

Legal Sidebar

You Win Some, You Lose Some: the Complicated Legal Status of Daily Fantasy Sports

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The recent emergence of the [daily fantasy sports](#) (DFS) industry, combined with [increased press coverage](#) and [advertising](#) spots that promise big money prizes, has prompted many questions about the industry's legality. DFS contests work much like season-long fantasy sports games, in which participants pay entry fees into a common pool, from which the winner(s) receives his or her award, and the operators receive a percentage of the total pool value. Contestants assemble make-believe teams of athletes from real sports teams and compete against other players to accumulate points that are based on the statistical performance of their selected athletes on a daily (or weekly) basis. The two most popular DFS operators, [FanDuel](#) and [DraftKings](#), [control more than 90%](#) of the North American daily fantasy market and are [financially backed](#) by major professional sports leagues, team owners, and leading media companies. DFS companies [claim](#) their legality is supported by a [statutory exemption](#) to the Unlawful Internet Gambling Enforcement Act of 2006 ([UIGEA](#)) regarding games of skill and fantasy sports.

States have traditionally handled regulation of gambling, supported by federal law in situations where an interstate or foreign element might otherwise frustrate the enforcement of state law. The legal status of fantasy sports under most state gambling laws appears to turn on whether success depends primarily on the skill of individual contestants (which would likely make it legal) or mostly chance (which would probably make it unlawful gambling). In recent years, several state entities (including [state gaming control boards](#), [state attorneys general](#), and [state legislatures](#)) have turned their attention to DFS. These state actions have persuaded DFS companies to withdraw their operations from some jurisdictions, [such as Nevada](#), although DFS companies have [won a temporary reprieve](#) from an order by the New York attorney general to [stop doing business](#) in the State of New York, which boasts the [largest percentage](#) of daily fantasy players.

With respect to federal law, DFS may implicate at least four gambling-related statutes. The Unlawful Internet Gambling Enforcement Act (UIGEA) prohibits anyone "[engaged in the business of betting or wagering](#)" from knowingly accepting financial payments in connection with "unlawful Internet gambling." However, UIGEA relies on underlying federal or state gambling laws to determine what gambling activity is unlawful. Notably, UIGEA contains an [express exemption](#) for certain fantasy or simulation sports games. Because this exception to UIGEA was enacted before the existence of DFS, it is [debatable whether Congress intended](#) it to cover DFS. Also, UIGEA does not specifically authorize DFS or other forms of fantasy sports and expressly provides that it [does not preempt](#) state laws related to gambling.

The Professional and Amateur Sports Protection Act ([PASPA](#)) generally prohibits governmental entities from licensing, sponsoring, or engaging in gambling on competitive games in which amateur or professional athletes participate. PASPA also prohibits anyone who seeks to sponsor, operate, advertise, or promote, pursuant to law or compact, such sports gambling. (PASPA contained a "grandfather" clause that allows sports gambling in Nevada, Oregon, Delaware, and Montana.) It is unclear whether DFS (or state laws that regulate DFS) violate PASPA, as no federal or state court has considered the issue. However, PASPA's sole enforcement mechanism is an injunction that may be sought by the U.S. Attorney General, the major professional sports leagues, or the National Collegiate Athletic Association (NCAA). It is unclear whether any of these entities may be inclined to file a PASPA action. Several DFS operators have [entered into partnerships](#) with professional sports leagues, while the NCAA has long been an [opponent of sports wagering](#)

involving its student athletes and has reportedly [refused to allow DFS advertisements](#) during college basketball tournaments.

The Wire Act [prohibits](#) the use of interstate wire communication facilities by those in the gambling business to [transmit sports bets or sports gambling](#)-related information. It is unclear whether participation in DFS constitutes “the placing of bets or wagers on any sporting event or contest” within the meaning of the Wire Act. The Illegal Gambling Business Act (IGBA) [punishes](#) anyone who conducts, finances, manages, directs, or owns all or part of an “illegal gambling business,” which the statute defines as a gambling business that, among other things, violates state law. Thus, a DFS company’s liability under IGBA would depend on its legality within the state in which it operates. Reportedly, a [federal grand jury](#) in Florida has been investigating DFS companies for possible IGBA violations, and the [FBI](#) and [Justice Department](#) are also examining DFS’ business practices.

Several Members of Congress have called for formal inquiries into the operation of DFS and have urged government oversight. For example, Representative Jeffries has [asked](#) the House Judiciary Committee to examine whether “permitting a multi-billion dollar industry to police itself serves the best interests of the American people.” Senator Mendendez and Representative Pallone [have requested](#) the Federal Trade Commission to take action to implement safeguards and ensure a fair playing field for participants in the DFS leagues. Senator Blumenthal has [urged](#) the FTC and the Justice Department to investigate deceptive or fraudulent practices in DFS.

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