INTRODUCTION

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2015 is the year of fantasy sports. Not the year of its invention. Perhaps not the year of its reckoning. But the year fantasy sports have managed to become the hottest topic in gambling. The irony is that its most steadfast proponents insist that pay-to-play fantasy sports contests are not gambling at all.

Let’s consider that question.

To begin, what are “fantasy sports contests?” There certainly is no legal definition, and a new permutation is likely to emerge as often as daily fantasy sports contests are played. However, as a general principle, fantasy sports contests have the following attributes: (a) contestants pay money to participate; (b) contestants assemble rosters or teams of real-world professional athletes who are competing in real-world competitive athletic events; (c) the contest is scored by comparing the statistical performance of players on the contestants’ rosters; (d) the statistics are generated based upon the real-world performance of the selected athletes; (e) the contestants are not the actual athletes competing in the real-world sporting events; (f) the prizes for each fantasy sports contest are fixed and announced prior to the start of each contest; (g) prizes are cash or something of value; (h) the outcome of the contests are based on the statistical performance of athletes in multiple games, not on any single athlete or single game; (i) no winning outcome is based on the score, point-spread or performance of any real-world sports team; and (j) participants in all 50 states play over the Internet.

By some estimates, 56.8 Million people in the United States and Canada play fantasy sports and spend an average of $465 over a 12-month period.1

Fantasy sports operators generally argue that the contests are not gambling because: (a) federal law exempts fantasy sports contests from criminal gambling laws (some claim that federal law explicitly legalizes fantasy sports contests); (b) fantasy sports contests are games of skill; (c) organizations like Major League Baseball and the National Football League support fantasy sports; and (d) no one has gotten in trouble.

With regard to fantasy sports under federal law, there is a pervasive misconception that the Unlawful Internet Gambling Enforcement Act of 20062

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("UIGEA") legalizes fantasy sports contests that meet certain criteria. However, the UIGEA is not a gambling statute. It is a financial transfer act that has two primary operative provisions. First, it prohibits anyone engaged in the business of unlawful Internet gambling (as determined by other statutes, such as state law) from transferring funds in furtherance of such businesses. Second, it requires the federal government to enact regulations applicable to banks to stop transactions identified by the banks as transfers for unlawful Internet gambling (as determined by other statutes, such as state law). In essence, the UIGEA is an added charge statute. In other words, one must be engaged in an illegal gaming activity before one will face a separate added charge for violating the UIGEA for transferring funds associated with the underlying illegal gaming activity. Therefore, although the UIGEA does have a fantasy sports exemption, the UIGEA doesn’t make the fantasy sports activity legal. It merely means that if someone is charged with violating other criminal gambling laws for operating a fantasy sports contest that meets the UIGEA exemption, that person will not face an added separate offense for violating the UIGEA for transferring funds associated with the activity.

The UIGEA does not transform fantasy sports into a legal activity or otherwise modify any other federal or state gambling law.

Proponents of fantasy sports contests also tend to overlook other applicable federal laws. Besides the UIGEA, there is the Federal Wire Act, Wagering Paraphernalia Act, Travel Act, and the Illegal Gambling Business Act (and don’t forget RICO). Generally speaking, with the exception of the Federal Wire Act, rather than preempting state gambling laws, federal laws that govern gambling crimes were designed to aid states in enforcing their own gambling laws.

The Federal Wire Act makes it illegal for those in the business of betting or wagering to offer or take bets from U.S. gamblers in interstate or foreign commerce over phone lines or through other wired devices. The statute’s relevant provision (Section 1084(a)) provides as follows:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or

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for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.\(^7\)

From the 1960’s through September 20, 2011, the official published position of the U.S. Department of Justice (the “DOJ”) was that all Internet gambling was unlawful under the Federal Wire Act, regardless of the form of wagering and regardless of whether it was limited to intrastate play. On September 20, 2011, the DOJ issued a new opinion that substantially reversed course on all key elements of interpretation.\(^8\) In the 2011 Opinion the DOJ opined that the Federal Wire Act was applicable only to sports wagering and that it did not apply to intrastate activities.\(^9\) What that means is that during the Obama administration, the DOJ will prosecute accused Federal Wire Act violations only against those in the business of interstate or foreign sports wagering.\(^10\) The DOJ may reverse, rescind, amend the 2011 provision—just as the 2011 Opinion reversed prior DOJ opinions—or it may issue a new, contrary opinion.

