More than 40 million people played fantasy sports in North America last year, the equivalent of 30 percent of U.S. adult males. –Bloomberg Business

In addition to my day job as an attorney, I’ve been writing for one of the forerunners in the fantasy-sports industry, Rotowire, since 2009.[i] As such, I’ve had a front-row seat in witnessing the popularity of fantasy sports not only sweep the nation, but also watching the industry evolve before our eyes. In this article, I will take a brief look at the history of fantasy sports; the laws governing the industry; and the recent popularity of “daily fantasy sports” and their potential legality.

A Brief History

While its popularity has lagged in recent years, no sport has impacted American culture quite like baseball, and it should come as no surprise that modern-day fantasy sports germinated from America’s Pastime. The recognized founding father of fantasy sports is Bill Gamson, a former psychology professor at Harvard University and the University of Michigan.[ii] Gamson liked baseball and wanted to find a way to interact with the game beyond his interest as a mere fan. In the early 1960s, Gamson and friends constructed a game, which he dubbed “The Baseball Seminar,” and each paid ten dollars to enter the game. Each participant was given an imaginary budget, with which they could bid on Major League Baseball players and “draft” their team, so long as they stayed within their budgetary restraints. The winner of the game was the person who selected players that earned the most points in a pre-determined set of statistical categories.

One of The Baseball Seminar’s first participants was Robert Skylar, an assistant professor at the University
of Michigan. When a college freshman by the name of Daniel Okrent learned of his professor's passion for baseball, Skylar explained to him the basic tenets of the simulated game. Thereafter Okrent began to create his own version of The Baseball Seminar, and by 1980, he had constructed his own version of a baseball statistics game, which he called “Rotisserie Baseball.”[iii]

Okrent's Rotisserie Leagues spread across the country, and it remains the prominent format in which gamers play fantasy baseball. A participant's score in the original Rotisserie Baseball League was based on eight statistical categories: four for offense and four for pitchers. At the start of the season, a draft would take place, and each team would have an imaginary budget, which was used to purchase players from a pool of MLB players. Each team would then earn points based on his selected players' real-life performances. At the end of the season, the Rotisserie Baseball League participant whose team earned the most points would win the league.

While Rotisserie Baseball had a significant following, it was not until the Internet became commonplace in the mid-1990s that the popularity of fantasy sports really exploded. Instead of using pen-and-paper to calculate scores dug out of a newspaper, information and tabulated statistics were only a computer click away. Further, with the Internet allowing people to communicate and organize from across the globe, fantasy sports became an easy way for participants to keep in touch. Capitalizing on the growing popularity, a number of traditional sports and entertainment companies began to provide fantasy sports games on the web, including ESPN, which launched its first entirely Internet-based fantasy baseball game in 1995.[iv]

Now, fantasy games are available for almost any sport or activity. The most common games are fantasy football, baseball, and basketball, but other fantasy games include golf, hockey, auto racing, and, yes, bass fishing (if that's your thing). There are also a multitude of different formats by which players are allocated, real-life performances are scored, and participants organized. Entry fees for some contests cost thousands of dollars; there is an entire market devoted to analysis and “expert” advice; and gamers can even purchase insurance policies protecting against injury to their star fantasy players. Needless to say, the fantasy sports industry is blossoming.[v]

Federal and State Laws
UIGEA

Around the same time that fantasy sports leagues began popping up in every corner of the World Wide Web, the Internet was facilitating another, less-socially-accepted craze: gambling. By 1999, some offshore sportsbooks had begun to accept online bets from U.S. residents.[vi] Online poker had grown into a multi-billion dollar industry, with about two-thirds of the nearly 9,000 people participating in the $10,000 buy-in Main Event at the 2006 World Series of Poker having qualified through online satellites.

