A BILLION DOLLAR INDUSTRY’S BILLION DOLLAR QUESTION:
ARE FANTASY SPORTS ACTUALLY LEGAL?

Richard Pandorf*  

I. INTRODUCTION

The concept of gambling in the United States predates even the official formation of the United States.1 Gambling has likely existed in the rest of the world for as long as humans have engaged in competitive activity. The advent of fantasy sports is much more recent.

The purpose of this article is not to provide a detailed history of fantasy sports or to discuss the legality of traditional, season-long fantasy sports leagues.2 This article will specifically discuss the current legality of daily fantasy sports contests. Part II of this article will discuss U.S. federal and state law that applies to daily fantasy sports contests. Part III will discuss how current U.S. federal and state law applies to various daily fantasy sports contests. Finally, Part IV concludes this article and discusses the uncertain legal status of daily fantasy sports.

II. APPLICABLE LAW

A. Federal Law

1. The Unlawful Internet Gambling Enforcement Act of 2006 (“UIGEA”)

On October 13, 2006, President George W. Bush signed the UIGEA into law.3 The UIGEA prohibits those engaged in the “business of betting or wagering” from knowingly accepting, in connection with the participation of another person in unlawful internet gambling:

1) credit, or the proceeds of credit, extended to or on behalf of such other person;

2) an electronic fund transfer, or funds transmitted by or through a money transmitting business, or the proceeds of an electronic fund

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* Richard Pandorf ’15  


transfer or money transmitting service, from or on behalf of such other person;

3) any check, draft, or similar instrument which is drawn by or on behalf of such other person and is drawn on or payable at or through any financial institution; or

4) the proceeds of any other form of financial transaction, as the Secretary and the Board of Governors of the Federal Reserve System may jointly prescribe by regulation, which involves a financial institution as a payor or financial intermediary on behalf of or for the benefit of such other person.4

The UIGEA, which attempts to regulate internet gambling, imposes restrictions primarily on providers of payment system instruments, credit cards, and wire transfers.5 However, the UIGEA specifically exempts from the definition of “bet or wager” participation in any fantasy or simulation sports contest in which no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization, and that meets the following conditions:

1) All prizes and awards offered to winning participants are established and made known to the participants in advance of the game or contest and their value is not determined by the number of participants or the amount of any fees paid by those participants.

2) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.

3) No winning outcome is based—
   a) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
   b) solely on any single performance of an individual athlete in any single real-world sporting or other event.6

While the UIGEA’s exemption for fantasy sports contests should comfort daily fantasy sports operators to an extent, the most important carve out for daily fantasy sports under the UIGEA is in the UIGEA’s definition of “unlawful internet gambling.” The term “unlawful internet gambling” means to place, receive, or otherwise knowingly transmit a bet or wager by means of the internet where such bet or wager is unlawful under any applicable federal or state law in

5. Id. § 5361(a)(1).
6. Id. § 5362(1)(E)(ix).
the state in which the bet or wager is initiated, received, or otherwise made." Therefore, if a particular daily fantasy sports contest is legal in all states in which the contest is available, the contest will not violate the UIGEA.

2. The Wire Act

The Wire Act prohibits those in the “business of betting or wagering” from knowingly using a “wire communication facility for the transmission of bets or wagers in interstate or foreign commerce.” The Wire Act was enacted in 1961 primarily as a way to combat organized crime. While the Department of Justice (“DOJ”) long relied on The Wire Act to assert that all forms of internet gambling were illegal, the DOJ changed its position and, on December 23, 2011, publicly announced that The Wire Act is limited to sports betting.

Notably, unlike the UIGEA, The Wire Act can apply to gambling that is legal even under state law. However, it is critical to note that The Wire Act contains an exemption when a bet is placed in one jurisdiction where betting on a sporting event is legal, to another jurisdiction where betting on a sporting event is legal. In other words, when specific “betting” activity, such as a buy-in to a daily fantasy sports contest, is legal in all jurisdictions involved, there is no violation of The Wire Act.

3. The Professional and Amateur Sports Protection Act (“PASPA”)

PASPA makes it unlawful for any person or governmental entity to sponsor, operate, advertise, promote, license, or authorize a betting or wagering scheme based on games in which professional or amateur athletes participate, or even on the performance of athletes in such games. However, to violate PASPA a person or governmental entity must act pursuant to some governmental law or compact. Therefore, unless a law or compact authorizes a “betting or wagering scheme,” PASPA will not apply.

