! Not so fast.<sup>5</sup>

With over 41 million people playing fantasy sports<sup>6</sup> and significant investments from venture capital firms, sports media conglomerates, and professional sports leagues flooding the industry,<sup>7</sup> daily fantasy sports have become integrated in the sports viewing experience. But are they actually legal? While daily fantasy sites cling to a fantasy sports carve-out provided in the 2006 Unlawful Internet Gambling Enforcement Act (“UIGEA”), should daily fantasy contests actually qualify as gambling activities that should be regulated or outlawed? Are daily fantasy games primarily based on skill or chance? Allegations that daily fantasy employees playing on other sites may have access to information unavailable to other daily fantasy sports participants<sup>8</sup> have accelerated state,<sup>9</sup> Congressional,<sup>10</sup> and other federal bureau investigations<sup>11</sup> with the issue of daily fantasy legality even arising in the Presidential campaign process.<sup>12</sup>

The days of uninhibited growth and the lack of governmental intervention and regulation are over. So what should daily fantasy companies do to survive and prosper? This article explores the birth and explosion of the daily fantasy sports industry, federal and state gambling law restraints and other legal issues, and provides recommendations for how daily fantasy companies and shareholders should confront a rapidly changing legal landscape. Specifically, daily fantasy companies should frame their contests as participatory tournaments requiring “entry fees” instead of “bets” or “wagers,” avoid soliciting participants in states that classify daily fantasy sports as gambling, refrain from offering NCAA-based contests, and maximize skillful elements of prognostication by increasing roster sizes, avoiding contests reliant on a limited number of events, such as MLB “off days,” and eliminate large tournaments with few cash payouts to align more closely with conventional season-long fantasy sports. Daily fantasy companies should also consider diversifying their offerings with multi-week contests or enter the season-long fantasy sports market.

### **I. Origins of Fantasy Sports**

While traditional sports gambling provides individuals a means (albeit a largely illegal one) to predict the future outcome of player performances by wagering on particular games and specific player statistics, fantasy sports enable participants to form fictional leagues to “draft” and assemble rosters of professional athletes as if the participant functioned as an executive of a professional sports franchise.<sup>13</sup> Based on the players’ real-life results in predetermined statistical categories (such as homeruns or batting average), the team that performs the best in those categories over the course of the season emerges as the champion.<sup>14</sup> The “Rotisserie League,” the first fantasy baseball league to gain public notoriety in 1980, featured ten participants drafting in an auction style format with \$260 to bid on the exclusive rights to the statistics of Major League Baseball players in eight distinct categories (four hitting – runs scored, runs batted in, home runs, and steals, and four pitching – earned run average, wins, saves and strikeouts).<sup>15</sup> Other leagues

have since incorporated additional or different statistical categories, a “draft” style format to originally select players instead of an auction, different scoring systems (including head-to-head style weekly matchups), and of course, adaptations to other sports, most notably football.<sup>16</sup> Like other industries, the Internet served as a catalyst for the proliferation of fantasy sports, allowing individuals to compete against others from around the world with “instantaneously downloadable statistics” and third parties collecting league entry fees and presenting cash payouts to league winners.<sup>17</sup>

In addition to fantasy sports, however, the Internet also led to the promulgation of U.S. residents participating in illegal online sports gambling and poker games fostered by offshore sites.<sup>18</sup> To supplement federal and state laws restricting sports wagering and gambling, President George W. Bush signed into law the Unlawful Internet Gambling Enforcement Act (“UIGEA”) on October 13, 2006 holding “payment processors liable for the funding of unlawful gambling websites that conducted business with U.S. customers.”<sup>19</sup> As a result, online sports gambling and poker websites either left the U.S. marketplace voluntarily or were prosecuted under federal and state laws, while payment processors who continued to enable such illegal activity were also prosecuted.<sup>20</sup>

## **II. The Birth and Proliferation of “Daily Fantasy Sports”**

While UIGEA thwarted online sports wagering and other forms of gambling, the statute provided a carve-out for fantasy sports to evade its definition of a “bet” or “wager.”<sup>21</sup> Seeking to fill the void in the market for instant gratification wagering, risk-engaging startups, led by Fantasy Day Sports Corp. in 2007,<sup>22</sup> entered the market providing daily sports contests under the guise of “fantasy sports” to fall within the scope of the statute’s carve-out.<sup>23</sup> FanDuel, one of the industry’s “Big Two” along with DraftKings (founded in 2012<sup>24</sup>),<sup>25</sup> entered the market in 2009<sup>26</sup> after founder Nigel Eccles recognized that UIGEA failed to define a minimum requirement for the duration of a fantasy sports contest.<sup>27</sup>

As a derivative of traditional fantasy sports, daily fantasy sports retain elements akin to its predecessor with participants relying on the individual performances of professional athletes generally comprising a team competing against other teams constructed by other contestants. Although a variety of daily fantasy sports models exist, the most popular forms on DraftKings and FanDuel incorporate “salary cap” restraints for selecting athletes, with players assigned particular dollar values determined by the sites based on the athlete’s perceived level of skill (i.e., better players cost more to add to one’s roster).<sup>28</sup> Other daily models, however, depart from the traditional system by allowing players to “compete directly against the host site, rather than against other contestants,”<sup>29</sup> construct lineups as small as three or fewer players,<sup>30</sup> or bet on specific “event-based” outcomes, abandoning the lineup model altogether.<sup>31</sup> As its moniker suggests, daily fantasy sports contests can start and conclude in just a single day, as opposed to traditional season-long fantasy leagues that last several months. Thus, the time period from the placement of an “entry fee” to payouts to winners has shrunk dramatically, as well as the number of sporting events that ultimately decide contest results.

