

The Legal Status of Fantasy Sports



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A Brief History of Fantasy Sports

- 1960s: Professor Bill Gamson conducts The Baseball Seminar
- 1980: Daniel Okrent invents Rotisserie Baseball
- 1995: ESPN launches its first entirely Internet-based fantasy baseball game in 1995
- 2007: Fantasy Day Sports Corp. coins the term “daily fantasy sports”



Professor William Gamson

Season-long vs. Daily Fantasy Sports

Season-long

- Draft team (snake; auction)
- Manage team (waivers; free agency; trades)
- Scoring format (H2H; roto; points)
- Winner at end of season



C.B.C. Distribution v. MLB Advanced Media

- *C.B.C Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818 (8th Cir. 2007)
- Seminal case in the advancement of the popularity of fantasy sports
 - Clarified murky intellectual property rights issues and bolstered the fantasy sports industry
- CBC sought declaration that it had right to use, *without license*, names and stats of MLB players in its commercial fantasy games
- Court balanced CBC's First Amendment interest against players' right of publicity
 - “[S]ubstantial public interest” in expressions pertaining to baseball statistics
 - Players, by contrast, had only minimal interest in owning right of publicity over stats because they are already incentivized and well compensated to play baseball (and creation of publically-available stats is a by-product)
- Holding: “CBC’s first amendment rights in offering its fantasy baseball products supersede the players’ rights of publicity.”

Unlawful Internet Gambling Enforcement Act (UIGEA)

- With Internet boom, emergence of offshore sports books and online poker
- 2006: UIGEA enacted as part of unrelated SAFE Port Act
- UIGEA: illegal for those “engaged in the business of betting or wagering” to “knowingly accept” funds “in connection with the participation of another person in unlawful Internet gambling”
 - Made the processing of online gambling transactions illegal.
- If a person located in a state where gambling is illegal places a bet over the Internet, any business that knowingly accepts a financial interest in connection with that bet, irrespective of the gambling business’ location, would violate the act
 - Made it extremely difficult for host sites, such as sports books and poker rooms, to collect user fees and conduct business



UIGEA'S Fantasy Sports Carveout

31 U.S. Code § 5362

(1) Bet or wager.—The term “bet or wager” —

...

(E) does not include—

...

(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.

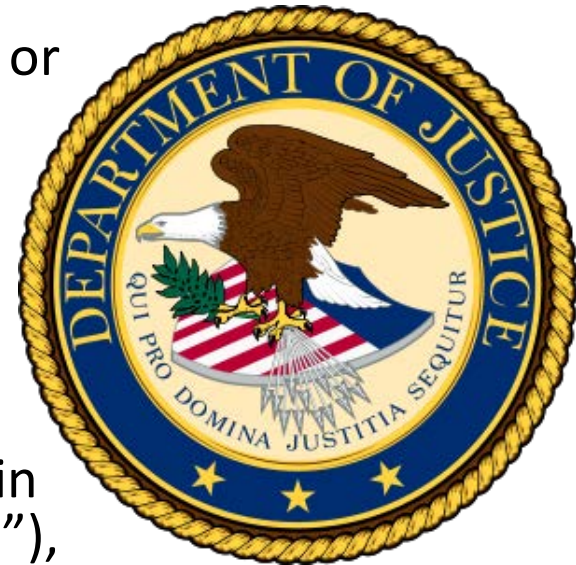
(III) No winning outcome is based—

(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.

Other Federal Laws

- Interstate Wire Act of 1961, 18 U.S.C. § 1084 (prohibiting engaging in the business of betting or wagering through the knowing use of wire communications)
- Illegal Gambling Business Act, 18 U.S.C. § 1955 (criminalizes conducting, financing, managing, supervising, directing, or owning an “illegal gambling business” of “major proportions”)
- Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (“Travel Act”), 18 U.S.C. § 1952 (illegal for a person to travel interstate or use the mail or any facility in interstate or foreign commerce, with intent to “otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.”)



