

You Want Daily Fantasy Sports? Move To Vegas

By Evan Simonsen

I. THE HISTORY OF FANTASY SPORTS: FROM HUMBLE BEGINNINGS...

a. INTRODUCTION: WHAT IS FANTASY SPORTS

At its most basic, “fantasy sport” is a term used to describe a statistics-based game involving a group of fans who comprise a “fantasy league,” pick their own team, and compete against the other teams within their league. For example, in fantasy football, each member of the league is considered the “owner” of one of the teams in the league.¹ Before the season starts, all of the owners gather together (with the advent of the Internet, many leagues, possibly even most leagues, gather by logging in at the same time) and draft their individual team.² The most common type of draft is what is known as a snake draft,³ in which the teams pick players in an order set by the league commissioner, *i.e.* numbers 1 through 10, for the first round.⁴ The second round is then reversed, and the teams pick in order from 10 through 1.⁵ The idea behind a snake draft is that it provides for more parity among the teams.⁶

Each team owner drafts a player for each of the designated skill positions, a set amount of bench players, and usually the defense of an entire football team.⁷ Generally

¹ What is Fantasy Football? Real Time Fantasy Sports. <http://www.rtsports.com/what-is-fantasy-football> (this is a very basic introduction to fantasy sports. All of the descriptions that follow in this explanation are intended as nothing more than general guidelines, as almost every fantasy league is slightly different with exact rules being decided by the league commissioner.).

² *Id.*

³ *Id.* (stating that the other type of draft, an ‘auction draft,’ is growing in popularity.)

⁴ What is a Snake Draft? Play Daily Fantasy Sports. <http://www.playdailyfantasysports.com/what-is-a-snake-draft/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Supra* note 1 (Personally, I have never been okay with the term ‘skill position.’ Every position has its own skill set, and anyone who has made it to professional the level has clearly mastered that skill set. But within

speaking, most fantasy leagues allow for more than one player in any position that would naturally have more than one during an actual game (in fantasy football, there are usually two starting running backs and two wide receivers, while in fantasy baseball there are usually at least three starting outfielders per team, etc).⁸

When every position on every team has been filled, the draft is complete and the season can start.⁹ Every week, the league is paired off into head-to-head matchups.¹⁰ Scores are determined by the performance of each individual player, and the team defense, that each owner has chosen to start that week.¹¹ For every good play that a player makes, the team owner accrues points, while every poor play may detract points from the player's , and the fantasy team's, overall score.¹² In other words, a player who scores a touchdown may score 6 points both for his actual team, *and* the fantasy team that has drafted him. If a player later fumbles a ball, he is likely to cost his fantasy team two points, even though the fumble does not result in a point loss for his actual team.¹³

In fantasy football, when every NFL game for each week is complete, all of the individual player scores are added up, and the owner whose team scores the highest wins.¹⁴ At the end of the fantasy league regular season, a predetermined number of teams

the context, it is the easiest term to use as it applies to all players whose position is not part of the offensive line or defensive line, as well as every member of special teams except the field goal kicker.).

⁸ *Id.*

⁹ *Id.*

¹⁰ In a league of 12 teams, the first week might be set up: 1 v. 2, 3 v. 4, 5 v. 6, 7 v. 8, 9 v. 10, and 11 v. 12. The second week might be: 1 v. 3, 2 v. 4, 5 v. 7, 6 v. 8, 9 v. 11, 10 v. 12. And so on for every week of the league).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ MATT SIGNORE. How Fantasy Football Game Play Is Scored. FOR DUMMIES. <http://www.dummies.com/how-to/content/how-fantasy-football-game-play-is-scored.html>

gets into the playoffs, with the top two teams after the playoffs meeting in one final head-to-head matchup to determine the league's winner.¹⁵

Fantasy sports is a billion-dollar-a-year industry.¹⁶ Fantasy sports has become completely ingrained into society: it is synonymous with “the way we consume sports”,¹⁷ it has created an entire industry *within* sports,¹⁸ and has even spawned a television sitcom.¹⁹

b. BLAME IT ON THE RAIDERS

Fantasy sports traces its origins back to games invented by Wilfred “Bill” Winkenbach, a silent minority owner of the Oakland Raiders, in the 1950's.²⁰ In 1962, during the worst season in Raiders history, Winkenbach travelled to the East Coast with the team on a road trip.²¹ During the trip, he met with two reporters covering the Raiders

¹⁵ Rules – Playoffs. ESPN.com. <http://sports.espn.go.com/fantasy/football/ffl/story?page=fflrulesplayoffs>.

