

2-26-2022

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Laws Surrounding Daily Fantasy Sports and Sports Gambling are Ambiguous; Let's Just Legalize Both

Patrick Azer*

To date forty-four states have legalized daily fantasy sports (“DFS”),¹ while only thirty have legalized sports betting.² Laws surrounding both DFS and Sports Gambling have viewed both categories as distinct entities, thus creating a discrepancy.³ The Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”) prohibited gambling businesses from “knowingly accepting payments in connection with the participation of another person in a bet or wager”⁴ but provides an exception for season long fantasy sports, which ultimately led to a debate concerning whether DFS is a form of sports gambling, or a skill based game (similar to that of poker).⁵

States have varying tests when determining whether a contest will be considered gambling, resulting in different classifications of DFS amongst states.⁶ States rely on one of two tests when deciding if a contest is one of skill or chance, the ‘dominant factor test’ and the ‘predominance test.’⁷ Using these tests, courts determine if a contest is dominated by skill or chance and thus exempt from gambling laws.⁸ Conversely, those states

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¹ See *WHAT ARE THE STATES WHERE YOU CAN PLAY DAILY FANTASY SPORTS?*, LEGAL SPORTS REPORT, <https://www.legalsportsreport.com/daily-fantasy-sports-blocked-allowed-states/> (last visited Feb. 24, 2022).

² See Will Yakowicz, *WHERE IS SPORTS BETTING LEGAL? A GUIDE TO ALL 50 STATES*, FORBES (Jan. 7, 2022), <https://www.forbes.com/sites/willyakowicz/2022/01/07/where-is-sports-betting-legal-america-2022/?sh=64db026c2342>.

³ See generally Joshua Taggart, *Is Daily Fantasy a Form of Gambling Hidden by Skill*, 6 MISS. SPORTS L. REV. 81 (2016).

⁴ See Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §§ 5361-66 (2006).

⁵ See Drew Harwell, *The rise of daily fantasy sports, online betting's newest empire*, WASH. POST. (July 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/07/28/how-daily-fantasy-sites-became-pro-sports-newest-addiction-machine/>.

⁶ Taggart, *supra* note 3.

⁷ See Jon Boswell, *Fantasy Sports: A Game of Skill That Is Implicitly Legal under State Law, and Now Explicitly Legal under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257 (2008).

⁸ See *Dew-Becker v. Wu*, 178 N.E.3d 1034 (Ill. 2020), *reh'g denied* (Sept. 28, 2020).

which do not rely on either test have taken an anti-gambling approach, even outlawing contests without outcomes determined by skill.⁹ Whether you believe DFS is a form of gambling, a game of chance, or a skill-based hobby, the reality remains that DFS is able to operate online legally in more states than sports betting.¹⁰

DFS users pay entry fees for contests and then draft teams within the confines of an artificial salary cap.¹¹ If their team outscores others within the contest, they win cash prizes.¹² Research has demonstrated that DFS requires skill.¹³ A data-driven study conducted by Todd Easton, an engineering professor at Kansas State University, and Sarah Newell, a private sector engineer, demonstrated that DFS was not a game of chance.¹⁴ In their first experiment, they randomly generated thirty-five DFS teams.¹⁵ This resulted in all thirty-five teams not winning a prize.¹⁶ While thirty-five teams may not seem like a lot, Professor Easton explained losing in thirty five contests is extremely rare.¹⁷ In fact, according to professor Easton, losing in thirty-five contests is less likely than flipping a coin and getting heads twenty-eight times in a row (the odds of that are 1 in 256 million) and three hundred times less likely than being struck by lightning in a given year.¹⁸ In their second experiment, Easton and Newell programed a model with a selection strategy driven by skill and again generated thirty-five teams.¹⁹ This time around all thirty-

⁹ *Id.*

¹⁰ See *The evolution of the daily fantasy sports industry*, ROTO GRINDERS, <https://rotogrinders.com/static/daily-fantasy-sports-timeline> (last visited Jan. 6, 2016).

¹¹ See Alexey Bobrov, *What is Daily Fantasy Sports?*, DRAFT GYM (Feb. 24, 2020), <https://draftgym.com/what-is-daily-fantasy-sports>.

¹² *Id.*

¹³ See generally Mark Richards, *Research Shows that DFS Contests Require Skill*, VEGAS SLOTS (May 3, 2018), <https://www.vegasslotsonline.com/news/2018/05/03/research-proves-that-dfs-contests-need-skill/>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Richards, *supra* note 13.

¹⁹ *Id.*

five teams won a prize.²⁰ The findings of this study were specifically directed for the Kansas legislature, but the principle holds true everywhere:²¹ DFS is a skill based game.