Seeking to capitalize on a fantasy sports market featuring over 41 million users<sup>32</sup> and exploding growth particularly in the daily space,<sup>33</sup> DraftKings and FanDuel have emerged as the primary beneficiaries of significant venture capital investments, with private funding as of October 2015 exceeding \$426 million and \$363 million, respectively, including \$575 million combined in July 2015 rounds of funding.<sup>34</sup> While the “Big Two” still maintains a duopoly with

approximately 95% of the market,<sup>35</sup> “season-long fantasy giant” Yahoo! Sports has also jumped into the daily space emerging as a third significant player in the industry.<sup>36</sup>

In addition to investments from venture capital firms and media conglomerates such as Fox<sup>37</sup> and NBC,<sup>38</sup> professional sports leagues and teams have also invested and partnered with daily fantasy sites<sup>39</sup> to capitalize on increased sports content consumption as a result of fantasy sports participation.<sup>40</sup> In 2013, Major League Baseball (MLB) purchased an undisclosed stake in DraftKings, while the National Basketball Association (NBA) gained a 2.5 percent ownership stake in FanDuel in 2014.<sup>41</sup> Also in 2014, DraftKings and the National Hockey League (NHL) entered into an exclusive multi-year sponsorship deal, while FanDuel agreed to a similar exclusive four-year deal with the NBA in addition to its previous deals with five NBA franchises.<sup>42</sup> FanDuel also maintains an exclusive sponsorship deal with fifteen National Football League (NFL) teams.<sup>43</sup> Both sites have also invested heavily in television advertising, with DraftKings and ESPN agreeing to a two-year, \$250 million deal that also grants DraftKings exclusivity in daily fantasy sports content on the network beginning in 2016, as well as brand integration into ESPN’s program segments.<sup>44</sup> As of October 2015, the daily fantasy sports boom has engineered company valuations in excess of \$1 billion for both DraftKings and FanDuel.<sup>45</sup>

### **III. Daily Fantasy Liability Under Federal Law**

Discussed in the preceding section, UIGEA remains the paramount authority as the justification for the legality of daily fantasy sports based on the federal statute’s silence on a duration requirement in its carve-out enabling fantasy sports wagering.<sup>46</sup> In light of the commercial proliferation of fantasy sports, three other federal gambling-related statutes that predated UIGEA may also implicate the daily fantasy space.

The Interstate Wire Act of 1964 (“Wire Act”) forbids individuals and companies from engaging in the business of betting or wagering on sporting events through the use of a “wire communication facility for the transmission in interstate or foreign commerce.”<sup>47</sup> The Wire Act defines “wire communication facility” as any communication made through an instrumentality “used or useful in the transmission of writings, signs, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception.”<sup>48</sup> Although the statute predated it, courts have held that the Internet falls within the scope of a “wire transmission.”<sup>49</sup>

Daily fantasy sports can avert the Wire Act’s reach by avoiding the implication that contests involve “betting” or “wagering,” or that the sites have a “skin in the game” like traditional bookies who gain when competitors lose.<sup>50</sup> Instead, sites need to organize their contests as participatory tournaments with an “entry fee” and a “prize pool,” while insulating daily fantasy sites from earning or losing money depending on the specific results of participants.<sup>51</sup> It remains unlikely that courts will outlaw contests framed this way since “countless contests engaged in every day,” such as golf tournaments or beauty pageants, would then be considered unlawful gambling.<sup>52</sup>

A second statute, the Illegal Gambling Business Act of 1970 (“IGBA”) authorizes criminal penalties for violations of state gambling laws, specifically relating to the financing, management, supervision, direction, or ownership of an “illegal gambling business.”<sup>53</sup> The IGBA characterizes an “illegal gambling business” as an operation (1) illegal under the state law in which it is conducted, that (2) involves five or more people, and (3) has been in operation for more than 30 days or has had gross revenue of \$2,000 in a single day.<sup>54</sup>

Given that daily fantasy sites have developed into large companies, the scope of liability remains dependent on factor (1), state treatment of daily fantasy sites. Although the IGBA defines “gambling” as activities such as “pool-selling, bookmaking, ... conducting lotteries ... or selling chances,” it fails to limit its scope to the activities specifically mentioned in the statute.<sup>55</sup> Further, given that the IGBA predated the advent of daily fantasy sports, its absence in the definition fails to insulate companies from liability. If states find that daily fantasy sports (or particular models) ultimately constitute “gambling,” sites should avoid offering contests to individuals from outlawing states, such as Arizona, Iowa, Louisiana, Montana, Nevada, and Washington.<sup>56</sup>