Season-long vs. Daily Fantasy Sports

Season-long

- Draft team (snake; auction)
- Manage team (waivers/free agency; set lineup; trades)
- Scoring format (H2H; roto; points)
- Winner at end of season



Daily

- Draft team (salary cap)
- Little team management (only set lineup)
- Scoring format (points)
- Winner at end of day/week



State Laws

- “Rule of Construction”: UIGEA does not alter, limit, or extend any “State law ... prohibiting, permitting, or regulating gambling within the United States”
 - States make their own determinations as to what constitutes illegal gambling activities and how they wish to regulate those activities within their borders
- “Unlawful Internet Gambling”
 - Activity only meets definition of “Unlawful Internet Gambling” if conduct in question is “unlawful under any applicable Federal or State law in the State ... in which the bet or wager is initiated, received or otherwise made.”
- Generally, a contest is considered an illegal lottery or gambling if three elements are present: consideration; chance; and prize
 - *See, e.g.*, Indiana Code Sec. 35-45-5-1(d) (emphasis added)
 - “Gambling means risking money or other property for gain, contingent in whole or in part upon lot, chance, or the operation of a gambling device, but it does not include participating in:
 - (1) bona fide contests of skill, speed, strength, or endurance in which awards are made only to entrants or the owners of entries”

State Laws (Continued)

- Two key questions:
 - What is the “bona fide contest?”
 - The underlying game between athletes; OR
 - The fantasy contest between participants
 - What level of “skill” is required?
 - Varies by state – Largely question of fact
 - Predominant Factor (majority) - activity to be one of chance where “greater than 50 percent” of the result is derived from chance
 - » *E.g.*, California, Massachusetts, Pennsylvania
 - Material Element – more than an incidental role in the outcome of a game (subjective)
 - » *E.g.*, Oklahoma, Oregon, New Jersey
 - Any Chance – even the slightest amount
 - » *E.g.*, Arizona, Iowa



