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# FANTASY SPORTS: ONE FORM OF MAINSTREAM WAGERING IN THE UNITED STATES

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## I. INTRODUCTION

Fantasy sports are contests where persons compete for cash or prizes based on a scoring system that takes into account the accumulated statistics of professional athletes chosen as part of a fantasy team. From humble origins in the early 1960s, when it was merely a competition among a small group of friends, and more for pride than for money,<sup>1</sup> fantasy sports have become a billion dollar industry.<sup>2</sup> Beyond the economics of the leagues

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1. Andy Mousalimas, *Fantasy History* (2006), NETPLAYERS.COM, available at <http://www.nflplayers.com/fantasy/history.aspx>. Other reports attribute the origin of rotisserie baseball to Dan Okrent and his group of friends in New York in 1979. Chris Ballard, *Fantasy World*, SPORTS ILLUSTRATED, June 21, 2004, at 80.

2. See generally Tim Lemke, *Fantasy Future in Flux? Licensing Case Could Hurt Rotisserie Sports*, WASH. TIMES, July 29, 2006, at CO1, Tresa Baldas, *Are Fantasy Sports Real-Life Gambling? Attorney Files Qui Tam Against ESPN, Others, Alleging Illegal Gambling*, 28 NAT'L L. J. 4, 4 (2004); Eddie Pells, *The Fantasy Gamble Billion-Dollar Fantasy Football Business Is No Gamble to NFL*, ASSOC. PRESS, Dec. 16, 2006 (attributing the billion dollar fantasy sports industry to the participation of several million players).

themselves, fantasy sports are now a cultural phenomenon that motivate viewers to watch professional sports beyond those games that involve or impact their favorite teams or athletes.<sup>3</sup> This has value to the sports leagues through increased viewership on television and on Internet websites. Ultimately, this translates to increased revenues through advertising and other sales.<sup>4</sup> The basic legality of fantasy sports competitions, however, has never been decided.<sup>5</sup> Despite this, the recently enacted Unlawful Internet Gambling Enforcement Act includes a blanket exemption for fantasy sports.<sup>6</sup> This article explores the basic legal issues surrounding fantasy sports and the background for the exemption.

By way of background, fantasy sports leagues are competitions between contestants. The winners of the competition are based on the accumulated statistics of individual athlete performances in particular sports, such as batting average in baseball, or yards gained in football.<sup>7</sup> Beyond this general definition, there are many variations of fantasy sports. In some instances, the contestants participate in a draft process so that no two contestants can have the same players on their "teams."<sup>8</sup> In others, the contestants are given a "bankroll" and can choose common players, but the total value of his "team" cannot exceed his total bankroll.<sup>9</sup> In some competitions, players play "head-to-head" on a weekly basis.<sup>10</sup> If they accumulate better statistics in

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3. Jerry Magee, *It's No Fantasy – NFL Puts Its Stamp on Gambling*, SAN DIEGO UNION TRIB., Aug. 17, 2003, available at [http://www.signonsandiego.com/sports/nfl/magee/20030817-9999\\_1s17nflcol.html](http://www.signonsandiego.com/sports/nfl/magee/20030817-9999_1s17nflcol.html); see also Stuart Miller, *The Real Revenue in Fantasy Sports: The Statistics, Players and Profits Are Authentic; Just the Teams Aren't*, MULTICHANNEL NEWS, Dec. 12, 2005, available at <http://www.multichannel.com/article/CA6290241.html> (expounding on the cultural impact of fantasy sports).

4. Miller, *supra* note 3; see also Chris Isidore, *Fantasy "Rights" and Wrong*, CNNMONEY.COM, Aug. 11, 2006 available at <http://money.cnn.com/2006/08/11/commentary/sportsbiz/index.htm> (discussing the financial viability of the industry).

5. See *infra* note 58 and accompanying text (setting forth the various legal tests used to evaluate gaming).

6. See *infra* note 15 and accompanying text (annunciating the exemption for fantasy sports leagues).

7. Isidore, *supra* note 4.

8. James Alder, *Fantasy Football 101*, About.com, <http://www.football.about.com/od/fantasyfootball/a/afantasy101.htm> (last visited Feb. 16, 2008).

9. This method is commonly called the salary cap or stock market method of play. In it, each team has a salary cap and each player has a specific value. The team "owners" then pick players for his or her team whose cumulative value can be up to but not exceed the salary cap. The game will then have a predetermined method of earning points based on the player's performance in actual games. Player's values can rise or fall based on past performances and teams can trade out players as long as they do not exceed the salary cap. MICHAEL HARMON, *THE SAVVY GUIDE TO FANTASY SPORTS*, 15 (2005).