Do fantasy sports operators face liability under the Federal Wire Act? Well, the outcomes of the contests depend on sports statistics, and the contests are conducted interstate. So, the answer is maybe.

The Illegal Gambling Business Act (“IGBA”)\(^11\) is a companion criminal law to the Federal Wire Act. This statute prohibits any person from financing, owning or operating an illegal gambling business.\(^12\) An illegal gambling business is defined as an operation that violates state law, involves five or more persons, and either is in substantially continuous operation for more than 30 days or has gross revenue of more than $2,000 in any single day.\(^13\) Under this statute, gambling includes pari-mutuel pools, bookmaking, slot machines, roulette, dice, lotteries or numbers, or selling chances therein.\(^14\)

IGBA was the primary gambling prohibition statute used in the much-publicized indictments of Poker Stars, Full Tilt, Absolute Poker and later indictments against operators, such as BoDog. In the indictments, not only were the principal operators of the businesses charged with violating IGBA, so were those that assisted in moving funds for such businesses. IGBA is the reason state laws are so important to the analysis of the legality of fantasy sports contests. Because fantasy sports contests are offered online and interstate, they will meet the interstate commerce requirement. In addition, the contests are likely to meet the minimum five-person threshold and be in operation for at least 30 days or

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\(^7\) 18 U.S.C § 1084(a).
\(^9\) Id.
\(^10\) See id.
\(^12\) Id.
\(^13\) Id.
\(^14\) Id.
have gross revenue in excess of $2000 in a single day. Therefore, the remaining issue for liability under IGBA is whether the activity violates any state laws in which the activity is conducted or offered.

The Travel Act is also a companion criminal law to the Federal Wire Act. The Travel Act prohibits any traveling person from using any facility in interstate or foreign commerce with the intent to promote, manage, establish, carry on or facilitate unlawful activity. Unlawful activity is defined as “any business enterprise involving gambling” in violation of state or federal laws.

And what about the Professional and Amateur Sports Protection Act (“PASPA”) we keep hearing about? While PASPA has been a hot topic for sports wagering activities in Delaware and New Jersey, there has been little discussion of PASPA related to fantasy sports in states with laws regulating or permitting the activity. PASPA is not a criminal statute. PASPA prevents states and tribes from authorizing by law any lottery, sweepstakes or other gambling or wagering scheme based on the performance of athletes in events in which amateur or professional athletes participate. The law also prohibits anyone from relying on such laws to engage in sponsoring, promoting, advertising or promoting such activities. PASPA is enforceable by the DOJ, and sports leagues may obtain injunctive relief under PASPA. Given that many sports leagues have partnered with fantasy sports operators, it would appear unlikely that fantasy sports operators would have to contend with PASPA enforcement.

But aren’t fantasy sports contests skill games and therefore not gambling?

In the U.S., each state has its own mosaic of gambling laws. Generally speaking, a bet or wager occurs when a person risks something of value (consideration) on the outcome of an uncertain event: (i) in which the bettor does not exercise control; or (ii) which is determined predominantly by chance, with the opportunity to win something of greater value than what was risked (prize). Lotteries are a subset of gambling, and a lottery generally consists of: 1) the award of a prize; 2) on the basis of chance; and 3) consideration. If any of the three elements are missing, then the activity usually is not gambling. Nevertheless, analysis of these three elements is not uniform in all jurisdictions, nor must all elements be present for an activity to be deemed gambling in a particular state.

16. Id.
17. Id.
19. Id.
20. Id.
Keep in mind that the skill analysis is irrelevant if fantasy sports contests are
deemed to be a form of sports betting. Sports betting is gambling regardless of
the skill that may be involved.