11. See Rose, supra note 9.
12. See 18 U.S.C. § 1084(b) (2012) (“Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State or foreign country where betting on that sporting event or contest is legal into a State or foreign country in which such betting is legal.”).
13. In the case of daily fantasy sports, the jurisdictions involved are the jurisdiction where the daily fantasy sports operator is located, as well as every state where a participant in the contest is located.
15. Id.
4. Illegal Gambling Business Act

The Illegal Gambling Business Act prohibits persons from conducting, financing, managing, supervising, directing, or owning all or part of an “illegal gambling business.”\(^{16}\) An “illegal gambling business” is a gambling business that:

1) violates state law in the state in which it is conducted;
2) involves five or more persons who conduct, finance, manage, supervise, direct, or own the business; and
3) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.\(^{17}\)

Therefore, like the UIGEA, a daily fantasy sports contest that does not violate state law in the state in which it is conducted will not run afoul of the Illegal Gambling Business Act.

B. State Law

In most states, a contest will constitute illegal gambling if it contains three elements: consideration, chance, and prize.\(^{18}\) While it is worth noting that free-to-play daily fantasy sports contests will not constitute “illegal gambling” for want of consideration, most daily fantasy sports contests unquestionably contain consideration and prize.\(^{19}\) Therefore, the debate turns on whether a specific daily fantasy sports contest possesses a large enough element of “chance” to constitute illegal gambling. Courts have utilized four tests to determine whether a particular activity is one of skill or one of chance: the “predominant purpose” test, the “any chance” test, the “gambling instinct” test, and the “material element” test.\(^{20}\)

1. Predominant Purpose Test

The predominant purpose test, which a majority of courts use, requires courts to determine whether player skill or “uncontrollable” chance is the predominant

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\(^{17}\) Id. § 1955(b) (2012) (emphasis added).
factor behind the result of a contest. The predominant purpose test seems self-explanatory, but it has led to divergent results with regard to even the same type of contest.  

2. Any Chance Test

While the predominant purpose test rests on one end of the “chance spectrum,” the any chance test rests on the opposite end. Under the any chance test, if a contest contains any element of chance, then it is a game of chance and therefore prohibited as illegal gambling. Only a small number of states utilize this test.

3. Gambling Instinct Test

A few jurisdictions employ tests that rest in the middle of the chance spectrum. The gambling instinct test prohibits a contest or activity that “appeals to the player’s gambling instinct.” This highly subjective test gives no consideration to whether skill or chance dominates.

4. Material Element Test

The material element test prohibits a contest if the contest contains chance as a “material element.” Courts that utilize this test may categorize a contest as a game of chance if chance has more than a “mere incidental effect” on the game. This test comes with a high degree of subjectivity as to when an element of chance becomes “material.”

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22. See Geoffrey T. Hancock, Upstaging U.S. Gaming Law: The Potential Fantasy Sports Quagmire and the Reality of U.S. Gaming Law, 31 T. JEFFERSON L. REV. 317, 336-37 (2008) (stating that some courts have determined that poker is a game of skill, while other courts have determined that poker is a game of chance.).

23. Cabot & Csoka, supra note 19, at 1205.

24. Id.

25. Cabot, Light, & Rutledge, supra note 18, at 393-94.

26. Id. at 394.

27. Id. at 392.

28. Id. at 393.

29. See, e.g., Boardwalk Regency Corp. v. Attorney Gen. of N.J., 457 A.2d 847, 849 (N.J. 1982) (“[T]he . . . games are still played for stakes and involve the hazarding of money on uncertain events; that being so they constitute forms of gambling . . . regardless of whether skill or chance predominates.”); see also Cabot, Light, & Rutledge, supra note 18, at 393 (“This tends to be an even more subjective test because it is not quantifiable like the predominance test.”).
III. THE LAW’S APPLICATION TO FANTASY SPORTS