10. Head-to-head scoring is prevalent in Fantasy Football because games are only played weekly. Each week two participants are paired and the

that week than an assigned opponent, they earn a victory, but the statistics have no other value.<sup>11</sup> In other competitions, the statistics are accumulated over the course of a season or other defined time period and are the basis for a contestant's standing in the league.<sup>12</sup>

This Article will review, from a policy and legal perspective, the burgeoning phenomenon of fantasy sports that has become a form of mainstream wagering in the United States. Specifically, Part II of this Article will examine the basic political, commercial, and special interest components to the recent adoption of the so-called fantasy sports exemption in the Unlawful Internet Gambling Enforcement Act. Part III of this Article will analyze the existing state and federal legal framework of gambling laws as they may be applicable to fantasy sports, including a more detailed examination of the scope of the apparent exemption for certain fantasy sports contests from the Unlawful Internet Gambling Enforcement Act. Last, in Part IV, this Article will provide one view of the way forward in fantasy sports and some concluding thoughts.

## II. THE UIGEA AND FANTASY SPORTS

On September 30, 2006, the United States Congress passed the Unlawful Internet Gambling Enforcement Act of 2006 ("UIGEA").<sup>13</sup> The criminal provisions of UIGEA provide that no person engaged in the business of betting or wagering may knowingly accept directly or indirectly virtually any type of payment from a player in unlawful internet gambling (i.e. bets that are unlawful under other state or Federal laws).<sup>14</sup> Fantasy sports are exempt from the definition of unlawful internet gambling provided that:

- They are not based on the current membership of an actual sports team or on the score, point spread or performance of teams;

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winner is the participant whose fantasy players perform the best in the various statistical categories established by the league. The winner gets a win for the week and the loser gets a loss. The team owners with the highest number of wins earn a spot in the "playoffs" where they compete for the championship. *Id.* at 133.

11. *Id.*

12. These leagues typically follow rotisserie scoring. Teams are ranked from highest to lowest in statistical categories such as stolen bases, and team earned run average. Points are given in each category based on ranking, e.g., ten points for first, nine for second and so on. The points are added up for each category and the team with the highest cumulative total is the winner. *Id.*

13. Sean F. Kane, *Internet Gambling Banned: New Legislation Forces Online Gambling Sites to Decide When to Hold Them and When to Fold Them*, 4 INTERNET L. & STRATEGY, No. 11, 1, 1 (2006).

14. 31 U.S.C. § 5363 (2006).

- All prizes and awards are established and made known before the start of the contest;
- Winning outcomes are based on the skill of the participants and predominately by accumulated statistics of individual performances of athletes, but not solely on a single performance of an athlete.<sup>15</sup>

How and why fantasy sports obtained an exemption can be best understood in the commercial context of fantasy sports and the politics behind UIGEA.

*A. The Basic Commercial Context Preceding the UIGEA*

For about thirty years, the National Football League distanced itself from fantasy football because of the connotation that it was a form of gambling.<sup>16</sup> According to an official spokesperson for the NFL:

[Y]ears back, there was a misconception of what fantasy football really was . . . It had gambling connotations, and for a long time that put us off a bit. But once we took a good look at what the game actually involved and the kind of information that was required to be successful, we realized it wasn't a gambling activity, and that helped move us past some hurdles.<sup>17</sup>

What may have helped them more in their thinking was the growing popularity of fantasy sports and the prospect of a financial share in that popularity. Beginning in the early 1990s, professional sports leagues began charging licensing fees for fantasy sports leagues to use their players' names and statistics necessary to conduct the games.<sup>18</sup> By 2005, the fantasy sports industry had become a billion-dollar industry.<sup>19</sup> According to a 2006 survey commissioned by a fantasy sports trade association, over fifteen million people participate in fantasy sports.<sup>20</sup> The sports leagues charged licensing fees to the promoters of fantasy leagues.<sup>21</sup> A typical licensing fee is about ten percent.<sup>22</sup> The leagues earn millions in licensing fees each year. For example, Major League Baseball agreed to pay fifty million dollars over five

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15. 31 U.S.C. § 5362(1)(E)(ix) (2006).

16. Magee, *supra* note 3.

17. *Id.*

18. Michael McCarthy, *Stats Ruled Free for Use in Fantasy Games*, USA TODAY, Aug 9, 2006, at 3C.

19. Lemke, *supra* note 2.

20. LeeAnn Prescott, *Fantasy Sports Online*, IMEDIA CONNECTION, May 19, 2006, <http://www.imediaconnection.com/content/9599.asp>.