After many futile attempts to pass anti-gambling legislation, on the last day before Congress adjourned for the 2006 elections, the Unlawful Internet Gambling Enforcement Act (UIGEA) was hastily tacked onto the end of unrelated legislation, the SAFE Port Act, a lock for passage. The bill was passed unanimously by the Senate, and on October 13, 2006, President George W. Bush signed it into law. The UIGEA makes it 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.” To put it another way, the UIGEA, for the first time, made the processing of online gambling transactions illegal. Thus, 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. This ultimately made it extremely difficult for host sites, such as sportsbooks and poker rooms, to collect user fees and conduct business.[vii]

To be certain, other federal laws can significantly affect the distribution and operation of fantasy sports. [viii] What makes the UIGEA so exceptional is that, while it has the effect of broadly prohibiting online businesses from facilitating “unlawful Internet gambling,”[ix] it makes a special exception for fantasy sports games. Nestled within the UIGEA is a long section of what is excluded from the law’s restrictions, including an explicit carve-out for “fantasy sports games” that meet the following criteria:[x]

- The outcome of the fantasy sports game is not based on the score, point-spread, or performance of any real-world team or combination of teams;
- The outcome of the fantasy sports game is not based solely on a single performance of an individual athlete in any single real-world sporting event or contest;
- The outcome of the fantasy sports game is determined predominantly by the accumulated statistical results of the performance of athletes in multiple real-world sporting events or contests;
- All prizes and awards offered are established and made known to the participants in advance of the game or contest;
- The value of any prizes or awards is not determined by the number of participants or the amount of any fees paid by those participants; and
• The outcome of the fantasy sports game reflects the relative knowledge and skill of the participants.

Most of these restrictions are straightforward. For example, the first three criteria listed above distinguish traditional fantasy sports, where the outcome of a league or contest is determined by the statistics accumulated by a collection of individual athletes, from sports betting, in which a bettor’s outcome is typically determined by the score of a single game or combination of games (i.e. parlay). The restrictions on awards and prizes can sometimes cause an issue for fantasy sports businesses called “overlay,” [xi] but are generally easy to follow. Thus, while fantasy sports now come in many different shapes and sizes, the most prominent model – one in which the final outcome of a league is not determined until the professional season on which the game is based comes to a close – does in fact comply with federal law, even when played for money.[xii]

**State Laws**

Congress clearly intended that the traditional, full-season version of fantasy sports games not be subject to the UIGEA's restrictions, making it safe for many fantasy sports businesses to operate across state lines. Yet, fantasy sports operators are not only required to comply with federal regulations, but, where applicable, state gambling laws as well. In fact, UIGEA's “Rule of Construction” makes clear that the statute does not alter, limit, or extend any “State law … prohibiting, permitting, or regulating gambling within the United States.” States are therefore free to make their own determinations as to what constitutes illegal gambling activities and how they wish to regulate those activities within their borders.

Under most state anti-gambling or anti-lottery laws, fantasy sports contests would likely be considered illegal if they involve three elements: consideration (i.e. entry fee), reward (i.e. a prize), and chance. In those states where there is no specific legislation authorizing fantasy sports contests played for money, their legality often depends on the state's interpretation of the degree of “chance” vs. “relative knowledge” or “skill” involved in the contests at issue.

[xiii] In fantasy sports, generally, much of the “skill” involved is attributable to the participants' prognosticating abilities, which is mainly manifested through gamers' selections of real-world athletes. The element of “chance,” however, may come in the form of a startling bounce of the ball, unexpected injury or suspension, or even unpredictable weather. The legality of playing or operating a fantasy sports game for prize money in a particular state therefore often comes down to whether the game is defined as one of skill (legal) or chance (illegal).