Third, the Professional and Amateur Sports Protection Act (“PASPA”) passed in 1992 forbids any individual or state (other than certain forms of gambling in Delaware, Montana, Nevada, and Oregon<sup>57</sup>) to operate “a lottery, sweepstakes, or other betting, gambling, or wagering scheme based directly or indirectly ... on one or more competitive games in which amateur or professional athletes participate.”<sup>58</sup> PASPA also provides a cause of action for professional sports leagues and the National Collegiate Athletic Association (NCAA).<sup>59</sup>

Given the leagues’ financial ties to the industry, it remains unlikely that professional leagues will implicate daily fantasy sites.<sup>60</sup> The NCAA, however, may challenge daily fantasy sites given its policy against “accepting advertising from sports wagering entities,” while concluding that entry fees fall under its definition of “sports wagering” as “putting something at risk.”<sup>61</sup> Based on PASPA, daily fantasy sites can likely proceed with professional sports contests, but should refrain from offering games relating to the performances and results of NCAA athletes.

Lastly, UIGEA provides the latest framework for liability under federal law. While the fantasy sports carve-out offers an avenue for legality, the following criteria must be met:

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

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

(III) No winning outcome is based — (aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or (bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.”<sup>62</sup>

Since Congress specifically intended for the protection of traditional season-long fantasy leagues under UIGEA,<sup>63</sup> it remains unclear if daily fantasy sports will remain protected under federal law.<sup>64</sup> While factors (I) and (III) provide relatively straight forward parameters for creating legal fantasy sports contests, factor (II) requires an analysis of the amount of “skill” involved in daily fantasy games, paralleling state gambling law tests. The legality of daily fantasy contests under UIGEA predominantly hinges on this determination.

#### IV. State Gambling Laws' Effect on Daily Fantasy Sports

In addition to obeying federal statutes, daily fantasy sports companies must also comply with state gambling laws,<sup>65</sup> and state violations can implicate federal penalties.<sup>66</sup> To violate state gambling laws, most states require that a contest involves (1) consideration, (2) chance, and (3) prize.<sup>67</sup> Since daily fantasy sports participants deposit entry fees and winners receive cash payouts, the analysis hinges on factor (2), a state's stance on "chance" versus "skill" in a game, similar to factor (II) in UIGEA's fantasy sports carve-out.

States differ markedly on this issue. While a majority of states utilize a "predominant purpose" test, enabling for the legality of contests that involve more skill than chance,<sup>68</sup> other states analyze activities under "material element" tests that allow them to declare a contest illegal even if chance fails to dominate.<sup>69</sup> Further, Arizona, Arkansas, Iowa, Louisiana, and Tennessee outlaw games that involve any chance at all,<sup>70</sup> Hawaii uses a "gambling instinct" test, and Montana forbids any forms of online gambling.<sup>71</sup>

Even states that follow the same test have reached different conclusions regarding the level of skill and chance involved in fantasy sports. Although both New Jersey and Kansas follow the "predominant purpose" test, the U.S. District Court of New Jersey in *Humphrey v. Viacom* acknowledged the "skill involved in selecting players" as a key factor in authorizing the legality of season long fantasy leagues,<sup>72</sup> while Kansas' Racing & Gaming Commission concluded that despite the skill involved in selecting players, chance supersedes skill in all fantasy sports contests.<sup>73</sup>

States must weigh a daily fantasy contest's skillful elements, specifically the "mathematical modeling and prognostication" involved in initially selecting players,<sup>74</sup> against elements of chance, such as "systematic" chance (e.g., "snake draft" models for selecting players that randomly allocate participant draft position),<sup>75</sup> "imperfect information" (e.g., potential for injury or weather cancellations),<sup>76</sup> and "lucky shot" chance (e.g., a golfer shooting a hole in one).<sup>77</sup> Proponents of daily fantasy sports distinguish it from other traditional gambling activities like horse racing based upon player selection and the multiplicity of events.<sup>78</sup> Dissenters, however, compare daily fantasy sports contests to poker or blackjack, activities largely outlawed despite maintaining elements of skill.<sup>79</sup> On the other hand, even games universally identified as "skill-based," such as chess, involve elements of chance.<sup>80</sup>

Daily fantasy sports remain in a nebulous area along the skill versus chance spectrum, making state-to-state resolution difficult to project with current state gambling law tests. In October 2015, however, the Nevada Gaming Control Board notably declared daily fantasy sports as gambling, requiring companies to register for state gambling licenses,<sup>81</sup> essentially serving as a de facto ban on daily fantasy sports in the state.<sup>82</sup> As a result, Nevada has joined Arizona, Iowa, Louisiana, Montana, and Washington as locales where DraftKings and FanDuel refrain from offering contests,<sup>83</sup> with other states considering joining Nevada in its characterization of daily fantasy sports as gambling.<sup>84</sup>