21. McCarthy, *supra* note 18.

22. Jeff Passan, *The Reality of Fantasy*, YAHOO! SPORTS, Apr. 20, 2006, available at <http://sports.yahoo.com/mlb/news?slug=jpfantasy042006&prov=yahoo&type=lgns>.

years to its players as their share of the fees from fantasy baseball.<sup>23</sup>

Major League Baseball, in particular, issued twenty licenses in 2004, but only seven in 2005.<sup>24</sup> If licensing were upheld by the courts, the leagues could even further reduce the number of authorized fantasy sports providers by forcing the leagues without licenses to terminate operations.<sup>25</sup> Through this method, they could effectively gain monopoly control over fantasy sports and enforce monopoly pricing on the general public.<sup>26</sup>

### *B. Some Basic Politics Behind the Passage of the UIGEA*

Professional sports may have had two interests in protecting fantasy sports. The first was preserving increasing revenues. The future of fantasy sports would have been placed in jeopardy if Congress passed internet gaming legislation that could have been read to prohibit fantasy sports.<sup>27</sup> The second was maintaining increased viewership by individuals who played fantasy sports.<sup>28</sup> Not surprisingly, the NFL played a major role in the passage of UIGEA. According to a New York Post article:

[T]he National Football League used a big bucks lobbyist to ram through Internet gambling-curbing legislation in the final minutes of the legislative session, sources revealed. But opponents of the bill charge that the NFL broke the rules when it fast-tracked legislation that never even got a vote in the Senate - a trick play that provided a big exemption for fantasy football. The NFL runs its own fantasy football site, and gets royalties from others.<sup>29</sup>

The same *New York Post* article went on to say:

Last month, right before lawmakers left town to campaign, the league was struggling for a way to overcome opposition to clearing the gambling bill. The league decided to try to tack the gambling bill onto final defense legislation that couldn't be amended . . . . NFL Chairman Roger Goodell and past chairman Paul Tagliabue wrote Senate Armed Services Committee Chairman John Warner (R-Va.) that the bill was an "achievement" he could be proud of, but that couldn't get through the Senate by regular means.<sup>30</sup>

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23. Isidore, *supra* note 4.

24. McCarthy, *supra* note 18.

25. Isidore, *supra* note 4.

26. Passan, *supra* note 22; see also Richard J. Dalton Jr., *A New Reality for Fantasy Leagues? MLB Argues It Owns Stats, Which Could Ground Free Games for Many Fans of the Leagues*, *NEWSDAY*, Mar. 22, 2006 (addressing the ramifications to the fantasy leagues if the Major league had been awarded rights to player statistics).

27. Dalton, *supra* note 26.

28. *Id.*

29. Geoff Earle, *NFL Makes Fantasy Pass*, *N.Y. POST*, Oct. 10, 2006.

30. *Id.*

The letter was referring to an attempt by Senator Bill Frist, then Senate Majority Leader, to have the legislation attached to the Defense Appropriations bill then being considered by a joint committee of the Senate and House in the closing days before the 2006 fall adjournment.<sup>31</sup> Senator Bill Warner (R-VA) rejected this attempt in a September 25th letter to Senator Frist that read, in part, "My strong objection is based on the following precedents: Section 102 of S.2349, The Legislative Transparency and Accountability Act of 2006 which passed the Senate on May 23, 2006 clearly expresses the views of the Senate that out-of-scope provisions are not to be included in conference reports."<sup>32</sup>

Undeterred by this rejection, Senator Frist turned to another joint committee, this one considering the Port Safety Act.<sup>33</sup> Unlike Senator Warner, none of the members of the committee objected to the inclusion of the amendment. Once attached, the full legislation went before Congress and its members were unable to vote against the amendment without voting down the bill in its entirety.<sup>34</sup>

### C. Fantasy Sports Licensing Revenues May Be in Jeopardy

When the NFL was acting to preserve its licensing revenues, a case was being decided that jeopardized the league's ability to charge fees to fantasy leagues to use player statistics.<sup>35</sup> In a decision from August of 2006, a federal district court held that fantasy operators do not need to pay licensing fees to the sports leagues to use the statistics of players in that league.<sup>36</sup> This was a significant decision because the licensing fees gave the sports leagues a direct interest in the success of the major fantasy leagues.<sup>37</sup>

Two major issues in the case involved a legal doctrine called "right of publicity" and whether the players' names and statistics were copyrightable.<sup>38</sup> The right of publicity is described in Section 46 of the Restatement (Third) of Unfair Competition (2005), Appropriation of the Commercial Value of a Person's Identity: The Right of Publicity. This Restatement provision states that "[o]ne who appropriates the commercial value of a person's identity by

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31. *Id.*

32. Memorandum for Senator Bill First, from Senator John Warner, September 25, 2006.

33. Anna Palmer, *Online Gambling Lobbyists Lose Big with New Prohibitions*, THE RECORDER (San Francisco), Oct. 12, 2006, at 3.