Most states adopt what's called the “predominant purpose test” in determining whether an activity legally
qualifies as gambling.[xiv] Under this test, play-for-cash contests are only illegal if they involve more chance than skill. To put it another way, most states deem an activity to be one of chance, and therefore illegal, if greater than 50 percent of the result is derived from chance. Under this test, traditional, full-season leagues are almost certainly games of “skill,” as the 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 during the course of the season; and deciding who among his or her players will start and which players will be placed on the bench.[xv]

Yet, a minority of states take a stricter view. For example, Arizona, Arkansas, Tennessee, and Louisiana have all adopted the “Any Chance Test.” According to Professor Marc Edelman, these states “have interpreted contests to be illegal games of chance if they involve any chance at all: even a modicum of chance.”[xvi] It would be hard to argue that there’s not at least some level of random chance involved in fantasy sports – such as the bouncing of a football or an untimely injury – and therefore pay-for-cash fantasy sports games would likely be illegal in these states.

Arizona is one of a handful of states that adopts the “Any Chance Test” to determine whether a contest is a prohibited form of gambling

While some state laws – including one recently passed in Maryland – are modeled after UIGEA, other state statutes, such as in Montana, appear on their face to prohibit or heavily disfavor fantasy sports. Further still, various advisory opinions issued in Florida, Louisiana, and until recently removed, Kansas, call into doubt the legality of fantasy sports contests, even in states using the predominant purpose test. While there’s been a definitive trend in state legislatures seeking to overturn fantasy sports prohibitions, as of now, even the traditional fantasy sports model is illegal in many states.[xvii]

**Daily Fantasy Sports**
While the season-long versions of fantasy sports leagues have been around since at least the 1960s, evolution was inevitable in the present Era of Attention Deficit Disorder. Enter, daily fantasy sports (“DFS”). Unlike traditional leagues, in which the final standings typically aren’t determined until an entire professional or amateur season runs its course, most DFS contests last only a day. Rather than waiting months for a winner to be declared, gamers know the final outcome of the DFS contest as soon as time runs out in the last sporting event of the day. During a time where interest in fantasy sports is at a record-high, but participants’ attention spans run short, DFS has exploded in popularity.

While 41 million Americans played traditional, season-long fantasy sports contests last year, only about 800,000 played daily fantasy sports. Still, the industry leader, FanDuel, has raised $88 million from investors, including Comcast; private equity firms Shamrock Capital Advisors and KKR; and the National Basketball Association, whose commissioner, Adam Silver, has come out in support of legalizing sports gambling. The next-biggest site, DraftKings, has attracted $76 million in venture capital. According to a Bloomsberg Business source, FanDuel was valued at more than $1 billion during its last investment round. Further, Eilers Research, which studies the gaming industry, reports that in 2015 the DFS industry will collect more entry fees than all the sports books at Vegas combined.

While there are various types of DFS games – all of varying potential legality – this article will focus on the most common format, which is primarily used by FanDuel and DraftKings – two competitors who make up 95 percent of the total DFS market. Under FanDuel and DraftKings’ typical DFS model, a participant chooses a contest, in which he or she will compete against other participants, and pays an entry fee to play. The participant then, subject to a designated budget constraint, selects a team of real-world players, each of whom is assigned a “salary” by the host site. Once the games start, players accumulate points based on how they perform. As previously noted, unlike typical fantasy sports games, which are based on a sport’s entire season, DFS games are based on only one day’s worth of performances. Once the last game of the day is complete, participant(s) with high scores in their contests win cash or other prizes, which are established in advance. Participants can enter into as many contests in a day as they choose, provided they pay each contest’s entry fee.