## **V. Current Gambling-Related Legal Issues & Impact on the Daily Fantasy Industry<sup>85</sup>**

Daily fantasy sports largely avoided governmental interference until September 2015 when DraftKings employee Ethan Haskell inadvertently released lineup data from DraftKings' "Millionaire Maker" tournament the same weekend he won \$350,000 in a FanDuel contest.<sup>86</sup> While DraftKings employees could not play on their own site, they could still enter into contests on other daily fantasy platforms.<sup>87</sup> Since DraftKings and FanDuel contest models largely mirror each other, the potential for access to roster information trends exposed the possibility of "insider trading" by utilizing the trends to form algorithms to increase chances at winning contests on the other sites.<sup>88</sup> While an independent investigation commandeered by Greenberg Traurig cleared Haskell of any wrongdoing, determining that he received the data after rosters locked,<sup>89</sup> daily fantasy sites banned employees from playing on other sites after the scandal.<sup>90</sup> Nevertheless, class action lawsuits have been filed against daily fantasy sites attacking employee access to information unavailable to other players.<sup>91</sup>

Since the scandal, FanDuel CEO Nigel Eccles has publicly backed regulation in the industry<sup>92</sup> and the Fantasy Sports Trade Association announced plans to create an independent control board to self-regulate the industry.<sup>93</sup> While the NFL, MLB, and NBA, still back daily fantasy sites, not surprising given their business ties to daily fantasy sites,<sup>94</sup> the leagues' respective commissioners, Roger Goodell, Rob Manfred, and Adam Silver, also agree that the sites should be regulated to mitigate future concerns of match-fixing.<sup>95</sup> Silver, notably, also believes that sports gambling should be regulated.<sup>96</sup>

## **VI. Recommendations for Daily Fantasy Sports Companies and Stakeholders**

Although UIGEA provides a fantasy sports carve-out, daily fantasy sports companies would be naïve to interpret the statute as insulating daily fantasy sites from liability simply because they include "fantasy sports" in their contest descriptions or that player selection automatically qualifies such contests as skillful competitions. States have established balancing tests evaluating the amount of skill versus chance in games, and daily fantasy companies should conduct similar inspections of each contest they offer. Not all daily fantasy contests are alike; while some daily models may implicate gambling laws, others that parallel traditional fantasy sports protected by UIGEA may be able to lawfully continue. To more effectively satisfy UIGEA and state gambling law tests, daily fantasy companies should offer contests that maximize the number of events (i.e., games) that effect competition results and only offer tournaments with team roster sizes at least as large as traditional fantasy sports rosters to emphasize the skillful elements of picking players.

Further, daily fantasy sites should avoid professional league "off days" where only a few teams play on a particular night, such as Mondays and Thursdays in the MLB. The fewer the number of games or events available to select players from, the closer the contest resembles traditional gambling. For this reason, professor Marc Edelman believes DraftKings' one-tournament fantasy golf games remain risky for DraftKings.<sup>97</sup> Similar contests based on NASCAR race results analogize to horse racing since winning fantasy contests, like winning bets, rely on an individual actor's final performance in a single race. While participants select "rosters" of golfers or drivers, the final results in single competitions dictate success. Other daily

fantasy sports games, while implicating player performances, involve multiple events and avoid team results from deciding contest winners.

Daily fantasy sites should also consider monitoring the number of entrants into their competitions while increasing the percentage of participants that earn cash payouts. Traditional fantasy leagues involve close competition among a limited number of participants, while larger contests analogize more closely to lotteries (or large NCAA March Madness bracket pools), especially considering their short duration. In large tournaments with few payouts, contest winners not only must select players that perform well, but they must also select players owned by as few contestants as possible to maximize the benefit when the player succeeds.<sup>98</sup> While tournament success still requires skillful prognostication, winning participants also rely on other contestants avoiding selection of the same players, a matter left to chance. Although daily fantasy contests would be less enticing with lesser top prizes, companies should consider reducing the size of their competitions while providing for a greater percentage of participants to receive cash payouts in each contest to dissuade concerns that certain competitions resemble lotteries disguised as fantasy sports.

Companies should also limit the number of athletes that participants may select from the same team in a particular contest to mitigate match-fixing concerns. Jacob Sommer, shareholder and gaming attorney at ZwillGen PLLC, opines that fantasy sports companies should limit the number of same-team players to “less than half” of a fantasy roster.<sup>99</sup> By restricting roster selection in this manner, match fixers would have to pay off multiple players in multiple contests to enable for any possibility for a fruitful scheme. Limits on contest payouts would also disincentivize such conspiracies.

Professional sports leagues should likewise consider divesting their equity stakes in daily fantasy companies while the government questions their legality. Leagues have long maintained hard stances on gambling given significant match-fixing scandals in the NBA<sup>100</sup> and MLB<sup>101</sup> that compromised the integrity of competition vital to their brands. NBA Commissioner Adam Silver’s call for regulation in both daily fantasy and gambling suggests that while the league believes fantasy sports represent legal skillful games, daily fantasy nevertheless implicates nefarious activity that warrants monitoring.