The DFS industry claims its platforms are skill based and thus can operate as a form of legal wagering.²² But the evolution of DFS platforms has made it so that the line between DFS and sports gambling is both blurred and convoluted. Take PrizePicks for instance.²³ PrizePicks offers daily fantasy in the form of prop betting parlays.²⁴ A prop bet, short for proposition bet, is one that is not directly tied to the outcome or score of a sporting event.²⁵ Almost anything can be classified as a prop bet – from total passing yards by a player to who will win the coin toss at the beginning of a football game.²⁶ A parlay wager combines multiple wagers into one bet slip,²⁷ and in the case of PrizePicks, multiple prop bets. When reviewing PrizePicks, Action Network sports analyst Steve Petrella explained the platform as a “DFS site where you create a lineup of prop selections you like, think of it like a prop parlay.”²⁸ In fact, it is not “like” a prop parlay; it is a prop parlay. Because PrizePicks markets itself as a DFS platform, it is able to legally operate in 30 states that do not have legal sports betting.²⁹

²⁰ *Id.*

²¹ *Id.*

²² ROTO GRINDERS, *supra* note 10.

²³ See generally PRIZEPICKS, https://www.prizepicks.com/?gclid=Cj0KCCQiAieWOBhCYARIsANcOw0wB91ApHuKaN-Mg1xQRPGijByPPjiGncYaFKHTE38QFTx_BRRxkdBgaAmrSEALw_wcB (last visited Jan. 9, 2022).

²⁴ *Id.*

²⁵ See Steve Petrella, *What is a Prop Bet? Definition, Examples, More*, ACTION NETWORK (Sept. 23, 2021), <https://www.actionnetwork.com/education/prop-bet>.

²⁶ *Id.*

²⁷ See Danny Donahue, *Parlay Definitions, Examples in Sports Betting*, ACTION NETWORK (Dec. 31, 2021), <https://www.actionnetwork.com/education/parlay>.

²⁸ See Steve Petrella, *What Is PrizePicks? How to Play, Legal States, More*, ACTION NETWORK (Sept. 12, 2021), <https://www.actionnetwork.com/legal-online-sports-betting/what-is-prizepicks>.

²⁹ *Id.*

PrizePicks has taken the idea of parlay sports betting and disguised it as DFS in order to operate legally in as many states as possible. It is evident that the UIGEA fantasy exemption has begun to be abused, far beyond its congressional purpose. At this rate, taking anything sports betting related and slapping a DFS tag on it will allow for its legal operation. But perhaps instead of questioning the legal operation of sports betting disguised as DFS and instead categorizing both forms of wagering as skill based better serves to clarify the ambiguity in the law surrounding the matter.

It is also important to note that the UIGEA never legalized or authorized DFS. Rather, the UIGEA provided an exemption for fantasy sports and did not regulate or authorize its operation.³⁰ If the UIGEA had truly authorized and regulated DFS, then DFS platforms could safely offer its services in all states because the supremacy clause of the United States Constitution likely would pre-empt state law.³¹ The question still remains: why are other forms of gambling outlawed, especially considering the fact that many daily fantasy platforms have simply slapped the DFS tag on their product in order to avoid answering legal questions?

The statistics also demonstrate that because DFS is a more inefficient and riskier game than traditional sports betting, it creates a variety of wealth demographics dumping money into its well-oiled machine.³² Both big and small fish lose at staggering rates in this risky inefficient market. To make the argument that both DFS and sports gambling are not synonymous would be to overlook the fact that chance plays a substantial role in both markets. Eliminating chance from any situation is a very difficult task, and nobody can truly predict the future (not yet at least!). Therefore, to claim DFS is solely a skill-based game would be to ignore the underlying mathematical facts surrounding this sports-related hobby.

Both DFS and sports gambling lend themselves to a substantial amount of chance. But in order to be successful in both markets some skill is required. The fact that we outlaw one and not the other promotes

³⁰ See Kevin P. Braig, *Daily Fantasy Sports Firestorm*, 30 OHIO LAW 12 (2016).

³¹ *Id.*

³² *Id.*

inconsistency in the law. It also misses out on a considerable amount of tax opportunities because an estimate of 1.7 trillion dollars is illegally wagered each year.³³ So why not just legalize both?

Edited by Alex Beezley

³³ See Owen Poindexter, *U.N.: Illegal Sports Betting Reaches \$1.7T Annually*, FRONT OFFICE SPORTS (Dec. 13, 2021), <https://frontofficesports.com/u-n-illegal-sports-betting-reaches-1-7t-annually/#:~:text=The%20report%20estimates%20that%20up,sports%20bets%20are%20made%20illegally.>