



DAILY FANTASY SPORTS – A LEGAL PRIMER

by Peter C. Spier

Fantasy sports are a booming industry with an estimated 56.8 Million players spending over \$26 Billion per year in North America alone. The newest and fastest growing segment of the fantasy sports industry is daily fantasy sports (DFS), in which all of the applicable games from which the player statistics are culled occur on a single day or weekend. However, the tremendous success of daily fantasy sports contests has led to increased scrutiny on whether such contests are actually legal.

What are Daily Fantasy Sports?

Daily fantasy sports are somewhat of a cross-breed between traditional sports betting on the outcome of a game or match and full-season fantasy sports contests that dominated the fantasy sports industry prior to the passage of the federal Unlawful Internet Gambling Enforcement Act (UIGEA) in 2006. Like season-long fantasy sports, daily fantasy sports involve selecting or “drafting” individual athletes, the statistics of whom are then used to calculate the fantasy player’s score. However, unlike season-long fantasy contests, daily fantasy sports have the immediacy of traditional sports betting. The outcome of winning or losing the wager is determined on the same day or weekend on which the bet is placed. Daily fantasy sports, because of the immediacy of the results, appeal to the hardcore gambler, who has no interest in waiting an entire season to learn whether he has won his bet. Daily fantasy sports, as its name suggests, can be played every single day, with the thrill and adrenaline rush of the potential big win experienced nightly. Furthermore, not only does the DFS format cater to the hardcore gambler much more than season-long fantasy contests, but because of the frequency with which it can be played, the amount of money that any one person will spend annually on daily fantasy sports dwarfs what he or she is likely to spend on a season-long fantasy contest played only once per year.

Explosive Growth of Daily Fantasy Sports

The explosive growth of the industry is perhaps best demonstrated by the fact that each of the two dominant DFS sites, FanDuel and DraftKings, the latter of which was formed merely three years ago, have recently raised capital valuing the company in excess of \$1 Billion. These two sites currently account for more than 90% of the industry’s annual gross revenue. Each company has drawn interest from a bevy of A-list investors. FanDuel’s equityholders include the NBA, Google Capital, Comcast Ventures, private equity giant KKR and NBC Sports Ventures, while DraftKings’ investors include Major League Baseball, the NHL and Fox Sports. The sizable investments made by three of the four major U.S. sports leagues¹ in the top DFS sites is

¹ Although the NFL is notably absent from the list of major investors in the primary DFS sites, FanDuel has direct partnership agreements with about half of the NFL franchises.

a significant departure from the leagues' longstanding vigorous stance against sports betting. The basis for the leagues' prior position against sports wagers was that it potentially compromised the integrity of the sport, such as with the infamous 1919 "Black Sox" or the Pete Rose gambling scandal, each of which led to lifetime bans from Major League Baseball. A substantial factor behind the leagues' support of daily fantasy sports is the incredible expansion of the NFL's fan base resulting from the popularity of fantasy football and the connection that fantasy players often feel towards the individual athletes on their team, deepening their knowledge of and personal bond with NFL players.

The tremendous success of daily fantasy sports has not gone unnoticed by the gaming industry. In the face of growing discontent regarding daily fantasy sports among traditional gaming companies, the Nevada Gaming Control Board announced in late-July of this year that it is initiating a "legal analysis" of DFS. At the heart of the gaming companies' complaints are the fact that while they face tremendous regulation, compliance with which is extremely time-consuming and expensive, daily fantasy sports companies face minimal regulation. The analysis of the Nevada Gaming Control Board bears close watching as it could have a significant impact on the future of this burgeoning industry.

Legal Landscape

Daily fantasy sports arose largely in response to Congress' enactment of the UIGEA, which is well-known as the statute that brought down the online gambling industry in the U.S. The Act expressly exempts most fantasy sports contests from its scope on the basis that such contests are predominantly skill-based and thus do not constitute illegal gambling. What made this exemption particularly surprising is that traditional sports betting has long been held to be predominantly based on chance, not skill, and thus to constitute a form of illegal gambling. The federal Professional and Amateur Sports Protection Act (PASPA), adopted in 1992, prohibits traditional sports betting except in those states where such betting was legal at the time the law was passed or within one year thereafter. Only four states qualify for this exemption: Nevada, Oregon, Delaware and Montana. However, a common misconception is that the UIGEA *legalized* fantasy sports, which is not the case. In fact, what it did was simply exempt fantasy sports from its own prohibitions, but left it subject to other federal and state laws and regulations.

In nearly every state, the analysis of what constitutes illegal gambling involves three elements – (1) there must be something of value at stake, (2) the outcome must be determined by chance, and (3) the winner must receive a valuable prize. State laws differ significantly on the second element – chance. The majority of states require that chance must predominate over skill in order for a game to constitute illegal gambling. In about a dozen other states, the degree of chance involved in the game must be "material" relative to the degree of skill in order for it to be deemed illegal gambling. Finally, there are a few states where so long as a game involves any degree of chance, it is considered illegal gambling. The states in this third group include

Arizona, Iowa, Louisiana, Montana and Washington, and customers in those states are blocked from engaging in daily fantasy sports by most DFS sites.

Most states do not have any laws on the books directly addressing the legality of fantasy sports. Outside of the few states noted above where DFS clearly runs afoul of the state's anti-gambling laws, the legality of daily fantasy sports on the state level is an open question. Despite the confident boasts of DFS sites to the contrary, it is a question that presently is without a clear answer. It will be very interesting to monitor as these answers begin to emerge in the coming months and years.

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