¹⁶ TOM VAN RIPER. The Rich Reality of Fantasy Sports: A \$1.7B Industry by 2017. FORBES. <http://www.forbes.com/sites/tomvanriper/2012/07/12/money-still-rolling-into-fantasy-sports/> (“...bringing annual profit to an estimated \$397 million on \$1.1 billion in revenue.”).

¹⁷ *Id.*

¹⁸ See Amazon.com http://www.amazon.com/s/ref=nb_sb_noss_1?url=search-alias%3Daps&field-keywords=Fantasy+baseball&rh=i%3Aaps%2Ck%3AFantasy+baseball; and Van Riper. <http://www.forbes.com/sites/tomvanriper/2012/07/12/money-still-rolling-into-fantasy-sports/> (Positing the theoretical question “Can you imagine the reaction of NFL fans if Red Zone were suddenly taken away?” NFL Red Zone is a channel that skips between every football game that is being played so the viewer can see all of the action from around the NFL, essentially allowing the Fantasy Sports player to see anything and everything that his “team” is doing.).

¹⁹ See <http://www.fxnetworks.com/theleague/> (“The League” is a television show that will enter its fifth season this fall. It centers around a group of friends who have competed against each other in the same fantasy football league since college.).

²⁰ LUKE ESSER. The birth of fantasy football. FANTASY INDEX. <http://www.fantasyindex.com/toolbox/birth> (“Winkenbach developed a PGA golf tour game where every week the players would draft pro golfers and then add up their scores after the weekly tournament was over. In the late 1950's he developed a baseball game where the players drafted home run hitters and pitchers, matching statistics against their opponents.”).

²¹ *Id.* (showing that the 1962 season was the only time in the history of the Oakland Raiders that the team won only 1 game. Some may argue that the 2006 team, which finished the season with a record of 2-14 was worse than the 1962 team that finished 1-13, but the .125 win percentage in 2006 is almost twice as good as the 1962 team's .077 win percentage.).

and explained the rules of a football game similar to his earlier PGA and MLB games.²² The three men; Winkenbach; Scotty Stirling, the Raider's beat reporter for the Oakland Tribune; and George Ross, the sports editor for the Oakland Tribune, worked all night devising "a set of rules by which sports fans could draft the skill players from pro football teams onto their own imaginary teams, and play weekly games against their friends in a league that rewarded the team with the best record."

The three returned to Oakland and immediately started the Greater Oakland Professional Pigskin Prognosticators League (GOPPPL).²³ "The early GOPPPL was a low-tech fantasy league, in which information was harder to come by than today,"²⁴ but the original league required that every team owner be "1. An administrative official of the AFL; 2. A journalist with direct relation to pro football; 3. Someone who has purchased or sold 10 season tickets for the Raiders' 1963 season."²⁵ Consequently, every person in the league had direct access to scores and individual statistics through the team or newspaper that they worked for. The first public fantasy football league was started 6 years later by Oakland restaurateur, Andy Mousalimas, at his bar, Kings X Sports Bar.²⁶ "Mousalimas was responsible for the push toward the current practice of performance scoring, which rewards points to players who score touchdowns."²⁷ The early days of fantasy football bear little resemblance to the multi-billion dollar industry that exists today, but the groundwork was set.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ MATT HUNT. How Fantasy Football Works at page 2. HowStuffWorks.com. <http://www.howstuffworks.com/fantasy-football1.htm>.

²⁶ *Id.* at 4.