A. Federal Law

1. The UIGEA

To qualify under the UIGEA fantasy sports exemption, the outcome of a daily fantasy contest must reflect the relative knowledge and skill of the participants, and be determined predominantly by accumulated statistical results of the performance of athletes in multiple real-world sporting or other events. To qualify under the UIGEA fantasy sports exemption, the outcome of a daily fantasy contest must reflect the relative knowledge and skill of the participants, and be determined predominantly by accumulated statistical results of the performance of athletes in multiple real-world sporting or other events. 30 The “standard” daily fantasy sports contest, even though much shorter in duration than traditional season-long fantasy leagues, would likely qualify for the exemption. Depending on the sport, the standard contest requires players to draft a team of anywhere from 8-10 athletes utilizing a salary cap. 31 This “auction” method avoids many of the chance elements inherent in a “snake” or “autopick” draft. 32

While the “standard” daily fantasy sports contest should qualify for the UIGEA fantasy sports exemption, not all daily fantasy sports contests follow the standard format. For instance, some contests require players to draft as few as three athletes. The UIGEA fantasy sports exemption relies on the particular contest reflecting the knowledge and skill of the participants, but the element of chance increases as the roster size in a particular contest decreases. Moreover, athlete injury becomes much more devastating in contests that require players to select fewer athletes. Therefore, extremely small roster size in a daily fantasy sports contest may place the contest outside of the UIGEA’s fantasy sports exemption. 33

It is worth noting again that the UIGEA fantasy sports exemption is not required for a contest to be compliant with the UIGEA. If the contest does not “violate any applicable federal or state law in the state in which the bet or wager is initiated, received, or otherwise made,” it will not violate the UIGEA. 34

2. The Wire Act

Prior to the DOJ’s reversal of its long-standing interpretation of The Wire Act’s applicability to all forms of internet gambling, there was an incredibly

32. See Edelman, supra note 2, at *29-*30 (discussing chance elements in various draft models).
strong argument that The Wire Act prohibited all types of fantasy sports contests that required a buy-in and awarded a prize at the contest’s conclusion.\textsuperscript{35} Since the DOJ’s re-interpretation of The Wire Act’s scope, most industry participants and commentators are not concerned with The Wire Act’s applicability to fantasy sports.\textsuperscript{36} Further, state law factors heavily into The Wire Act’s applicability to daily fantasy sports because as long as daily fantasy sports are not illegal in any jurisdiction involved in the particular contest, The Wire Act will not apply. Therefore, as with most other federal laws, the legality of daily fantasy sports turns on state law.

3. PASPA

For PASPA to factor into the legality of daily fantasy sports, the daily fantasy sports operator must act pursuant to some law or compact of a governmental entity. While there are some concerns regarding the express legalization of fantasy sports in Maryland\textsuperscript{37} and Kansas,\textsuperscript{38} fantasy sports should not constitute “betting” or “wagering” schemes because fantasy sports are predominantly games of skill – not chance.\textsuperscript{39} Therefore, at least for as long as state legalization of fantasy sports mirrors the language of the UIGEA carve-out for fantasy sports, there should be little concern of PASPA’s applicability to contests in states where fantasy sports are expressly legalized because fantasy sports are not “betting” or “wagering” schemes.

PASPA is also highly unlikely to prevent the operation of daily fantasy sports because the primary forces behind PASPA’s enactment were professional and amateur sports leagues. Major professional and amateur sports leagues, such as the National Collegiate Athletic Association and the National Football League, fought back against New Jersey’s recent attempts to legalize sports betting.\textsuperscript{40} Major sports leagues’ stance on daily fantasy sports, on the other hand, is quite different. The leagues have not only not fought against the rise of daily fantasy sports, but have actually sought and attained partnerships with major daily

\textsuperscript{35} See supra Part II for further discussion of The Wire Act.
\textsuperscript{36} See, e.g., David O. Klein et al., Fantasy Sports: The Rapidly Developing Legal Framework, Mondaq, http://www.mondaq.com/unitedstates/x/428804/Gaming/Fantasy+Sports+The+Rapidly+Developing+Legal+Framework (last visited Sept. 27, 2015) (“Absent some future determination that UIGEA-exempt fantasy sports contests are considered sporting events, the Wire Act should not prohibit such contests.”).
\textsuperscript{39} See supra Part II Section B for further discussion on the distinction between games of skill and games of chance.
fantasy sports operators.\textsuperscript{41} Therefore, from a legal and business perspective it is very unlikely that PASPA will be an obstacle to the operation of daily fantasy sports.