States generally use one of three tests in determining whether the gambling
element of chance is present in any scheme: 1) the predominance test (also
known as the dominant factor or American test); 2) the material element test
(sometimes the “any element of chance” test); or 3) the gambling instinct test.24
Some states enumerate specific lists of games (often poker, roulette, and
blackjack) that are deemed to be gambling games per se, regardless of the
relative influence of skill or chance in determining the outcome of the game.

The predominance test is the prevailing test used by most state courts and the
federal courts when assessing the presence of the gambling element of chance.25
Under this test, one must envision a continuum with pure skill on one end (e.g.,
chess – although a slight advantage goes to the player who makes the first move)
and pure chance (e.g., roulette) on the other. A game or event is deemed to be a
game of skill if skill is the more dominant factor in determining the outcome of
the game or event; otherwise, the game or event is deemed to be one of chance.
In theory, an activity crosses from skill to chance at the middle of the continuum.

Along the continuum there are many games that contain elements of both
skill and chance. Where a particular activity lands on this continuum is a
question of fact rather than law, which means there is a great deal of subjectivity
(and unpredictability) in the application of the predominant factor test.

Under the material element test, the gambling element of chance is met if the
game or event has any material element of chance.26 This test recognizes that
although skill may primarily influence the outcome of a game, if chance has
more than a mere incidental effect” on the game, then the activity may involve
prohibited gambling. Application of this test tends to be very subjective and not
easily quantifiable. In a few particularly hostile states, courts consider a game
containing “any element of chance” to be illegal gambling.

There are also state court opinions in which the relative predominance of
skill versus chance is irrelevant. In these states, courts merely look at the nature
of an activity to determine whether it appeals to one’s “gambling instinct.”27

its New National Pastime, 3 HARV. J. SPORTS & ENT. L. 1, 28 (2012) (citing Anthony N. Cabot et
al., Alex Rodriguez, A Monkey, and the Game of Scrabble: The Hazard of Using Illogic to Define
Legality of Games of Mixed Skill and Chance, 57 DRAKE L. REV. 383, 390-94 (2009)).
25. See id. (Noting that most states apply the predominant purpose test).
26. Anthony N. Cabot et al., Alex Rodriguez, A Monkey, and the Game of Scrabble: The
Hazard of Using Illogic to Define Legality of Games of Mixed Skill and Chance, 57 DRAKE L.
REV. 383, 390-94 (2009)).
27. See Erica Buerger, Better to be Good than Lucky: Using Fantasy Sports Strategy to
Defend the Legal Status of America’s Newest Pastime, TIMELY TECH, (Feb. 12, 2013),
http://illinoisjlt.com/timelytech/better-to-be-good-than-lucky-using-fantasy-sports-strategy-to-
Because the “gambling instinct” test is highly subjective, courts vary widely in applying it to particular games.28

Even in states where a particular test is used to distinguish skill games from games of chance, there are often statutory lists of games that are deemed gambling despite the relative degree of skill or chance present in determining the outcome. For example, Nevada courts have used the dominant factor test to distinguish skill games from games of chance, but Nevada statutes also declare “faro, monte, roulette, keno, bingo, fan-tan, twenty-one, blackjack, seven-and-a-half, big injun, klondike, craps, poker, chuck-a-luck, Chinese chuck-a-luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, and panguingui…” to be gambling games by statutory definition.29

The customary argument that fantasy sports contests are skill games is that through skillful selection and management of a fantasy team a participant (the “team manager”) can mitigate many of the chance occurrences over the course of a season, and thus skill will be the dominant factor in determining the outcome of the contest. Key player injuries, weather events, abnormal performances by players or other chance events completely outside the control of the team manager can impact the outcome of any player’s statistical performance, or the sum of such statistics for a small-time sampling of events. However, there is an argument that a team manager’s ability to make selections, change starting lineups, make trades, drop players and make free-agent pickups over the course of the season mitigates the effect of such random chance events.