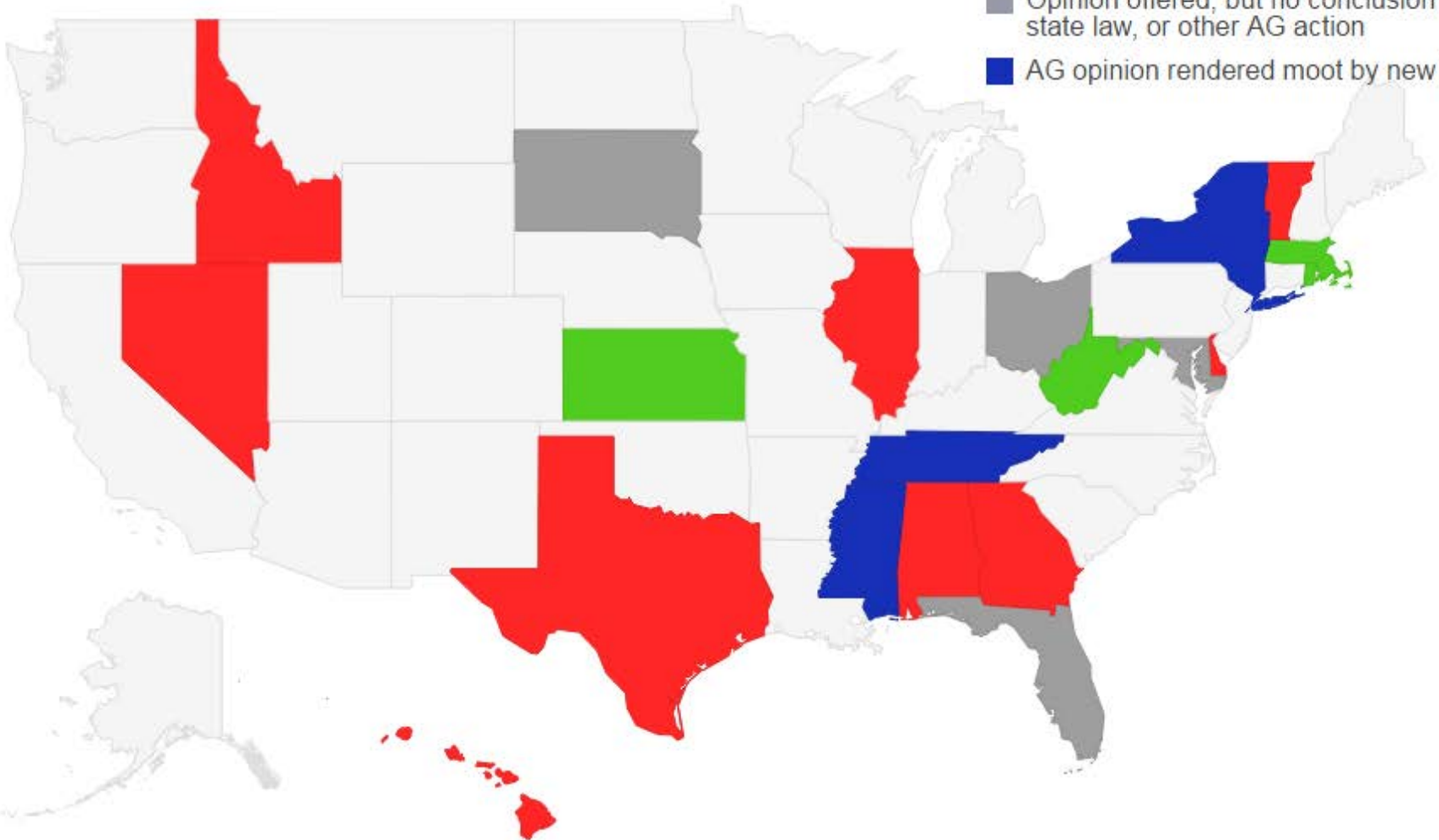
Case Law

- Very little case law specifically addressing legality of fantasy sports
- *Humphrey v. Viacom*, 2007 WL 1797648 (D. N.J. 2007)
 - “[t]he success of a [full-season] fantasy sports team depends on the participants’ skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players for his or her team, and deciding who among his or her players will start and which players will be placed on the bench.”
 - Entry fees for fantasy sports leagues were not bets or wagers because “(1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) defendants do not compete for the prizes.”
- *National Collegiate Athletic Association v. Christie*, 2012 WL 6698684 (D.N.J. 2012)
 - Dicta distinguishing DFS from sports betting (“fantasy sports fall outside the definition of gambling envisioned by New Jersey’s qui tam statute”)
- *National Collegiate Athletic Association v. Governor of the State of New Jersey*, 2015 WL 5010799, at *6 (3d Cir. Aug. 25, 2015)
 - Finding that the professional sports leagues did not have unclean hands because it was not hypocritical for them to oppose New Jersey’s attempt to legalize sports betting and “to support fantasy sports.”
- *People of the State of New York v. FanDuel and DraftKings* (Sup. Ct. NY, Dec. 11, 2015)
 - Order on motion for preliminary injunction concluding that the payment of entry fees associated with FanDuel’s and DraftKings’ games probably ran afoul of New York’s constitutional and statutory prohibition of gambling

Attorneys General

- A number of states' attorneys general have opined on the legal status of fantasy sports under their respective state laws
 - Typically advisory in nature; not binding precedent
 - Whether fantasy sports are games of skill or chance likely question of fact
 - Legality also varies by contest structure – not “one size fits all” analysis

- Legal
- Illegal/requires gambling license
- Opinion offered, but no conclusion under state law, or other AG action
- AG opinion rendered moot by new law