34. *Id.*

35. *C.B.C. Distribution v. Major League Baseball Advanced Media, L.P.*, 443 F. Supp.2d 1077 (E.D. Mo. 2006).

36. *Id.* at 1088-89.

37. Ben Smith, *Baseball Squeezing Fantasy Geeks Dry*, FT. WAYNE J. GAZETTE (Ind.), Aug. 15, 2006, at 6B.

38. *CBC Distribution*, 443 F. Supp. 2d 1077 at 1088-99.

using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability . . . ."<sup>39</sup> The court reasoned, in part, that:

[u]nlike cases where the commercial advantage element of the right of publicity has been found, there is nothing about CBC's fantasy games which suggests that any Major League baseball player is associated with CBC's games or that any player endorses or sponsors the games in any way. The use of names and playing records of Major League baseball players in CBC's games, moreover, is not intended to attract customers away from any other fantasy game provider because all fantasy game providers necessarily use names and playing records. Indeed, there is no evidence to create a triable issue as to whether CBC intended to create an impression that Major League baseball players are associated with its fantasy baseball games or as to whether a reasonable person would be under the impression that the baseball players are associated with CBC's fantasy games any more than the players are associated with a newspaper boxscore.<sup>40</sup>

The court concluded that:

the undisputed facts establish that the players do not have a right of publicity in their names and playing records as used in CBC's fantasy games and that CBC has not violated the players' claimed right of publicity. The court further finds, alternatively, that even if the players have a claimed right of publicity, the First Amendment takes precedence over such a right. The court further finds that the undisputed facts establish that the names and playing records of Major League baseball players as used in CBC's fantasy games are not copyrightable and, therefore, federal copyright law does not preempt the players' claimed right of publicity.<sup>41</sup>

Undoubtedly, the sports leagues will appeal this case and press forward in other cases to preserve their claims of entitlement to licensing fees and control over the economics of fantasy sports.<sup>42</sup>

### III. UIGEA DOES NOT ASSURE THAT PAY FOR PLAY FANTASY SPORTS ARE NOT ILLEGAL

The exemption in UIGEA for fantasy sports does not mean that fantasy sports are lawful, only that fantasy sports are not criminalized under UIGEA. In other words, conducting a fantasy contest for money still might violate other state or Federal laws. For example, a lawsuit was filed in a New Jersey federal court

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39. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (1995).

40. *CBC Distribution*, 443 F.Supp.2d 1077 at 1086.

41. *Id.* at 1107.

42. Donna Walter, *St. Louis-Based Fantasy Baseball Web Site Wins in Federal Court*, MO. LAW. WKLY, Aug 14, 2006.



against The Walt Disney Company, Vulcan, Inc. and Viacom Inc.<sup>43</sup> The suit sought to recover money lost by players in the fantasy sports leagues sponsored and operated by various subsidiaries of those companies. Specifically, the complaint sought to recover amounts paid by contests, deeming them to be gambling losses.<sup>44</sup>

A more natural approach to accessing the legality of fantasy sports is to begin with an analysis of state laws for two reasons. First, most federal gambling laws were enacted to help states enforce their own gambling laws.<sup>45</sup> Second, given the complimentary or supplemental nature of federal gambling laws to state gambling laws, those that first look to the federal laws can sometimes miss the larger theoretical framework underlying these federal laws. As such, this analysis will begin with an overview of state gambling law principles.

The legality of fantasy sports competitions has two dimensions. The first returns to the distinction between games of chance and games of skill.<sup>46</sup> The second dimension involves whether the activity violates laws that concern sports wagering or bookmaking.<sup>47</sup>

### A. Games of Chance Versus Games of Skill

#### 1. A Primer on Skill Gaming and Lottery Laws

The online skill gaming world has several popular market segments, including (1) fantasy sports; (2) poker tournaments; (3) simulated pool tournaments; (4) puzzle, trivia, and word contests and other intellectual contests and tournaments; (5) tournaments based on variations of classic board games and skill-enhanced versions of casino games; and (6) multi-user tournaments based on popular console and PC games.<sup>48</sup>

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43. *Humphrey v. Viacom, Inc.*, No. 2:06-CV-02768, 2006 WL 2300429 (D.N.J. Jan. 23, 2006).