It’s apparent that typical DFS games are similar in structure to many traditional forms of fantasy sports, so presumably they would be legal under UIGEA and most state laws. Yet, DFS face some unique legal challenges. For example, it’s uncertain whether offering daily contests in which participants choose tennis players in a single tennis tournament complies with UIGEA’s requirements that the outcome of the fantasy sports game be based on the statistical results of the
performance of athletes in multiple real-world sporting events. Further, the skill-to-chance ratio may be swayed by the shortened (read, “daily”) length of each contest, as the impact of a single activity of chance (i.e. a funny bounce of the ball) may have a heightened impact on the overall result of a DFS contest compared to traditional, season-long fantasy leagues. [xviii]

“Indeed, there is no blanket immunity under federal or state law for ‘daily fantasy sports,’” Professor Edelman writes, adding that the legality of the DFS contest depends on the game’s particular rules. “[UIGEA’s fantasy sports] carve-out,” Edelman continues, “does not seem to protect fantasy sports contests where the ratio of skill-to-chance does not meet a minimum threshold.” Whether this threshold is met is difficult to predict, because the determination of whether a contest is one of skill or chance often comes down to a battle of expert witnesses. The format in which the DFS contest is conducted likely has a huge impact on the game’s legality. Using prudence in operations can help minimize exposure and ensure DFS providers comply with federal and state laws.

DFS have only been around for a short amount of time,[xix] and there has been precious little precedent set regarding the legality of DFS. At least one federal court decision, however, seems to support the argument that “daily fantasy sports” entails at least some degree of skill and do not constitute illegal gambling. In Humphrey v. Viacom, the U.S. District Court for the District of New Jersey opined that “[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.” 2007 WL 1797648 (D. N.J. 2007). The court also concluded that the entry fees paid to operators for providing 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.”

The opinion that daily fantasy sports are contests of skill is further supported by empirical evidence. In April 2015, Star Fantasy Leagues (“Star”), an online “daily fantasy sports” company, announced the results of an independent skill simulation study of its “daily” fantasy football contests. The study was conducted during the 2014-15 NFL season. The study showed that, through empirical evidence, the results of Star’s fantasy football contests are predominated by skill, not chance.

To date, no DFS operator has ever been prosecuted by the federal government. As the DFS industry continues to grow, widespread prosecution becomes even unlikelier. “Money is pouring into the fantasy sports industry and into the daily fantasy sports sector of late,” writes Darren Heitner. “Large and
respected institutions like NBC Sports Ventures and Disney have delivered money to [DFS] platforms, because they realize the immense potential for further growth in fantasy sports and believe that daily fantasy games are simply the next iteration of an industry that has a track record of proven success.” With partnerships with the NBA, MLB, and the NHL – as well with many of the individual teams in those leagues and the NFL – the DFS industry has garnered added legitimacy with the backing from America’s major professional sports leagues. So long as these companies conduct their operations in compliance with applicable law – such as only offering contests based on multiple real-world games or formatting contests so that they are based on the results of player performances, as opposed to the scores or outcomes of real-world games – they will likely minimize legal scrutiny and curry favor with the leagues.

**Conclusion**

Unquestionably, the popularity of fantasy sports is at an all-time high. Season-long leagues, which have been around for decades, continue to thrive, and with the approval of the major pro leagues, the growth of the DFS industry is likewise showing no signs of slowing down. Yet, despite this incredible wave of prosperity, there remain outstanding legal issues. Most traditional, full-season operations may have be granted safe harbor by UIGEA’s carve-out language, but both participants and fantasy sports providers must still perform legal due diligence to ensure they do not run afoul of the ever-evolving interpretations of federal and state laws, including some of the stricter statutes and regulations found in individual states. Further, the legality of DFS remains decidedly unsettled. The format of the DFS contest has a big impact on potential legality, but so too does the potential effect that the shortened length of contests has on the ratio of skill to chance. Using legally prudent practices in complying with various state and federal laws can certainly help minimize potential liability. Notwithstanding, with rising their popularity and the pro sports leagues’ benediction, DFS are likely here to stay.

*This post was last edited on January 5, 2016.*

[i] Shameless self-promotion: I pen a monthly column titled “Fielkow's Law,” in which I analyze how certain legal issues affect fantasy teams and players, at Rotowire.com.


[iii] Okrent pitched his idea to his friends and the first-ever Rotisserie League baseball player auction was conducted at a now-defunct French bistro in New York City, La Rotisserie Francaise.