²⁷ *Id.*

c. “THANK YOU, DANIEL OKRENT. DARN YOU, DANIEL OKRENT.”²⁸

In 1979, Daniel Okrent, an employee of the New York Times, pitched an idea to a group of academics and sports writers at a French restaurant in Manhattan, called La Rotisserie Francaise.²⁹ The following season, the group started “The Rotisserie League” focused on “eight categories: batting average, home runs, RBI, stolen bases, earned-run average, wins, saves, and composite ration (now known as WHIP).”³⁰ The importance of Daniel Okrent’s creation was not so much in the fact that he altered Winkenbach’s game for baseball, but rather in his penning an article for The New York Times in 1980, as well as one for Inside Sports in 1981.³¹ While statistics were still very difficult to come by, USA Today was later credited for “making it a lot easier to be a Rotisserie manager through its extensive and easy to read box scores and statistics.”³²

The invention, and proliferation, of the Internet allowed for an exponential expansion in Fantasy sports.³³ “[A] 1988 USA Today article about fantasy baseball estimated five hundred thousand playing...”³⁴ What began among three friends in a hotel in 1963 finally found a worldwide audience as websites like Yahoo!, ESPN, and CBS made it even easier to run fantasy sports leagues.³⁵

²⁸ KEVIN KLEPS. Who Created Fantasy Baseball? Explaining the Origins of the Game that Started a Billion Dollar Industry. ABOUT.COM. <http://baseball.about.com/od/fantasybaseballfaq/a/fantasy-baseball-history-who-created-rotisserie-baseball.htm>.

²⁹ *Id.*

³⁰ *Id.* (WHIP stands for “Walks plus Hits per Inning Pitched).

³¹ *Id.*

³² BOB BENTZ. THE HISTORY OF FANTASY BASEBALL. <http://es.slideshare.net/kenviv/the-history-of-fantasy-baseball>.

³³ JON HABER. Fantasy Sports Continue to Rise. JON HABER’S WEBLOG. <http://jonhaber.wordpress.com/2008/11/07/fantasy-sports-continues-to-rise/> (Fantasy Sports was moderately popular in the 1980’s but became a sensation when the Internet became a mass commodity in the late 90’s...) (Last visited June 3, 2013).

³⁴ Fantasy Sports: The New American Pasttime. CHATALAS SHRUGGED. <http://gjchatalas.wordpress.com/fantasy-sports/fantasy-sports-the-new-american-pasttime/>. (Last visited June 5, 2013).

³⁵ BENTZ. <http://es.slideshare.net/kenviv/the-history-of-fantasy-baseball>.

d. FANTASY SPORTS TODAY

“It is estimated [...] that 32 million people aged twelve and above in the US and Canada played fantasy sports in 2010 [...] Participation has grown by over 60% the last four years...”³⁶ Fantasy sports now exists for almost anything even slightly thought of as a sport.³⁷ Books have been written about fantasy sports, dozens upon dozens of websites have been devoted to the strategies behind drafting and managing a fantasy sports team, and television sitcoms based on the people who play them.³⁸ ESPN even began a trend by creating a short term fantasy game, ESPN’s “Streak for the Cash.”³⁹ This type of short-term fantasy game flourished after 2006, with the Unlawful Internet Gambling Enforcement Act of 2006.⁴⁰

II. THE UNLAWFUL INTERNET GAMBLING ENFORCEMENT ACT OF 2006: MORE BARK THAN BITE

a. WHY WAS IT ENACTED?

The Unlawful Internet Gambling Enforcement Act is a part of the Safe Port Act that was passed in September of 2006.⁴¹ Congress started attempting to pass some form of Internet gambling legislation in 1998, but the two houses of Congress were never able

³⁶ LEIGH STEINBERG. Fantasy Football Madness. FORBES.

<http://www.forbes.com/sites/leighsteinberg/2012/08/28/fantasy-football-madness/>.

³⁷ See <http://games.espn.go.com/frontpage> (showing that there are fantasy leagues for hockey, playoff basketball, golf, baseball, soccer, and NASCAR, as of June 5, 2013, all of the sports that are in-season in June.).

³⁸ See http://www.amazon.com/s/ref=nb_sb_noss_1?url=search-alias%3Daps&field-keywords=fantasy+sports (showing two books about fantasy sports), Query for “Fantasy Football Strategy Sites”, GOOGLE, www.google.com (showing “About 14,700,000 results). *and* <http://www.fxnetworks.com/theleague/> (the front page for the TV show “The League”).

³⁹ See <http://streak.espn.go.com/en/entry?date=20130606> (every day, members login and pick the winners from a variety of possible sporting events. The member with the longest winning streak every month wins \$100,000.).