44. *Id.*

45. ANTHONY N. CABOT, *FEDERAL GAMING LAW* (1998) 1-23.

46. See discussion *infra* and notes 53-55 (distinguishing games of skill from games of chance).

47. *Id.*

48. See generally *Skill Gaming*, <http://www.online-casinos.co.uk/Skill-Games/> (last visited, May 24, 2007) (offering an overview of skill gaming). See also Dave Spohn, *Gaming for Money: Online Games of Skill*, ABOUT.COM, <http://internetgames.about.com/cs/playingformoney/a/playformoney1.htm> (last visited, May 24, 2007) (offering an explanation of online gaming and gambling); Anthony N. Cabot, *INTERNET GAMING REPORT IV* 13 (2001); Anthony B. Cabot & Louis V. Csoka, *The Games People Play: Is It Time for a New Legal Approach to Prize Games*, 4 NEV. L.J. 197, 219-27 (2005) (discussing parallels and distinctions between internet gaming and traditional gambling).

Recently, each of these segments has generated significant revenues for their operators, with online poker games and poker tournaments “still leading the pack” at approximately sixty billion dollars wagered last year.<sup>49</sup> Fantasy sports, however, were second in popularity, given the large number of sports fans that are active over the Internet.<sup>50</sup>

The legal landscape surrounding skill-based games has many layers, and, as a result, any skill game requires significant gaming law analysis.<sup>51</sup> As a preliminary matter, most states do not prohibit contestants from wagering on their own performance in a skill tournament if skill predominates in that contest.<sup>52</sup> Under common law principles, prohibited lottery and gambling offenses generally involve activities in which each of the following elements is present: (1) the award of a prize, (2) determined on the basis of chance, (3) where consideration was paid.<sup>53</sup> If, however, the element of chance is missing, as in a game of skill, then contestants wagering on their own performance in that activity is not prohibited as criminal gambling.<sup>54</sup>

In reality, of course, almost all human endeavors contain some chance. Therefore, the issue then becomes how one determines whether a betting activity will have a sufficient element of chance associated with it to rise to the level of a criminal offense.

Recognizing the subjective cultural component in that analysis, one court opined as follows:

Paying an entrance fee in order to participate in a game of skill . . . in the hope of winning prize money guaranteed by some sponsor to successful participants, is a traditional part of American social life.

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49. James McManus, *The Poker World Is Flat, Part 1*, N.Y. TIMES (Online Edition), Dec. 31, 2005, available at <http://www.nytimes.com/2005/12/31/sports/othersports/31poke.html?ex=1180152000&en=e734529dd33da853&ei=5070>.

50. American Mosaic: *Millions Turn Fantasy Sports Leagues into a Real Industry in the U.S.*, VOA radio broadcast (Dec. 7, 2006) (transcript available at <http://www.voanews.com/specialenglish/archive/2006-12/2006-12-07-voa1.cfm>).

51. See generally Cabot & Csoka, *supra* note 48, at 219-27 (2005) (expounding on the intricacies of skill-based gaming).

52. *Id.* at 205-07; see also *Las Vegas Hacienda, Inc. v. Gibson*, 359 P.2d 85, 87 (Nev. 1961) (stating, “[t]he test of the character of a game is not whether it contains an element of chance or an element of skill, but which is the dominating element”).

53. See, e.g., *F.C.C. v. Am. Broad. Co.*, 347 U.S. 284, 289-91 (1954) (subsequently, distinguished on different grounds); see also *Commonwealth v. Plissner*, 4 N.E.2d 241 (Mass. 1936) (holding similarly).

54. See *Las Vegas Hacienda*, 359 P.2d at 85, 87, n.6 (stating, “[i]nasmuch as the contesting for a prize offered by another, which the one offering must lose in the event of compliance with the terms and conditions of his offer is not gambling”).