[v] It would be remiss to fail to mention *C.B.C Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.,* a seminal case in the advancement of the popularity of fantasy sports. 443 F.Supp.2d 1077 (E.D. Mo. 2006). CDM had a licensing agreement with the MLB players’ association, in which it was authorized to use the names and playing records of MLB players in its online fantasy baseball game. Out of fear that it would be precluded from using players’ statistics when its license expired in 2004, CDM brought suit, seeking declaratory relief. In a huge victory for fantasy sports providers, the Court found that players do not have a right of publicity in their names and playing records. The Court further ruled that that even if the players’ did have such a right of publicity, the First Amendment applied to fantasy sports games, and the simple use of the players’ names and publically-known statistics was permissible. As such, the Court ordered the players’ association and league not to interfere with the CDM’s fantasy baseball games, a ruling which clarified murky intellectual property rights issues and bolstered the fantasy sports industry.


[vii] On April 15, 2011, a day dubbed as “Black Friday” by the poker community, the federal authorities unsealed an indictment against online poker’s big three – PokerStars, Full Tilt Poker, and Absolute Poker – and a handful of payment processors. The charges were based on UIGEA and the Illegal Gambling Act of 1955. As part of the indictment, restraining orders were issued on 75 bank accounts used by the online poker companies and their payment processors, as well as five Internet domain names. The chain of events that followed crippled the online poker industry.

[viii] *See, e.g.,* 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”); and Professional and Amateur Sports Protection Act, 28 U.S.C. § 3701 (making it illegal to operate a wagering scheme based on “competitive games in which amateur or professional athletes participate,” with the exception of certain forms, such as sports betting in Nevada, that fall under the statute’s “grandfather” clause).
The UIGEA defined “unlawful Internet gambling” as “knowingly transmitting a bet or wager”, by means of the Internet, where the bet or wager is illegal under the laws of the place where the wager is “initiated, received, or otherwise made.” Unlawful Internet Gambling Enforcement Act, 31 U.S.C. §5362(10) (2006).

The overlay problem is one that more typically affects daily fantasy game providers. Under UIGEA, fantasy sports operators must publish a prize amount before a contest and reward that prize, regardless of how many entrants participate. When contests don’t fill to capacity, the league operator has to pay the prize originally promised, regardless of whether they take a profit or loss. This inevitably means operating a typical daily fantasy sports site, such as FanDuel or DraftKings, without significant capital backing is a risky endeavor, as operators promising outsized payouts could be on the hook for a large loss if they can’t drum up enough participants.

Games that are completely free, even where prizes may be awarded, are typically legal in most states, because there is no “consideration.” Similarly, fantasy sports games that do not provide prizes to winners are not likely to violate state gambling laws because they fail to meet the element of “reward.”


It’s worth briefly noting that most fantasy sports leagues operated by individual citizens – such as popular “home leagues” among friends – where money is exchanged, even in season-long formats, likely violate both state and federal gaming laws. Much of this has to do with the fact that prizes in such leagues are often determined by the number of participants or the amount of any fees paid by those participants, which runs afoul of the carve out language of UIGEA. Given the relatively small amounts that change...
hands in these leagues, state and federal prosecutors have proven disinterested in pursuing charges in most instances.

[xviii] Additionally, participants in the most common DFS formats are typically not afforded much opportunity to offset “chance.” For example, if you draft a player in a full-season league, you can take steps to mitigate random chance results, such as injury, by deploying various strategies – i.e. trades or free agency. In DFS, if an injury strikes a particular player on a day in which a participant select him, that participant is often left without recourse.

[xix] The term “daily fantasy sports” was coined in 2007, when Fantasy Day Sports Corp. – one of, if not the first, provider of DFS – was launched. The two largest competitors in the market, FanDuel and DraftKings, were not started until 2009 and 2012, respectively.