Gambling and the Law®:
Are Daily Fantasy Sports Legal?

Technology is speeding up changes in the world of gaming. It took almost two centuries for poker to evolve from Straight Poker – five paper cards dealt face down with no draw – to Internet Hold ’Em linking players using computers in different states and even on different continents. Decades passed before three-reel mechanical slot machines were replaced by electro-mechanical gaming devices; then decades more before those made way for 100 percent computerized video games with virtual reels, and online slots with no physical cabinets at all.

Internet gambling, especially online poker, is still being fought over in state legislatures. But the real growth area, a couple of years ago, was social casino games. Today it is daily fantasy sports.

The introduction of daily games has been as big a boost to the world of fantasy sports betting as the invention of the under-the-table camera was to T.V. poker.

But, is daily fantasy legal?

The first thing to know about the law of fantasy is that the federal Unlawful Internet Gambling Enforcement Act did not make fantasy sports betting legal. I have been on three or four panels in the last five or six months discussing daily fantasy games. Many operators and proponents seem to truly believe that the UIGEA creates a safe harbor carve out for all fantasy sports. The industry leader FanDuel declares:

Fantasy sports is considered a game of skill and received a specific exemption from the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA 2006). FanDuel uses exactly the same rules as any other season-long fantasy sports format, the only difference is that our games last only one day or one week. Sites like FanDuel point to the following language from the UIGEA:

§§ 5362. Definitions
In this subchapter:
(1) BET OR WAGER.—The term ‘bet or wager’—
(2) (E) does not include—
(3) (ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involves a team or teams) 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:
(I) 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.
(II) 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.
(III) No winning outcome is based—
(aa) on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or
(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.

Note how easy it is for operators to comply with these provisions. Fantasy sports is played by fans who pay a fee to enter and compete against each other for valuable prizes. Players create and manage their “teams,” made up of real-world athletes. But the athletes are not normally actually competing against each other in real-world games. Rather, the fantasy sports team consists of athletes from different real-world teams and events. The only thing that is real is the statistics generated by the individual athletes. Computers combine the information about real-world performances to determine which fantasy team has won.

Under the UIGEA, a fantasy team cannot be composed entirely of the players of a real-world team. But there is nothing preventing all players but one of a fantasy football team from being from the same real-world team. There is no limit on the cost of entering, the size of the prizes or, most significantly, the length of time involved.

Until recently, fantasy sports was season-long. But this appealed mostly to only the most devoted of sports fans, who follow a sport over weeks or months. Technology has shortened our attention spans. And the brilliant idea that a fantasy league could be started and finished on the same day, using statistics generated by real-world contests on that day, led to an explosion of interest in fantasy sports.

So, the UIGEA does permit, under its own terms, daily fantasy sports. But, the argument that the UIGEA preempts all other federal and state anti-gambling laws might be defensible, except for the following from the very opening section of the UIGEA:

RULE OF CONSTRUCTION.—No provision of this subchapter shall be construed as altering, limiting, or extending any Federal or State law or Tribal-State compact prohibiting, permitting, or regulating gambling within the United States. It is hard to imagine a clearer express statement that this Act was not intended to change any other anti-gambling law.

The UIGEA bill itself is labeled an “Enforcement Act.” By its own language, the UIGEA made only two changes in the law of Internet gambling. It created a new federal crime of receiving money by an operator of an illegal gambling website. And it ordered federal regulators to enact regulations to identify and block money transfers by bettors in the United States to those outlaw gambling sites. The UIGEA is designed to go after online gaming that is already illegal under some other federal or state anti-gambling law; and, today, no serious legal commentator, regulator or enforcement agent would argue otherwise.

Of course, the UIGEA has had a real-world impact far beyond its actual, limited changes in the law. Within hours
of it being passed by Congress, PartyGaming, then the largest publicly traded Internet poker company, announced that it was pulling out of the American market. This was apparently based on a misunderstanding of the bill: the frankly bizarre belief that before the UIGEA only online bettors were violating state anti-gambling laws and now operators could be prosecuted as well.

Whatever the reason, the exit of this giant online gaming operator from the U.S. scared every other publicly traded Internet gaming company to also stop taking money bets from America.

The passage of the UIGEA had many other impacts, both large and small. The one most relevant for the question of daily sports bets was the acceptance of UIGEA’s “carve out” listed above by state and local police and prosecutors.

Fantasy sports has always been problematic for law enforcement. Sports betting is one of the few forms of gaming that clearly is illegal under just about every anti-gambling law. But everyone charged with enforcing the laws against gambling also knows that contests of skill are almost never illegal. Gambling requires prize, consideration and chance. If any one of those elements are absent the activity can still be regulated, but not under the anti-gambling laws.

A game whose outcome is determined entirely by the skill of the players is simply not gambling.

Agents of law enforcement have always been wary of fantasy sports. The reasons are practical as well as legal. There are few prosecutors who would care to go in front of a jury to prosecute a months-long fantasy sports contest. But a fantasy game that starts and ends in a single day and involves as few as two real-world sports events is another matter. The game is easy to explain and may even look like sports betting.

There are no court cases yet on whether a daily fantasy game has enough skill elements remaining to keep it out of the category of sports betting. The question will be determined entirely by state law.

States are free to decide their own public policies toward gambling. Utah and Nevada share a common border, yet their state legislatures have come to completely opposite decisions on whether gambling should be legal.

This is already beginning to happen with fantasy sports. Although the general test for gambling is chance, prize and consideration, states and other jurisdictions are free to create other tests, or outlaw or legalize specific activities. FanDuel decided to prohibit residents of Arizona, Iowa, Louisiana, Montana and Washington from participating in fantasy games for money. Maryland, on the other hand, expressly legalized fantasy sports in 2012. It did this by enacting a statute that tracked the language of the UIGEA on fantasy games and then simply declared those games not to be gambling.

Although a few state legislatures are considering expressly outlawing fantasy sports, the trend is definitely in the opposite direction. The sports leagues, until recently consistently united in their opposition to sports betting, are very much in favor of fantasy sports, to the point where they are partnering and investing tens of millions of dollars in the companies that run the games. The reason is obvious: Fantasy players will continue to watch a game to the end, even if one team is wiping out the other, because they want to know how their individual fantasy team players do. More viewers mean more advertising revenue.

There may also be another, more subtle factor. The professional and collegiate teams and leagues are beginning to recognize that wagering on sports events has been and continues to be a significant factor in the popularity of athletic contests. Fantasy sports is a way for the individuals and organizations that have said that they would never support sports betting to get many of the benefits without having to be openly hypocritical. And it doesn’t require them lobbying to repeal the very same anti-sports-betting laws that they worked so hard to have passed only a few years ago.

*About the author*

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1. 31 U.S.C. §§ 5361 et seq.
6. MD Code, Criminal Law, § 12-114.
7. Id., § (b).