⁴⁰ See <http://www.forbes.com/sites/chris-smith/2012/09/19/should-gambling-on-fantasy-football-be-legal/> (stating that UIGEA carved out a safe haven for fantasy sports, and that fantasy sports has grown, on average, 12% annually since 2007 and that short-term fantasy sites have been “riding that wave to serious profits.”).

⁴¹ <http://www.latestcasinobonuses.com/UIGEA.html>.

to agree on a piece of legislation during a single session.⁴² In 2006, two Republican representatives, Bob Goodlatte from Virginia, and Jim Leach from Iowa, both proposed different Internet gambling prohibition bills as part of the Republican “American Values Agenda”.⁴³ “The intent of the Leach Bill was to prohibit various electronic financial transactions (“EFTs”) related to online gambling...”⁴⁴ The Goodlatte bill, on the other hand, referenced the regulation of EFTs, but went further in trying to expand the scope of the Wire Act by prohibiting the ability to offer traditional online casino games over the Internet.⁴⁵

“On July 11, 2006, the House passed a consolidated Leach/Goodlatte Bill,” and despite strong belief “that the Senate would run out of time before it could calendar the Internet gambling issue for discussion and voting, Senate Majority Leader, Bill Frist (R-TN), found a way to get this Bill passed.”⁴⁶ Sometime between the Senate passage of the Safe Port Act on September 14, 2006, and the final passage of the Safe Port Act, UIGEA was tacked on, at the last minute, in a version almost politically unopposable.⁴⁷ Unfortunately, in order to ensure its passage, the proponents had to remove many of the stronger prohibitions in the UIGEA.⁴⁸ This “gutting” of the law, created a lot of confusion about what, exactly, the law affected.⁴⁹

b. THE EFFECT OF UIGEA

⁴² LAWRENCE G. WALTERS, ESQ. On Second Thought...What Does the UIGEA Really Mean For Internet Gambling? <http://www.firstamendment.com/site-articles/UIEGA/>

⁴³ WALTERS, <http://www.firstamendment.com/site-articles/UIEGA/>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* See also, *supra* note 26 (stating that UIGEA was not in the version of the Safe Port Act that passed the senate on September 14), and <http://hardboiledpoker.blogspot.com/2011/10/five-years-of-uigea.html> (stating that the UIGEA was added on “just before [the SAFE Port Act] was rapidly rushed through both houses literally minutes before Congress had finished its legislative business).

⁴⁸ WALTERS.

⁴⁹ *Id.*

As finally passed, the UIGEA is vaguely reminiscent of the Leach Bill: the only criminal activity mentioned in the bill centers on the transferring of funds intended for online gaming.⁵⁰ Section 5363 of the Act provides:

No person engaged in the business of betting or wagering may knowingly accept, in connection with the participation of another person, in unlawful Internet gambling – [credit, EFTs, checks, drafts, or the proceeds of any other form of financial transaction as set forth in federal regulation].⁵¹

Put simply, UIGEA made it illegal for U.S. companies to transfer funds for use in gambling.⁵² The confusion comes in when trying to “determine which online gambling activities trigger application of the financial transaction prohibitions.”⁵³ The Act uses the somewhat nebulous term “business of betting or wagering,” in defining its prohibition, but never goes on to define what that *is*.⁵⁴ Instead, the Act gives a broad definition of what is *not* included in the term, and thereby manages to create significant ambiguity regarding “financial service providers”, the primary category of business intended to be governed by the Act.⁵⁵

UIGEA proposes a 3-prong test for establishing a violation:

- (1) A “person” was engaged in the business of betting or wagering;
- (2) That person knowingly accepted a financial instrument or proceeds thereof; **and**,
- (3) That instrument was accepted (by the person) in connection with the participation of another person in “unlawful Internet gambling.”⁵⁶

The third-prong, relating to ‘the participation in “unlawful Internet gambling”’ is the most significant part of the test; understanding what “unlawful Internet

⁵⁰ *Id.*

⁵¹ 31 U.S.C. § 5363, *as quoted in* WALTERS.