The influence of skill in fantasy sports diminishes as the number of opportunities for a team manager to influence the outcome of the event diminishes. With NFL football, a season-long team manager typically has thirteen weeks of regular season games to manage a team, and thus thirteen instances to make lineup changes, free agency pickups, and player drops and trades. A one-week contest, on the other hand, relies solely on the team manager’s ability to pick statistical winners.

The skill argument fades rapidly when analyzing newer fantasy sports products that mimic proposition betting or proposition parlays. Some sites have daily or weekly contests where participants can win a set return for picking three correct outcomes of pre-selected matchups between players from a menu of eight to ten pre-selected matchups. These are similar to proposition wagers or proposition parlays offered at Nevada licensed sports pools, particularly for the NFL Championship.

Some sites utterly disregard any skill argument by offering an “auto pick,” “auto draft,” or “draft machine” mode where the site can propose or select a fantasy team for the participant. At this point, the skill of the player may be

28. Id.
nearly non-existent as the participant is not using his skill to assemble a roster, 
but is deferring to the software or approving the software’s selections.

With respect to daily fantasy sports contests, as ESPN commentator Scott 
Van Pelt pointed out on September 24, 2015, the same research, analysis, effort, 
and skill that go into picking game winners each week (traditional sports 
wagering) are the same research, analysis, effort and skill that go into fantasy 
sports. Daily fantasy sports contests are simply unregulated gambling.

Often overlooked in the gambling discussions are state bookmaking and 
pool-selling statutes. Bookmaking as a criminal offense generally does not 
require the lottery elements of gambling. Historically, bookmakers operated in 
two ways: 1) they accepted wagers from their patrons and, after subtracting a 
service fee, paid out winnings to their patrons who won wagers; or 2) they 
operated primarily as stake-holders or pool-sellers and would record wagers 
between others and hold stakes and pay the winner after extracting a small 
service fee. Bookmaking laws were enacted in many states to put bookmakers 
out of business by criminalizing the elements of a bookmaking business. Many 
state laws regarding bookmaking were aimed at both types of activities, and thus, 
the statutory prohibitions are often broad and encompass a wide range of 
activities.

With regard to fantasy sports contests, particularly the one-week NFL 
contests or daily baseball or basketball contests where the activity was often 
called “betting” by the sites, there is an argument that the contestant’s fee is 
merely a bet or wager and that the site, in recording the payment and recording 
the roster, is acting as a bookmaker or stakeholder for the wager. Although this 
risk has been largely ignored in the press, such bookmaking laws are still on the 
books of many states.

The position that each state takes regarding the legality of fantasy sports is 
critical because several federal laws applicable to gambling crimes require a 
predicate state gambling law offense as a trigger for violating the federal statute.

The closing argument made by fantasy sports operators is that everyone likes 
fantasy sports contests, including the professional sports leagues, and there has 
been no enforcement by state or federal authorities against fantasy sports sites. 
Lack of prior enforcement is not a good indicator of future risk, and it certainly has no 
bearing on the legal analysis.

This lack of enforcement (“everybody’s doing it!”) was a popular argument 
asserted by online poker sites for more than a decade. Online poker operators, 
and even a Nevada casino operator, were quoted in Forbes magazine in March 
25, 2011 citing lack of enforcement and popularity of the game as indicators of

31. See, e.g., *IOWA CODE §725.13* (2006); *OHIO REV. CODE ANN. §2915.01(A)* (West 2006); 
the legality of online poker. However, on April 15, 2011 that all came to an end when the DOJ unsealed criminal indictments against those involved with the three largest online poker sites.

Ultimately, what gets lost in the un-nuanced, circular declarations that fantasy sports contests are games of skill, and therefore not gambling, is the actual legal analysis. Whether fantasy sports contests are illegal gambling depends on: (1) how an individual defines fantasy sports contest, (2) whether a fantasy sports bet is a sports bet, (3) where you’re located, (4) what the U.S. Department of Justice thinks, and (5) the judge or the jury.