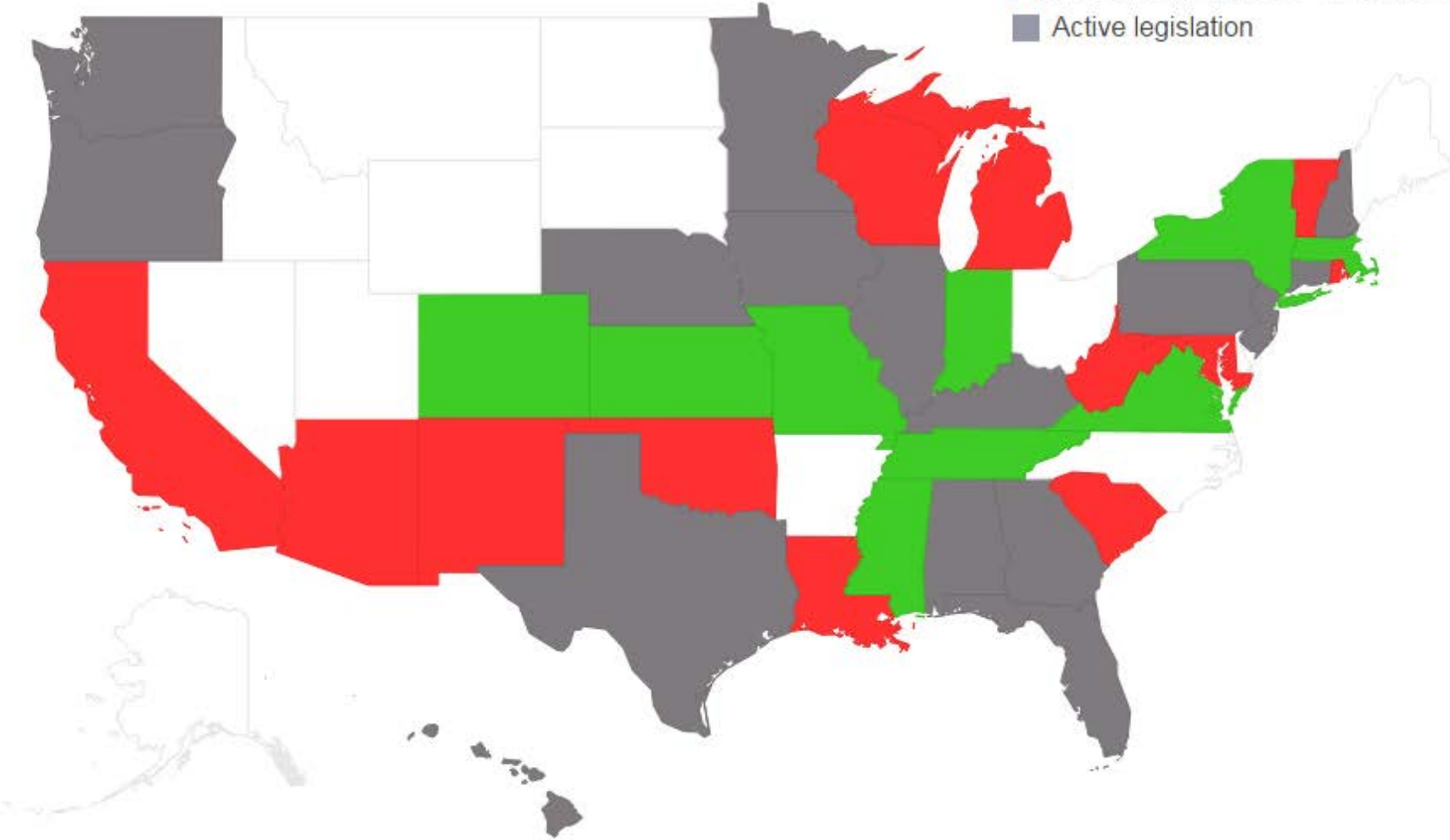


Legislative Efforts

- Extensive state-by-state lobbying + grassroots player mobilization
- Proposed bills and laws – two primary goals
 - Clarify legal status of fantasy sports as game of skill and not gambling
 - Institute consumer protections
 - Segregation of player funds and operating accounts
 - Minimum age restrictions
 - Deposit limits
 - Licensing fees? Audits? Taxes?
 - May cause barriers to entry for small business and startups

Here is a **snapshot of legislative action** involving **daily fantasy sports** in and 2017, and a **map of current legality and legislative efforts** in states:

- Already legalized in 2016 or earlier
- Introduced legislative effort failed in 2016
- Active legislation



What's Next?

- Federal action?
 - Hearing on fantasy sports held in May 2016 in House Subcommittee on Commerce, Manufacturing, and Trade
 - Nothing imminent
- Legalized sports betting?
 - Overturn or repeal of PASPA – *Christie II* petition for certiorari being considered by Supreme Court (opinion of Solicitor General requested)
 - Bootstrapping possibility for DFS
- Most likely: continued push for state-by-state clarity
 - Continued growth expected
 - Backed by pro leagues (increased viewership and enhance sports-watching experience) and large investors such as Comcast
 - BUT there will continue to be legal ambiguity, particularly in “gray” states where no legislative action expected

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