⁵² WALTERS (stating that “the Department of Justice has a new tool in its arsenal to use against those who receive funds relating to certain prohibited online gambling activities.”).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

gambling” is in the context of the UIGEA is critical to understanding how UIGEA impacts Internet gambling in the U.S.⁵⁷ UIGEA essentially applies only to “online gambling transactions that are already prohibited by other state, federal, or tribal laws.”⁵⁸ In other words, UIGEA did not create any new prohibitions on the act of Internet gambling itself.⁵⁹ Rather, it gave the Department of Justice another way to go after the individuals and businesses already violating state, federal, or tribal laws.⁶⁰

c. THE EXCEPTION

The most interesting aspect of UIGEA lies in one of its two exceptions, the so-called carve out for fantasy sports.⁶¹ As already noted, fantasy sports is a multi-billion dollar industry, with almost half of that industry being post-UIGEA growth.⁶² Understandably, the fact that UIGEA creates a safe haven for any fantasy sports game that:

has an outcome that reflects the relative knowledge of the participants, or their skill at physical reaction or physical manipulation (but not chance), and, in the case of a fantasy or simulation sports game, has an outcome that is determined predominantly by accumulated statistical results of sporting events...⁶³

In other words, the Act does not consider fantasy sports to be gambling because it is more a game of skill than of chance.⁶⁴ Since fantasy sports is based on “successfully utilizing

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ CHRIS SMITH. Why Is Gambling On Fantasy Football Legal? FORBES.

<http://www.forbes.com/sites/chris-smith/2012/09/19/should-gambling-on-fantasy-football-be-legal/>

⁶² *Id.* (as already noted, the average growth since 2007 has been 12% per year, which would mean that the current industry is 197% of what it was in 2006.).

⁶³ *Id.* (Quoting 31 U.S.C. § 5362(1)(E)(XI)).

⁶⁴ *Id.*

superior knowledge of the players involved,” and only marginally involves a level of chance, entering a fantasy league is not considered gambling.⁶⁵

III. DOES THE LOOPHOLE APPLY?

a. IS IT FANTASY SPORTS?

After UIGEA, the U.S. government had a weapon to go after some online gambling businesses. But many companies started offering sports wagering services under the guise of fantasy sports, attempting to fit themselves into the exception carved out of UIGEA.⁶⁶ Consequently, the most important question that must be considered when evaluating whether a site is eligible for the UIGEA exception is whether or not its services are actually “fantasy sports.” In order to determine whether the services are, in fact, “fantasy sports,” it is necessary to determine the level of skill involved in playing.⁶⁷

Clearly, any fantasy sport service provider that offers exclusively season-long fantasy games falls within the exception, because the success of any individual person is dependent on that person’s skill *over the course of an entire season*, not simply that person’s ability to choose the outcome of individual games. The intent of the carve out is specifically to allow for simulation games like fantasy sports that allow the overly-knowledgeable sports fan to showcase that knowledge. There is always an element of chance in sports – an element that shows itself in numerous ways, from a bird getting killed when it accidentally flies into the path of a pitched baseball⁶⁸, to myriad different

⁶⁵ *Id.*

⁶⁶ It is interesting to note that while the number of people participating in fantasy sports has increased an average of 12% a year since the passage of UIGEA, there is no data indicating what percentages of those players are playing season-long, month-long, week-long, day-long, or other types of fantasy games.

⁶⁷ See *supra* section II(c) (the carve out exists specifically for games that “reflec[t] the relative knowledge... (but *not chance*), and, in the case of a fantasy...sports game” is determined by statistics. 31 U.S.C. § 5362(1)(E)(XI)(emphasis added)).

⁶⁸ See <http://www.youtube.com/watch?v=KxEUW3pQX6A>.

outstanding upsets across all sports⁶⁹ – if there weren't there would be no reason to play the games, but the point behind the fantasy carve out is that by drafting players from across the sport and following just their stats (and not how their teams perform), and then tracking them throughout the entire season, the accumulation of statistics overcomes the minor element of chance.⁷⁰ Guessing how an individual player performs in one game is almost impossible, but to assume that a particular player will have a good season is much easier.⁷¹

The real questions start arising with fantasy leagues that run on a more short-term basis. Does the accumulation of statistics over one month count? What about during one week? How about one day? These are the determinations that must be made in deciding whether a “fantasy sports” website can be prosecuted under UIGEA. The sites themselves certainly seem to believe that they fall within the scope of UIGEA and that they are completely legal. DraftDay.com, which offers one-day fantasy sports in prices ranging from free to \$530, has a large hyperlink tab on it's landing page titled “LEGAL AND SAFE;”⁷² FanDuel.com, also has a large hyperlink tab in the middle of its landing page,