[Thus, we] are reluctant to adopt a statutory interpretation which would turn sponsors of golf, tennis or bridge tournaments, rodeos, livestock, poultry, and produce exhibitions, track meets, spelling bees, beauty contests, and the like into class 6 felons . . . .<sup>55</sup>

To determine whether a particular contest falls under state anti-gambling prohibitions, most states employ a common law test called the "Dominant Factor Test," or, alternatively, the "Predominance Test."<sup>56</sup>

In applying the Dominant Factor Test, a court asks whether "player skill" or "uncontrollable chance" is the most likely factor that will influence the outcome of a contest.<sup>57</sup> For example, in applying the Dominant Factor Test, the Nevada Supreme Court found that because player skill was the dominant factor in influencing the outcome of a hole-in-one golf contest, such contest was a game of skill and players could pay an entrance fee and compete for a prize in that contest.<sup>58</sup>

While the Dominant Factor Test is fairly easily applied to roulette (clearly a game of chance) and chess (clearly a game of skill), there lies a large "grey middle ground," populated by hundreds of games that contain both an element of chance and an element of skill.<sup>59</sup> Not surprisingly, in evaluating games with hybrid characteristics, two different courts in different states applying the Dominant Factor Test to identical games reached opposite conclusions.<sup>60</sup> For example, poker has been described both as a game of chance and as a game of skill.<sup>61</sup> Differences, however, can be attributed to the determination of skill and

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55. *State v. Am. Holiday Ass'n.*, 727 P.2d 807, 812 (Ariz. 1986).

56. *See generally* Cabot, *supra* note 48 at 13. *See also* State Gambling Law Summary, available at <http://www.gambling-law-us.com/State-Law-Summary/> (setting forth and describing in depth the various tests utilized in different jurisdictions).

57. Cabot, *supra* note 50, at 13.

58. *Las Vegas Hacienda*, 359 P.2d at 87.

59. *See generally* Cabot & Csoka, *supra* note 48, at 219-27 (offering an analysis of why it can be difficult to develop a brightline test for determining games of skill).

60. *See, e.g., Plissner*, 4 N.E.2d at 245 (upholding jury instructions that allowed jurors to conclude that the "crane game" was a game of chance under the Dominant Factor Test). *But cf.* Kan. Op. Att'y Gen. No. 87-140 (Sept. 18, 1987) (concluding that "crane games" are games of skill under the Dominant Factor Test).

61. *See, e.g., Charnes v. Cent. City Opera House Ass'n.*, 773 P.2d 546, 551 (Colo. 1989) (holding that, in Colorado, poker is an illegal gambling game of chance); *see also* Colo. Op. Att'y Gen. No. 93-5 (Apr. 21, 1993) (opining that, in Colorado, poker is a game of skill, but, nevertheless, illegal under specific statutory language); *United States v. Marder*, 48 F.3d 564, 569 (1st Cir. 1995) (holding that, in Massachusetts, video poker is a lottery in which chance predominates). *But see* *Commonwealth v. Club Caravan, Inc.*, 571 N.E.2d 405, 406-7 (Mass. App. Ct. 1991) (holding that, in Massachusetts, video poker games are games of skill).

chance as being a question of fact as opposed to a question of law. Therefore, the skill or chance decision can be influenced by the quality of evidence presented; the experience and qualifications of counsel; and the experience, qualifications, and biases of the triers of fact. As the *Plissner* case and the Kansas Attorney General Opinion set forth in the footnotes illustrates, juries can be difficult to predict and their decisions may be even more difficult to overturn on appeal.<sup>62</sup>

A second test used by some courts is the "Material Element" test. Under this test, courts find a particular activity to be a game of chance if chance plays a material element in the outcome.<sup>63</sup> This test is more subjective than the Dominant Factor test.

Lastly, some states prohibit betting on skill games altogether either by statute or effectively by using a conservative common law test. For example, a small number of states use tests called the "Any Chance Test" or the "Gambling Instinct Test."<sup>64</sup> Under the Any Chance Test, if the contest contains any element of chance, however small, wagering on such contest is always prohibited as gambling.<sup>65</sup> Similarly, courts employing the Any Chance Test prohibit an activity that "appeals" to the player's "gambling instinct."<sup>66</sup>

## 2. *Legal Precedent and Attorney General Opinions*

Given the prevalence of fantasy sports, the lack of legal

62. See *supra* note 60 and accompanying text (illustrating discrepancies within jurisdictions).

63. Video games simulating blackjack, draw poker and a slot machine have been held to be games of chance under the material element test. *Thole v. Westfall*, 682 S.W.2d 33 (Mo. App. 1984). A Missouri court reasoned that although a player with some knowledge may win more than a player without, chance is still a material element. *Id.* at 37 n.10. "The outcome of a game may depend significantly on chance notwithstanding that the skill of the contestants is a factor therein." *Id.* The court adopted a test measured by the average skill of the majority of players likely to play the game, and not a limited class of players or experts. *Id.* at 37. In addition, the court noted that chance need only be a material element, not a dominant element to be found a game of chance. *Id.* at 37 n.8. The Supreme Court of New York held that the video game of poker is a game of chance. *Plato's Cave Corp. v. State Liquor Auth.*, 115 A.D.2d 426 (N.Y. App. Div. 1985). A game of chance is a game which depends in a material degree upon an element of chance, even if some skill is involved. *Id.* at 427. Therefore, even if some skill is involved in the game of poker, if the outcome is based upon a material degree of chance, such as the draw of cards, the game is not one of skill. *Id.* at 428.