## **VII. Conclusion**

Ultimately, Congress will likely speak on an industry that federal statutes are currently silent, and states will continue to examine their legality under current tests or issue specific declarations. Although daily fantasy sports’ future remains largely in the hands of regulators, companies should continue to proactively institute policies for regulation and limit contest offerings to only those that closely resemble traditional fantasy sports based on as many games as possible while forcing diverse roster construction. Daily fantasy’s conceptual blend between legal traditional contests and illegal gambling presents an opportunity to narrowly apply gambling laws to limit the now multi-billion-dollar industry, broadly eliminate the fantasy sports’ UIGEA exemption, or enable for the future legalization of all sports gambling. Regardless, the old daily fantasy sports industry free from regulation will soon be history.

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- <sup>1</sup> See Matt Yoder, *Just how many DraftKings and FanDuel ads are there on an NFL Sunday*, Awful Announcing (Sept. 21, 2015), <http://awfulannouncing.com/2015/just-how-many-draftkings-and-fanduel-ads-are-there-on-an-nfl-sunday.html>.
- <sup>2</sup> FanDuel, *2015 FanDuel One-Week Fantasy Football Commercial*, YouTube (Aug. 18, 2015), <https://www.youtube.com/watch?v=pnvTXsqLxoE>; see also DraftKings TV, *DraftKings Millionaires Commercial: 30*, YouTube (Jun. 16, 2015), <https://www.youtube.com/watch?v=NwJnBV52rUE>.
- <sup>3</sup> FanDuel, *supra* note 2.
- <sup>4</sup> DraftKings TV, *supra* note 2.
- <sup>5</sup> See Joshua Brustein & Ira Boudway, *You Aren't Good Enough To Win Money Playing Daily Fantasy Football*, BloombergBusiness (Sept. 10, 2015), <http://www.bloomberg.com/news/articles/2015-09-10/you-aren-t-good-enough-to-win-money-playing-daily-fantasy-football>.
- <sup>6</sup> Adam Kilgore, *Daily Fantasy Sports Web Sites Find Riches in Internet Gaming Law Loophole*, Washington Post (Mar. 27, 2015), [https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html).
- <sup>7</sup> See *DFS Funding, investment & Acquisition Tracker*, Legal Sports Report (Nov. 2, 2015), <http://www.legalsportsreport.com/dfs-investment-and-acquisition-tracker/>.
- <sup>8</sup> Michael McCann, *What Impact Will the Lawsuit Filed Against DraftKings, FanDuel Have?*, Sports Illustrated (Oct. 8, 2015), <http://www.si.com/nfl/2015/10/08/daily-fantasy-sports-lawsuit-draftkings-fanduel>.
- <sup>9</sup> *DFS State Watch: Monitoring Daily Fantasy Sports Sentiment and Action In Government*, Legal Sports Report (Oct. 23, 2015), <http://www.legalsportsreport.com/dfs-state-watch/>.
- <sup>10</sup> Mike Florio, *Congress to hold hearings on daily fantasy sports*, ProFootballTalk (Oct. 19, 2015), <http://profootballtalk.nbcsports.com/2015/10/19/congress-to-have-hearings-on-dfs/>.
- <sup>11</sup> Brad Reagan & Devlin Barrett, *FBI, Justice Department Investigating Daily Fantasy Sports Business Model*, Wall St. J. (Oct. 15, 2015), <http://www.wsj.com/articles/fbi-justice-department-investigating-daily-fantasy-sports-business-model-1444865627>.
- <sup>12</sup> Fred Imbert, *Jeb Bush: Daily fantasy sports is day trading*, CNBC (Oct. 28, 2015), <http://www.cnbc.com/2015/10/28/jeb-bush-daily-fantasy-sports-is-day-trading.html>.
- <sup>13</sup> See, e.g., Childs Walker, *Dream Teams*, The Baltimore Sun (Mar. 8, 1999), [http://articles.baltimoresun.com/2006-03-04/features/0603040085\\_1\\_fantasy-baseball-baseball-geek-fantasy-leagues](http://articles.baltimoresun.com/2006-03-04/features/0603040085_1_fantasy-baseball-baseball-geek-fantasy-leagues).
- <sup>14</sup> See *id.*
- <sup>15</sup> Marc Edelman, *A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime*, 3 HARVARD JOURNAL OF SPORTS & ENTERTAINMENT LAW 1, 7 (2012).
- <sup>16</sup> See Edelman, *supra* note 15, at 9.
- <sup>17</sup> Edelman, Marc, *Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law* (March 30, 2015). Univ. of Ill. L. Rev., 2016 Forthcoming. <http://ssrn.com/abstract=2587362> at 6.
- <sup>18</sup> Edelman, *supra* note 17, at 7.
- <sup>19</sup> 31 U.S.C. §§ 5361-67 (2012); Edelman, *supra* note 17, at 8.
- <sup>20</sup> Edelman, *supra* note 17, at 8-9.
- <sup>21</sup> 31 U.S.C. § 5362(1)(E)(ix) (2012).
- <sup>22</sup> *Company Overview of Fantasy Day Sports, Corp.*, BloombergBusiness (2015), <http://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=243481076>.
- <sup>23</sup> Edelman, *supra* note 17, at 10.
- <sup>24</sup> Scott Kirsner, *Two local companies, StarStreet and DraftKings, prepare to launch new fantasy sports sites*, Boston.com, (Feb. 27, 2012), [http://www.boston.com/business/technology/innoeco/2012/02/two\\_local\\_companies\\_starstreet.html](http://www.boston.com/business/technology/innoeco/2012/02/two_local_companies_starstreet.html).
- <sup>25</sup> Dustin Gouker, *FanDuel vs DraftKings – Who's Number 1 In Daily Fantasy?*, Legal Sports Report (Sept. 13, 2015), <http://www.legalsportsreport.com/3832/fanduel-or-draftkings/>.
- <sup>26</sup> *History*, FanDuel (2014), <https://www.fanduel.com/history>.
- <sup>27</sup> Kilgore, *supra* note 6.
- <sup>28</sup> See generally *id.*
- <sup>29</sup> Edelman, *supra* note 17, at 14-15.
- <sup>30</sup> *Id.* at 15-16.
- <sup>31</sup> *Id.* at 16.
- <sup>32</sup> Kilgore, *supra* note 6.