B. State Law

The legality of daily fantasy sports in various states hinges on which test a state court uses to assess the element of chance.\textsuperscript{42} Proponents of daily fantasy sports argue that daily fantasy sports are legal under the predominant purpose test, and even pass muster in “material element” states.\textsuperscript{43} Daily fantasy sports operators typically only block a handful of states due to legal concerns.\textsuperscript{44}

Others have pointed out that the assessment of daily fantasy sports as skill-based gaming is not at all clear-cut. With very little in the way of case law regarding daily fantasy sports (none of which squarely discusses the skill vs. chance debate), much of the skill-based assessment is legal guesswork. Further, commentators have pointed out that the assessment of degrees of skill and chance in any daily fantasy sports game is highly subjective because there is no reliable way to quantify these elements.\textsuperscript{45}

Another issue with determining the legality of daily fantasy sports under state law is that the gambling law applied to daily fantasy sports in most states was written decades before the advent of daily fantasy sports.\textsuperscript{46} We are currently attempting to apply completely outdated law to a very modern concept. As of now, only three states have laws directly related to fantasy sports.\textsuperscript{47} As more

\textsuperscript{41} The National Basketball Association has officially partnered with daily fantasy sports operator FanDuel, while Major League Baseball officially has a small ownership stake in DraftKings, which is FanDuel’s major competition. There is a working list of all current sponsorships between daily fantasy sports operators and individual sports leagues and teams. See DFS Partnership/Sponsorship Tracker, LEGAL SPORTS REPORT, http://www.legalsportsreport.com/dfs-sponsorship-tracker/ (last visited Oct. 3, 2015).

\textsuperscript{42} See supra note 18 and accompanying text.

\textsuperscript{43} DraftKings proudly displays on its website that daily fantasy sports are games of skill in 45 out of 50 U.S. states, and thus “100 percent legal.” See Why Is It Legal?, DRAFTKINGS, https://www.draftkings.com/help/why-is-it-legal (last visited Oct. 3, 2015).


\textsuperscript{45} See, e.g., Amber Phillips, Are daily fantasy sports even legal?, WASHINGTON POST (Sept. 21, 2015), http://www.washingtonpost.com/news/the-fix/wp/2015/09/21/are-daily-fantasy-sports-even-legal/ (“We don’t have a machine you can drop a game into and it spits out a piece of tape that says, ‘This game is 52 percent skill and 48 percent chance.’ It is an inherently subjective standard, and we do not have a reliable way to quantify these kinds of elements.”).

\textsuperscript{46} See id. (“A lot of gambling law was written around the time of pinball machines and crane games. It becomes far more difficult to apply those tests to modern gambling products.”).

\textsuperscript{47} Maryland and Kansas have passed legislation authorizing fantasy sports, while Montana prohibits fantasy sports. See MD. CODE ANN., CRM. LAW § 12-114 (West 2012) (mirror language of the UIGEA fantasy sports exemption); KAN. STAT. ANN. § 21-6403(d) (2015) (mirror language
states speak to the legality (or illegality) of fantasy sports, the legal landscape will become much clearer.

Finally, a critical element in the assessment of skill and chance is what type of daily fantasy sports contest is offered. A contest with multiple team owners and an “auction” style draft that requires owners to draft, for example, between eight and ten National Football League players, is very defensible as a skill-based competition in most states. But as daily fantasy sports have gained momentum, the characteristics of various games have become more creative. For example, some games allow users to essentially “bet against the house” and pick which player, between two pre-selected players, will score more fantasy points.48 Other games allow two players to compete head-to-head in a very limited slate of games (e.g., only the late Sunday afternoon National Football League games). As daily fantasy sports operators stray from the traditional auction draft formula, the assessment of skill and chance differs wildly.

IV. CONCLUSION

The legality of daily fantasy sports has become one of the hottest legal issues among sports fans and even mainstream America in general. However, like many legal issues, there is currently only one accurate response to the question of the legality of daily fantasy sports: “it depends.” Specifically, though federal law is incredibly important, the legality of daily fantasy sports depends primarily on the interpretation of various state gambling laws. It also depends heavily on the specific type of contest offered. The “auction draft” formula that daily fantasy sports was built upon presents a game that is very defensible from a legal standpoint, but as daily fantasy sports operators become more creative with their contest offerings, the legal analysis necessarily changes. This, of course, would be a much easier legal landscape if more states took a stance on the legality of fantasy sports. However, as it stands today, there is anything but legal certainty in this field.

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48. These games typically require a player to select from as many as five “head-to-head” athlete matchups. If a player gets three or more correct, the player wins the pre-determined prize.