

Are Daily Fantasy Sports Gambling?

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Tomorrow is Thanksgiving, and Thanksgiving means football, and football nowadays means an endless parade of advertisements for DraftKings, FanDuel, and other daily fantasy sports businesses. This post asks the obvious question: are these contests illegal gambling?

What are daily fantasy sports? In case you haven't seen the commercials, Wikipedia [summarizes](#) daily fantasy sports as follows:

[P]layers compete against others by building a team of professional athletes from a particular league or competition, and earn points based on the actual statistical performance of the players in real-world competitions . . . over short-term periods, such as a week or single day . . . [U]sers pay an entry fee in order to participate, and build a team of players in a certain sport while complying with a salary cap. Depending on their overall performance, players may win a share of a pre-determined pot. Entry fees help fund prizes, while a portion of the entry fee goes to the provider as rake-off revenue.

Gambling is illegal. In North Carolina, [G.S. 14-292](#) makes it a crime to bet on a "game of chance." Other states have similar laws.

The argument that daily fantasy sports are gambling. Although sports like football may be games of skill, courts view the activity of betting on them as being a game of chance rather than one of skill. *State v. Brown*, 221 N.C. 301 (1942) (holding that betting on horse racing is gambling). And if betting on sports is a game of chance, the argument goes, it doesn't matter whether one is betting on individual athletes' performances rather than teams. Thus, opinion leaders like the [New York Times have argued](#) that daily fantasy sports are gambling and should be regulated as such.

The argument that this isn't gambling. The [website of DraftKings](#), one of the two largest daily fantasy sports operators in the United States, puts it simply: "Daily fantasy sports is a skill game and is not considered gambling." Or, as a Draft Kings executive [said to ESPN](#), "Our product is a game of skill. In order to be successful, you need to apply your skill in order to have the best lineups to go into our contests to win." The best evidence of this is also a cautionary signal for would-be participants: a small number of players [account for almost all the winnings](#).

Of course, many games involve both luck and skill, and daily fantasy sports certainly fall in that category. In North Carolina, as in most states, the key question is whether skill or chance predominates. Poker, for example, involves both skill and chance, but courts generally have said that chance predominates. *Joker Club, LLC v. Hardin*, 183 N.C. App. 92 (2007).

Are daily fantasy sports excluded from the federal gambling laws? Proponents of daily fantasy sports sometimes argue that federal law permits such contests. The law in question is the [Unlawful Internet Gambling Enforcement Act of 2006](#), a portion of which excludes from the definition of "bet or wager" certain "fantasy or simulation sports game[s]." There is some debate about the precise scope and meaning of this exemption, as discussed in [this Legal Blitz article](#), but it at least tends to support the idea that federal law does not prohibit this type of activity.

Other states are taking sides. The federal law discussed above expressly states that it does not preempt state gambling laws, and several states have taken action in connection with daily fantasy sports, including [Nevada](#) (which determined that daily fantasy sports constitute gambling and so require a license); [New York](#) (where the Attorney General has determined that daily fantasy sports constitute gambling and has ordered the leading operators to cease doing business in the state), and [Massachusetts](#) (where the Attorney General has declared that daily fantasy sports constitute gambling but has announced a proposal to regulate, rather than prohibit, the contests).

What about North Carolina? WRAL has [this article](#) on the legal status of daily fantasy sports in the Tar Heel State. As far as the article reports, and as far as I know, no court or other official body has opined on the issue here, and it doesn't sound like the Attorney General is keen to join the fray: "North Carolina Attorney General Roy Cooper said his office will only get involved if a district attorney asks for guidance as to whether it's illegal gambling."

The bottom line. I've never played any fantasy sport, daily or otherwise, and I certainly don't claim any special expertise on the gambling laws. Having said that, it is hard for me to see a legal difference between poker and daily fantasy sports. But there may be a practical difference. Daily fantasy sports have the financial and political backing of the NBA, Major League Baseball, ESPN, and Fox Sports among others. Given that lineup of heavyweights, I wouldn't be surprised to see some compromise emerge.