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<sup>33</sup> See Michael J. de la Merced, *FanDuel to Announce It Has Raised \$275 Million More*, N.Y. Times (Jul. 14, 2015), [http://www.nytimes.com/2015/07/14/business/dealbook/fanduel-to-announce-it-has-raised-275-million-more.html?\\_r=0](http://www.nytimes.com/2015/07/14/business/dealbook/fanduel-to-announce-it-has-raised-275-million-more.html?_r=0) (indicating that FanDuel's total active user base increased over 300% in the first half of 2015 from 1.1 million in 2014); see also Kilgore, *supra* note 6 (discussing DraftKing's growth from 200,000 to 2 million active users over the previous year, while speculating growth approaching 5-10 million by next year).

<sup>34</sup> Legal Sports Report, *supra* note 7; see also Dustin Gouker, *DraftKings Gets \$300 Million Investment, Led By Fox Sports*, Legal Sports Report (Jul. 26, 2015), <http://www.legalsportsreport.com/2645/draftkings-raises-300mm-led-by-fox-sports/>; Dustin Gouker, *Report: FanDuel Raises \$275mm For Billion-Dollar Valuation, Doubling All Investments In DFS Sites*, Legal Sports Report (Jul. 13, 2015), <http://www.legalsportsreport.com/2326/fanduel-raises-275-million/>.

<sup>35</sup> Anthony Crupi, *Fantasy Sports Sites DraftKings, FanDuel September Spend Tops \$100 Million*, AdAge (Sept. 30, 2015), <http://adage.com/article/media/draftkings-fanduel-spe/300658/>.

<sup>36</sup> See Chris Grove, *Yahoo Enters Daily Fantasy Sports Market: Impacts And Analysis*, Legal Sports Report (Jul. 8, 2015), <http://www.legalsportsreport.com/2152/yahoo-enters-daily-fantasy-sports-market/>; see also LSR *Daily Fantasy Site Standings™*, Legal Sports Report (Oct. 28, 2015), <http://www.legalsportsreport.com/dfs-site-standings/>.

<sup>37</sup> Dustin Gouker, *DraftKings Gets \$300 Million Investment, Led By Fox Sports*, Legal Sports Report (Jul. 26, 2015), <http://www.legalsportsreport.com/2645/draftkings-raises-300mm-led-by-fox-sports/>.

<sup>38</sup> Darren Heitner, *FanDuel Adds \$70 Million In Funding Following DraftKings \$41 Million Raise*, Forbes (Sept. 2, 2014), <http://www.forbes.com/sites/darrenheitner/2014/09/02/fanduel-adds-70-million-in-funding-following-draftkings-41-million-raise/>.

<sup>39</sup> Gouker, *supra* note 37.

<sup>40</sup> See Darren Rovell, *NBA partners with FanDuel*, ESPN (Nov. 12, 2014), [http://espn.go.com/nba/story/\\_/id/11864920/nba-fanduel-reach-4-year-exclusive-daily-fantasy-deal](http://espn.go.com/nba/story/_/id/11864920/nba-fanduel-reach-4-year-exclusive-daily-fantasy-deal) (demonstrating that FanDuel company data indicates that “once a fan starts playing daily fantasy, his or her weekly sports TV consumption jumps from 17 ½ hours to 24 hours).

<sup>41</sup> Kilgore, *supra* note 6.

<sup>42</sup> Rovell, *supra* note 40.

<sup>43</sup> Brent Schrottenboer, *FanDuel Signs Deals with 15 NFL Teams, Escalating Daily Fantasy Integration*, USA TODAY (Apr. 21, 2015), <http://www.usatoday.com/story/sports/2015/04/21/daily-fantasy-sports-fanduel-draftkings-nfl-mlb-nhl-nba/26149961/>.