⁶⁹ See <http://bleacherreport.com/articles/1036181-the-50-biggest-upsets-in-sports-history>

⁷⁰ The idea works similar to stock-broker investing, not every investment pans out, but over the long run, ideally, there is a positive return. Ironically, in perhaps one of the most counter-intuitive actions in sports betting, one man decided to bet \$20 against the Pittsburgh Pirates for every game of the 2010 season. His return was 9.98%, better than most 401(k) plans. This in no way helps the argument that fantasy sports is not gambling, but it does showcase the fact that sometimes daily betting can become a skill game when projected out for the entire season. See *Fan Bets Against Pirates for 162 Games, Gets Better Return Than Your 401(k)*. <http://blog.sfgate.com/hottopics/2010/10/05/fan-bets-against-pirates-for-162-games-gets-better-return-than-your-401k/>.

⁷¹ *E.g.* Miguel Cabrera, a player for the Detroit Tigers, is considered one of the best hitters in baseball history. And yet, three times in his career, he has had 18, or more, consecutive at-bats without a hit, approximately 4.3 straight games. See <http://beck.mlblogs.com/2012/04/16/picking-apart-miguel-cabrer-0-for-18-slump/>. See also, <http://sportsillustrated.cnn.com/fantasy/news/20130523/fantasy-baseball-miguel-cabrera-woba/> (discussing the fact that Miguel Cabrera is near the top in every statistical category in baseball) and <http://beforeitsnews.com/sports/2013/03/whos-the-number-one-pick-in-fantasy-baseball-this-season-2498222.html> (stating that Miguel Cabrera's average statistics since 2004 and the fact that he is “one of those players you pencil in on opening day and don't touch for the rest of the season.”).

⁷² See <http://www.draftday.com>.

this time titled “Play Safely & Securely” which links to a page that mentions the UIGEA and the fact that fantasy sports are exempted from it;⁷³ DailyJoust.com, in perhaps the most blatant disregard, similarly has a hyperlink, located this time in the lower right corner of the landing page, and much smaller, titled “LEGALITY” which links to a page that actually quotes the relevant part of UIGEA and discusses why fantasy sports are accepted.⁷⁴

If the definition of “fantasy sports” focuses on the cumulative performance of the athletes over the course of a season (or, at least a large portion of the season), then there can be no such thing as “daily fantasy sports.”⁷⁵ Since the definition of fantasy sports within the context of UIGEA specifically indicates that it is not based on any single performance of an individual, nor is it based on the performance of any one team, or combination of such teams, a “daily” league cannot be considered a “fantasy league.”⁷⁶ Particularly since many of the daily leagues do not run drafts in the same way that a season long draft is run. For example, in many of the daily leagues run by DailyJoust.com, the ‘owner’ is given an \$80,000 salary cap, and every player in baseball is given a set value.⁷⁷ The owner can then draft his team, so long as he drafts an entire team and stays within that \$80,000 budget. The problem arises in the fact that in these leagues, there may be hundreds of people drafting the same team, while a season-long

⁷³ See <https://www.fanduel.com>.

⁷⁴ See <https://www.dailyjoust.com> (hyperlink links to <http://www.dailyjoust.com/help/legality>).

⁷⁵ 31 U.S.C. § 5362(1)(E)(IX) (In subsection (II), the drafters made sure to include the phrase “determined predominantly by *accumulated statistical* results of the performance of individuals” (emphasis added); and subsection (III)(aa) focuses on prohibiting winning based on “performance of any single real world team or any combination of such teams”; while (III)(bb) focuses on prohibiting outcomes based “solely on any single performance of an individual athlete in any single real-world sporting event.”).

⁷⁶ *Id.*

⁷⁷ The author, in an attempt to understand how these leagues work created an account with Draft Day so he could navigate through the page. The following description is culled from his own personal experience using the page for daily fantasy baseball leagues.

fantasy team does not allow two teams to draft the same player. These daily leagues allow every owner to draft any player they want, regardless of who the other owners have drafted.