64. See, e.g., *State v. Gambling Devise*, 859 S.W.2d 519, 523 (Tex. App. 1993) (setting out the "any chance" test).

65. *Id.*

66. For example, a Hawaii court stated that "[p]laying a game, whether of skill or chance, for money or other thing of value constitutes . . . gambling." *State v. Prevo*, 361 P.2d 1044, 1049 (Haw. 1961). This has been interpreted as evidence that Hawaii adheres to the "appeals to the gambling instinct" test.

precedence is surprising. No reported federal or state cases discuss the legality of the activity. The only discussion of the legality of fantasy sports is found in three Attorney General Opinions, one from Arizona, one from Florida, and one from Louisiana. Each opinion concludes that fantasy sports are illegal games of chance. For various reasons, these Opinions provide very little guidance.

First, these three Attorney General Opinions originated in jurisdictions that have been historically very conservative on most gambling issues and even prohibit wagering on most games of skill.<sup>67</sup> Indeed, most skill game operators typically exclude these three jurisdictions (Arizona, Florida, and Louisiana), because they are perceived as following the Any Chance Test.<sup>68</sup> As such, even if supported, these Attorney General Opinions would not likely be followed in the majority of states that adopt the Dominant Factor Test.

Second, although Attorney General Opinions are persuasive authority in their home states, courts are still free to make up their minds about the construction of their own state's gambling laws. Indeed, many of the cases discussed in this article result from a court with a completely different opinion about the meaning of gambling laws than the local Attorney General.<sup>69</sup> To date, there are no reported court cases that have squarely addressed the skill component in fantasy sports.

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67. Arizona defines "gambling" as the "act of risking or giving something of value for the opportunity to obtain a benefit from a game or contest of chance or skill or a future contingent event . . ." ARIZ. REV. STAT. ANN. § 13-3301(4) (1999) (emphasis added). Similarly, a Florida statute provides that,

Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of human or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, or offered for the purpose of being staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any such result, or whoever aids, or assists, or abets in any manner in any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree. . . .

FLA. STAT. ANN. § 849.14 (1998) (emphasis added). Lastly, Louisiana in broad and undefined language characterizes "gambling" as "the intentional conducting, or directly assisting in the conducting, as a business, of any game, contest, lottery, or contrivance whereby a person risks the loss of anything of value in order to realize a profit." LA. REV. STAT. ANN. § 14:90(A)(1)(a) (2001).

68. See, e.g., HeySportsFans Playoff Fantasy Football, <http://www.heyportsfans.com/playoff-fantasy-football/playoff-football-official.htm> (last visited June 28, 2007) (excluding Arizona, Florida, and Louisiana from participating in the contest).

69. See, e.g., *Club Caravan, Inc.*, 571 N.E.2d at 406-07 (holding that, in Massachusetts, video poker games are games of skill); see also *Las Vegas Hacienda*, 359 P.2d at 87 (discussing the skill aspect of a hole-in-one contest).

Third, these Attorney General Opinions are somewhat dated and, recently, there has been at least some favorable scholarship on fantasy sports, as well as clarification provided by the Unlawful Internet Gambling Enforcement Act.<sup>70</sup> As such, large and well-respected corporations (like Fox and CBS) have been running certain types of fantasy sports contests over the Internet in all fifty states without any apparent threat of prosecution.<sup>71</sup>

Last, in the only reported federal case that we have found specifically on point, the federal court did not appear to be concerned whatsoever that it may be adjudicating the rights to an "illegal activity."<sup>72</sup>

### 3. *Are Fantasy Sports Games of Chance or Games of Skill?*

This question is difficult to answer in a law review article for three simple reasons. First, the test for determining what is a game of skill or chance is different among states. Second, the determination varies based on the method of play of the fantasy game at issue. Third, as a question of fact, the outcome can be influenced by the quality of the evidence before the court. However, we can construct a basic analytical framework that both permits a methodology for accessing fantasy games in light of the Dominant Factor Test and postulates why Fantasy Sports in general should meet this challenge.