<sup>44</sup> Kurt Wagner, *DraftKings Will Pay ESPN \$250 Million for Ads Over the Next Two Years*, Re/code (Jul. 20, 2015), <http://recode.net/2015/07/20/draftkings-will-pay-espn-250-million-for-ads-over-the-next-two-years/>; see also Crupi, *supra* note 35.

<sup>45</sup> Gouker, *supra* note 25; Steven Bertoni, *Fantasy Sports Site FanDuel Scores \$1 Billion Valuation*, Forbes (Jul. 14, 2015), <http://www.forbes.com/sites/stevenbertoni/2015/07/14/fantasy-sports-site-fanduel-scores-1-billion-valuation/>.

<sup>46</sup> Kilgore, *supra* note 6.

<sup>47</sup> 18 U.S.C. § 1084(a) (2012); Edelman, *supra* note 17, at 26.

<sup>48</sup> 18 U.S.C. § 1081 (2012); Edelman, *supra* note 17, at 27.

<sup>49</sup> Edelman, *supra* note 17, at 27-28.

<sup>50</sup> [NOTES FROM ABA FORUM PANEL]

<sup>51</sup> [NOTES FROM ABA FORUM PANEL]

<sup>52</sup> *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D. N.J. 2007) at \*7 (recognizing that courts across the country have found it “patently absurd” to hold that “the combination of an entry fee and a prize equals gambling”).

<sup>53</sup> 18 U.S.C. § 1955.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> See *What Are The States Where You Can Play Daily Fantasy Sports?*, Legal Sports Report (Nov. 2, 2015), <http://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/>.

<sup>57</sup> Edelman, *supra* note 17, at 32.

<sup>58</sup> 28 U.S.C. § 3702 (2012); Edelman, *supra* note 17, at 31.

<sup>59</sup> 28 U.S.C. § 3703 (2012); Edelman, *supra* note 17, at 32.

<sup>60</sup> Edelman, *supra* note 17, at 33.

<sup>61</sup> David Purdum, *NCAA prohibits DraftKings, FanDuel from advertising during championships*, ESPN (Oct. 21, 2015), [http://espn.go.com/chalk/story/\\_/id/13939337/ncaa-sends-letter-draftkings-fanduel-prohibiting-ads-championship-events](http://espn.go.com/chalk/story/_/id/13939337/ncaa-sends-letter-draftkings-fanduel-prohibiting-ads-championship-events).

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<sup>62</sup> 31 U.S.C. § 5362(1)(E)(ix)(I)-(III) (2012).

<sup>63</sup> Florio, *supra* note 10; *see also* Ryan Rodenberg, *The true Congressional origin of daily fantasy sports*, ESPN (Oct. 28, 2015), [http://espn.go.com/chalk/story/\\_/id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress](http://espn.go.com/chalk/story/_/id/13993288/daily-fantasy-investigating-where-fantasy-carve-daily-fantasy-sports-actually-came-congress).

<sup>64</sup> Edelman, *supra* note 17, at 36.

<sup>65</sup> *Id.* at 17.

<sup>66</sup> 18 U.S.C. § 1955.

<sup>67</sup> Edelman, *supra* note 17, at 17.

<sup>68</sup> *Id.* at 18.

<sup>69</sup> *Id.* at 24.

<sup>70</sup> *Id.* at 24.

<sup>71</sup> *Id.* at 25.

<sup>72</sup> *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D. N.J. 2007), at \*2; *see also* Edelman, *supra* note 17, at 22.

<sup>73</sup> *Are Fantasy Sports Leagues legal?*, Kansas Racing & Gaming Commission (Nov. 13, 2015), <http://www.krgc.ks.gov/index.php/component/content/article/2-uncategorised/113-fantasysportsillegal>.

<sup>74</sup> Edelman, *supra* note 17, at 18.

<sup>75</sup> *Id.* at 19.

<sup>76</sup> *Id.* at 19-20.

<sup>77</sup> *Id.* at 20.

<sup>78</sup> *See* Eugene Kim, *Unless you really know what you're doing, fantasy-sports betting leagues are a sucker's game*, Business Insider (Oct. 6, 2015), <http://www.businessinsider.com/skilled-players-win-daily-fantasy-sports-2015-10>.

<sup>79</sup> *Daily Fantasy Sports Vs. Online Poker: An In-Depth Comparison*, High-Tech Gambling (Apr. 17, 2015), <http://www.hightechgambling.com/sport-betting/daily-fantasy-sports-vs-online-poker-depth-comparison>.

<sup>80</sup> [NOTES FROM ABA FORUM PANEL] (mentioning that in matches between top chess players, “white” wins 54% of the time, suggesting that chance in the color determination affects the outcome of the contest).

<sup>81</sup> Chris Grove, *Nevada Gaming Says Daily Fantasy Sports Is Gambling Under State Law, Illegal To Offer Without State License*, Legal Sports Report (Oct. 15, 2015), <http://www.legalsportsreport.com/5173/nevada-says-dfs-is-gambling/>.