On a purely theoretical level, this means that an owner could choose an entire team as his starting line-up for a daily league (this would be completely nonsensical, but for argument's sake, it *is* possible). This would be a pretty obvious violation of UIGEA , because the outcome would be entirely based on the “performance of [a] single real world team or any combination of such teams.” Further, if an owner were to instead draft a starting team that consisted of the top 5 players from one team (*i.e.*, the pitcher, first baseman, third baseman, catcher, and an outfielder), and the top 6 players from another team (*i.e.* a second pitcher, as well as a second baseman, shortstop, two outfielders, and a designated hitter), then the outcome would essentially be based on the outcome of the two games being played by those two real life teams.⁷⁸ The problem is pretty obvious, there is no bright-line rule regarding what point the outcome is no longer based on the performance of a combination of real world teams. The plain language reading of the UIGEA is pretty clear: the outcome cannot be based on the “performance of any single real world team or *any combination* of such teams.”⁷⁹ While, the winner of a daily fantasy league is not *necessarily* the person who picks the most players from winning teams, the separation between the two is tenuous, at best, particularly when two of the

⁷⁸ For the hypothetical, I was looking at the Detroit Tigers and Cleveland Indians, who among the listed positions, almost every single player has played in an all star game in the past three season, most have played in multiple all-star games, and they include two Most Valuable Player awards and a Cy Young winner – the award for the season's best pitcher in his league.

⁷⁹ §31 U.S.C. § 5362(1)(E)(XI).

starting players in the daily fantasy baseball are starting pitchers.⁸⁰ Further, the language of the statute makes it clear that a fantasy league is such because of the “accumulation” of stats, something that is impossible in a daily fantasy league.⁸¹ Without the “accumulation” of statistics, there is no way that a game can be considered a “fantasy sport.”

b. THEN WHAT IS IT?

If these “daily fantasy sport” pages are not actually fantasy sport, then what are they? The answer, it seems is not nearly as complex as the rules of fantasy sport are; “daily fantasy sports,” at least, the ones that you must pay to enter, are nothing more than gambling. Gambling consists of three pieces: Chance, Prize, and Consideration.⁸² Prize is fairly clear, if the winner of any league is gaining some sort of prize, then that element has been fulfilled (though, I doubt that any court would find “bragging rights” sufficient, there is a train of thought that says that even such intangible ideas as “bragging rights” are a prize of a sort). Consideration and Chance are not so easy, though.

Consideration is an important aspect of gambling. If there is nothing of value laid down as a ‘wager,’ then gambling cannot exist. Even where two friends “bet” each other that a certain outcome will or will not happen, unless they “wager” something on the outcome -- i.e., pay consideration, it is not gambling. For example, if I were to turn to a

⁸⁰ An average starting pitcher starts 33 games a year. They get either a win or a loss in approximately 28 of those starts with a no-decision coming in the other 5. This means that the pitcher’s stats are *directly* related to the team’s outcome in almost 85% of his starts.

⁸¹ 31 U.S.C. § 5362(1)(E)(XI). Even the best players in baseball have days where nothing goes well. Miguel Cabrera, last year’s Most Valuable Player and the first player in 45 years to lead the league in Batting Average, Runs Batted In, and Home Runs. And yet, he had a streak of 5+ games in that season where he did not get a single hit. And even mediocre players have great days; in 2012, Phil Humber, a pitcher with a career 5.34 Earned Run Average (not good by any standards) threw a Perfect Game, the rarest feat in the sport of Baseball (he did not allow a single base-runner during the game, no hits, and no walks – only 23 have ever been completed).

⁸² I. NELSON ROSE. *But Is it Gambling?*. CASINO CITY TIMES.
<http://rose.casinocitytimes.com/article/but%2Dis%2Dit%2Dgambling-997>.

friend and say, “I bet you that the Forty-Niners win the Super Bowl next year,” and that friend responds by asking, “how much do you want to bet?” If I say, “nothing,” then there is no bet or wager (there can be no prize, either, in this situation, but that is not important in the terms of the hypothetical). My friend and I are simply discussing the outcome of next year’s Super Bowl. In the case of fantasy sports, even free leagues may be seen to have some form of consideration involved. For example, the time put in to learning all of the stats, or in setting your roster every week, can be seen as putting forth something of value. Fortunately, with daily fantasy leagues, the estimation is much easier because many require the payment of a small amount of money to the website in order to join leagues.⁸³ This is the purest form of consideration. If every daily fantasy site were to switch to purely free leagues, there is still a possibility that a court might rule consideration exists in the form of time spent researching, but that is a moot theoretical issue since every site appears to offer exponentially more leagues that require a fee than free ones.⁸⁴

