



What All Lawyers Must Know About Fantasy Sports “Gambling”

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WHAT ALL LAWYERS MUST KNOW ABOUT FANTASY SPORTS “GAMBLING”

I. ONLINE FANTASY SPORTS LEAGUES BASICS

1. Participants pay a fee and join an online league.
2. Participants have a budget to use to “draft” actual athletes.
 - a. The athletes are given a certain price tag by the league.
3. Participants create a virtual “team” that amasses points based upon the statistical performance of the players on the team roster.
 - a. Points are determined by the league based upon game feats such as touchdowns, sacks, interceptions, etc.
4. Participants with the most points are awarded monetary prizes.

II. TYPICAL SPORTS INVOLVED

Almost every professional sport has an online fantasy sports league. The most popular are football, baseball, basketball and hockey, but there is also soccer, NASCAR, PGA and MMA (mixed martial arts).

III. BIGGEST LEAGUES

1. DraftKings
 - a. Based in Boston
 - b. Established in 2012
 - c. Investors include MLB, Fox Sports, Kraft Group (the owners of the New England Patriots) and many venture capitalists
 - d. Exclusive deals with MLB, NHL and ESPN
 - e. Over 4MM participants per week
 - f. Profits of over \$3MM per week
 - g. Along with Fan Duel, spent over \$150MM on ads this year
2. FanDuel
 - a. Established in 2009
 - b. Funded by mostly venture capitalists
 - c. Partnership with NBA
 - d. Over 3.5MM participants per week
 - e. Profits of over \$3MM per week

IV. LEGAL BASIS

1. Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) (31 [U.S.C. §§ 5361, et seq.](#))

- a. The term “unlawful Internet gambling” means “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet where such bet or wager is unlawful under any applicable Federal or State law in the State or Tribal lands in which the bet or wager is initiated, received, or otherwise made.”
- b. The term “bet or wager” means “the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome; **and includes the purchase of a chance or opportunity to win a lottery or other prize (which opportunity to win is predominantly subject to chance).**”
- c. The term “bet or wage” does not include:
 - “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—
 - (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.”

- d. The UIGEA did not expressly legalize online fantasy sports leagues, but only exempts them from enforcement under the UIGEA. Therefore, online fantasy sports leagues can still be illegal under state gambling laws.

2. Various State Lottery Laws

- a. Under state laws, an illegal lottery consists of a game with three elements present: prize, chance and consideration.
- b. Skill can generally eliminate the element of chance.

V. **SKILL v. CHANCE (IN GENERAL)**

The exemption under the UIGEA and the legality under most state lottery laws essentially come down to whether online fantasy sports is a game of chance or a game of skill.

1. Traditional Aspects of Games of Chance

- a. Generally, the element of chance may not materially affect the selection of the winner or the amount of the prize the winner will receive.
- b. State laws differ:
 - a. Dominant Element Test
 - (a) Chance is the predominant element controlling the winner selection.
 - (b) Applied by majority of states.
 - b. Material Element Test
 - (a) Chance is present to any material degree.
 - (b) May include games with hybrid of skill and chance.
 - (c) Applied by some states.
 - c. Any Chance Test
 - (a) Any element of chance is present.
 - (b) Most restrictive.
 - (c) Applied by a few states.
- c. Examples:
 - a. Random drawing
 - b. Casino-type games

- c. Pinball
- d. Poker, blackjack (at least one hand)
- e. Lotto, bingo and keno
- f. Guessing games (e.g. most beans in jar)

2. Traditional Aspects of Games of Skill

- a. The nature of the task involves a genuine, quantifiable skill that controls the final result.
- b. Participants possessing the requisite skill should have a consistent and decided advantage over non-skilled players.
- c. Game format should allow skilled players the opportunity to exercise those skills.
- d. Examples:
 - a. Athletic ability
 - b. Manual dexterity
 - c. Knowledge
 - d. Talent (writing, singing)
 - e. Endurance and speed
 - f. Strategic games (bridge, checkers, chess)

3. The Gambling Instinct Test

- a. Notwithstanding the fact that a game does not violate state lottery laws, a game may still violate a state's gambling statutes if the nature and structure of the game appeals to the gambling instinct, irrespective of the relative degree of chance or skill.
- b. Not often applied

VI. ARE FANTASY SPORTS LEAGUES SKILL OR CHANCE

1. What is the “skill” involved?

- a. The ability to draft the optimum players based upon sufficient knowledge of their tendencies and athletic abilities.
- b. The ability to select players for a certain “game” with the best opportunity to amass the most points.
- c. The ability to compile a team using certain budgetary constraints.
- d. Statistics show that a small fraction of players win an overwhelming amount of the prizes. For example, from a survey of the 1st half of the 2015 MLB season, it was found that the top 1% of players paid 40% of the entry fees but reaped 91% of the profits.
- e. But the participants do not control the event. This was found significant by the Nevada Attorney General.

2. Daily vs. Season-long Events

Fantasy sports are arguably legal under the theory that a person with the requisite skill could out-perform persons with lesser skill. But is this true for daily games?

- a. It is likely that a person’s “skill” can be exhibited over the course of a season or multiple contests.
- b. It is probably less likely that a person’s “skill” can be exhibited based upon a single day’s events.
- c. For example, there is a significant degree of chance involved when determining the winner of a single hand of poker or blackjack; but skilled players are typically able to win poker or blackjack tournaments.
- d. The long-term versus short-term aspect of fantasy sports leagues was a critical factor recognized by the New York Attorney General in his recent cease and desist letter to DraftKings and FanDuel.

- e. The UIGEA appears to try to incorporate this concept into its exemption for online fantasy sports leagues:
 - 1. The outcome must be based upon “multiple real-world sporting or other events”
 - 2. The outcome cannot be based upon “any performance or performances of any single real-world team or any combination of such teams”
 - 3. The outcome cannot be based “solely on any single performance of an individual athlete in any single real-world sporting or other event.”