<sup>82</sup> Michael McCann, *Legal analysis of the risks facing the daily fantasy sports industry*, Sports Illustrated (Oct. 16, 2015), <http://www.si.com/nfl/2015/10/16/draftkings-fanduel-daily-fantasy-sports-lawsuit>.

<sup>83</sup> Legal Sports Report, *supra* note 56.

<sup>84</sup> Legal Sports Report, *supra* note 9.

<sup>85</sup> Washington Redskins wide-receiver Pierre Garcon filed a class action suit against FanDuel in October 2015 that alleges that “FanDuel uses player names and likenesses without their permission to promote their business and collect huge revenues.” Given that Garcon’s suit avoids attacking the legality of the industry and instead focuses on potential intellectual property breaches, it was not included in the body of the article. *See* Brent Schrottenboer, *Pierre Garcon Files Lawsuit against FanDuel on Behalf of NFL Players*, Oct. 31, 2015,

<http://www.usatoday.com/story/sports/nfl/2015/10/30/pierre-garcon-lawsuit-fan-duel-player-likeness/74889324/>.

<sup>86</sup> Patrick Redford, *DraftKings Employee With Access To Inside Info Wins \$350K At FanDuel*, Deadspin (Oct. 15, 2015), <http://deadspin.com/draftkings-employee-with-access-to-inside-info-wins-35-1734719747>.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Hayden Bird, *Independent Investigation Clears DraftKings Employee of Wrongdoing*, BostInno (Oct. 19, 2015), <http://bostinno.streetwise.co/2015/10/19/ethan-haskell-cleared-of-draftkings-insider-trading-charges-statement/>.

<sup>90</sup> Sarah E. Needleman & Sharon Terlep, *FanDuel, DraftKings Ban Employees From Playing Daily Fantasy Contests for Money*, Wall St. J. (Oct. 7, 2015), <http://www.wsj.com/articles/fanduel-bans-employees-from-playing-daily-fantasy-contests-for-money-1444233537>.

<sup>91</sup> McCann, *supra* note 81.

<sup>92</sup> Sharon Terlep, *FanDuel CEO Calls for Government Regulation*, Wall St. J. (Oct. 29, 2015), <http://www.wsj.com/articles/fanduel-ceo-calls-for-government-regulation-1446127412>.

<sup>93</sup> Darren Rovell, *FSTA appoints Seth D. Harris to create Fantasy Sports Control Agency*, ESPN (Oct. 27, 2015), [http://espn.go.com/chalk/story/\\_/id/13986375/fantasy-sports-trade-association-appoints-seth-d-harris-create-fantasy-sports-control-agency](http://espn.go.com/chalk/story/_/id/13986375/fantasy-sports-trade-association-appoints-seth-d-harris-create-fantasy-sports-control-agency).

<sup>94</sup> Charles P. Pierce, *It's Time to Stop Being Stupid About Sports Gambling*, Grantland (Oct. 14, 2015), <http://grantland.com/the-triangle/its-time-to-stop-being-stupid-about-sports-gambling/>.

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<sup>95</sup> Darren Rovell, *Commissioners say daily fantasy not akin to gambling, but needs regulation*, ESPN (Oct. 27, 2015), [http://espn.go.com/chalk/story/\\_/id/13983597/commishes-say-fantasy-not-gambling-needs-regulation](http://espn.go.com/chalk/story/_/id/13983597/commishes-say-fantasy-not-gambling-needs-regulation).

<sup>96</sup> David Purdum, *'I'm not pro sports gambling. I'm just a realist.'*, ESPN (Feb. 5, 2015), [http://espn.go.com/chalk/story/\\_/id/12262502/gambling-issue-adam-silver-wants-sports-gambling-legalized-other-leagues-join-him](http://espn.go.com/chalk/story/_/id/12262502/gambling-issue-adam-silver-wants-sports-gambling-legalized-other-leagues-join-him).

<sup>97</sup> Marc Edelman, *Could DraftKings 'Fantasy Golf' Get Major League Baseball Executives Into Legal Trouble?*, Forbes (Oct. 28, 2015), <http://www.forbes.com/sites/marcedelman/2015/10/28/could-draftkings-fantasy-golf-get-major-league-baseball-executives-into-legal-trouble/>.

<sup>98</sup> Redford, *supra* note 85.

<sup>99</sup> [NOTES FROM ABA FORUM PANEL]

<sup>100</sup> Mike Fish, *Donaghy sentenced to 15 months in prison in gambling scandal*, ESPN (Jul. 30, 2008), <http://sports.espn.go.com/nba/news/story?id=3509440>.

<sup>101</sup> *See, e.g.*, David Purdum, *Latest Rose scandal shouldn't affect MLB's sports betting stance*, ESPN (Jul. 4, 2015), [http://espn.go.com/chalk/story/\\_/id/13175767/latest-pete-rose-scandal-affect-baseball-evolving-stance-sports-betting-chalk](http://espn.go.com/chalk/story/_/id/13175767/latest-pete-rose-scandal-affect-baseball-evolving-stance-sports-betting-chalk).