Season-long “fantasy sports” as already discussed are not considered games of chance because they take place over the season, so that element of gambling is eliminated. There is always the chance that your sure-fire, can’t-miss player gets injured in the first game of the season and is unable to play the rest of the year. Similarly, there is always the ‘chance’ that someone drafted in the very late rounds will turn out to have an amazing year and will propel a fantasy team into first place. However, generally speaking, knowledge of the sport gives team owners more of an advantage, and as a result, chance is effectively taken out of the situation. Looking back at the explanation of

⁸³ In using Draft Day, I found that there are very few free leagues each day, while there are dozens of games starting all throughout the day that cost anywhere from \$1 to Hundreds of dollars.

⁸⁴ That is to say, every daily fantasy league that I have come across.

how the draft works, it is easy to see that there is a strategy involved in drafting a fantasy team. Further, knowing approximately how the other people in the league will draft is a skill developed over time and requires hours of studying players' statistics and news. Further, one of the things that makes fantasy sports exciting is seeing how an owner will react to a devastating injury. It takes skill to find an alternate player that will produce without having to sacrifice too much of your team in return (say by trading with other teams in your league). None of this exists in daily fantasy sports. Generally speaking, the day-to-day news of every player in a sport does not change much. And the important information (say if a player is injured and will not be on the roster) is readily available. The skill involved with dealing with an injury is completely removed. The skill that goes into drafting a team in a small league is drastically lessened, and the skill involved in knowing which player is about to begin producing better stats than he has in the past is barely relevant. Chance rules the day in daily fantasy sports, and as such, they should not be allowed to consider themselves "fantasy sports" with regard to UIGEA.

c. CONCLUSION

With the explosion of fantasy sports over the last few years, and the enactment of the Unlawful Internet Gaming Enforcement Act of 2006, many people have tried to capitalize on the so-called fantasy sports carve out. Daily fantasy sports site litter the Internet and many of them have advertisements pop up on many seemingly unrelated websites.⁸⁵ The problem is, none of these sites, and consequently none of the daily fantasy leagues, have the defining characteristics that make up fantasy sports with regard to UIGEA; they are almost purely games of chance and, therefore, satisfy all the elements

⁸⁵ I know that I, personally, come across the Fan Duel advertisement at least a few times a day. Granted, considering it is on the same computer I began research for this paper, that's probably not shocking.

of gambling. As a result, when taken in conjunction with the fact that the vast majority of daily fantasy sport leagues require some form of league fee, and the fact that the winner is almost always rewarded with a financial prize, it is clear that these leagues are not, in fact, fantasy sports leagues, but rather a sophisticated form of sports wagering. Whether the government wants to step in and shut down these sites is a whole other matter, but one thing is clear, they would violate almost every state law regarding gambling.⁸⁶ Regardless of the particular state law, every single law regarding gambling is premised on the same, three-prong, definition of gaming: Chance, Prize, and Consideration. Every fantasy sports league – or at least, every fantasy league that costs money to join – violates this three-prong definition: as discussed in section III(a), sport, by definition, is premised on the element of chance; the winner of any fantasy league wins some kind of ‘prize,’ even if that prize is something as intangible as ‘bragging rights’; by paying money to join fantasy leagues, the third prong, Consideration, is satisfied (the time spent studying statistics and preparing for fantasy leagues might even be deemed ‘consideration’ as it is, for many people, valuable⁸⁷

⁸⁶ They may, in fact, violate state law in all 50 states. I am unaware of any sites offering what they call “daily fantasy sports” that operate out of, and are licensed to accept wagers in Nevada. But, on the off chance that one exists, I chose to say that they violate *almost* every state law. Even if one of these companies exists in Nevada, Nevada law prohibits residents of Nevada from gambling with business not licensed by the state of Nevada. Similarly, since “Daily Fantasy Sports” are actually a form of gambling, any business operating one in the state of Nevada is breaking state law if they are not licensed.

⁸⁷ See <http://legal-dictionary.thefreedictionary.com/consideration> (stating that the legal definition of “consideration” is “something of value that can be objectively determined.”).