Accordingly, notwithstanding the Attorney General Opinions from Arizona, Florida, and Louisiana, the legality of fantasy sports is by no means settled law even at the state level. In particular, in addition to general structuring concerns, the promoter of the fantasy game must address the likelihood of a skill game being exempt in every state where the fantasy sports contest will be offered by completing a more detailed survey of state gaming laws on skill gaming.

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70. See *infra* Part III.C.1. (discussing federal laws with the potential to directly bar fantasy sports).

71. See generally CBS SPORTSLINE.COM, <http://football.sportsline.com/splach/football/spln/single> (last visited Oct. 4, 2004); CNN/SPORTS ILLUSTRATED SI.COM, [http://games.si.cnn.com/signup/prizes.asp?game\\_id=22](http://games.si.cnn.com/signup/prizes.asp?game_id=22) (last visited Oct. 4, 2004); ESPN NETWORK ESPN.COM, <http://www.games.espn.go.com/cgi/home/Request.dll?FRONTPAGE> (last visited Oct. 4, 2004); FOX'S SPORTINGNEWS.COM, <http://fantasygames.sportingnews.com/crs/home.html> (last visited Oct. 4, 2004); USA TODAY, <http://www.fantasyfootball.usatoday.com/index.php?sports=pftball&type=home> (last visited Oct. 4, 2004); YAHOO! SPORTS, <http://www.football.fantasysports.yahoo.com/f2> (last visited Oct. 4, 2004) (representing several corporate fantasy sports programs).

72. See *Fantasy Sports Properties, Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108 (U.S. Ct. App. 2002) (adjudicating the patent infringement claims of an Internet Fantasy Sports operation). If the court had thought that Fantasy Sports was illegal, it probably would not have adjudged the case in the manner that it did.

In the majority of jurisdictions using the Dominant Factor Test, at least some forms of fantasy sports are arguably games of skill. In particular, fantasy sports require skill on the part of contest participants to assess players and decide their worth in relation to such players' expected performance over the season.

In support of the argument that fantasy sports are skill-based, contestants use their skill and knowledge of the sport and the fantasy sports rules to create and manage their own fantasy team of players who will (hopefully) accumulate the most points.

The skill elements are found primarily in three separate aspects of the game: drafting, playing, and trading players. Arguably, drafting requires the most skill. Most fantasy leagues have multiple teams but only allow actual athletes to be drafted by a single fantasy team. This requires the fantasy owner to first assess the relative worth of each player in light of the scoring criteria used by the league and the theoretical evaluation of the players' prospective accumulated statistics over the course of the contest.<sup>73</sup> For example, a fantasy owner needs to evaluate a baseball player's anticipated statistics for multiple categories such as batting average, home runs, RBIs, runs scored, and stolen bases. The fantasy owner has a wealth of statistics from past seasons from which to predict future performances, but these need to be analyzed in light of factors such as age, statistical trends, injuries, the player's statistics in particular stadiums, and the quality of the player's teammates and how that might affect performance and playing time.<sup>74</sup> The players are then assessed a value in the draft process. This process is not unlike the process that general managers of major league teams must undertake in accessing player talent and constructing a team that maximizes the talent within a given payroll.

The team owner also must overcome team biases and prejudice and understand its relationship to the fantasy game.<sup>75</sup> For example, the team owner must avoid overrating players that play for his favorite team and underrating other players because they play for a disfavored team. Arguing that assessing sports talent is not a skillful activity is belied by the fact that the sports industry recognizes and monetarily compensates successful general managers.

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73. Here the team owner must study the league rules and make evaluations of the player's strengths and weaknesses based on these rules. Team owners must understand and be aware that on-field performance or value is not necessarily relevant to Fantasy performance – which is based on statistics- not leadership or efforts that result in the player's team winning on the field. HARMON, *supra* note 9, at 25.

74. *Id.* at 42-43.

75. *Id.* at 24-25. At the same time, the team owner can take advantage of other owners that tend to overrate or underrate players based on these biases. *Id.*

The fantasy team owner must develop a strategy to create a team that is balanced in a manner consistent with the team's overall strategy. This strategy is not only important in the draft stage, but extends to the management of the team through the course of the season. For example, drafting all homerun hitters may advantage the team in the categories of homeruns and RBIs, but it will likely disadvantage the team in batting average, stolen bases and runs scored.<sup>76</sup>

Moreover, this balance is not only important from a categorical perspective, but also from a seasonal perspective.<sup>77</sup> For example, some baseball players perform better in the second half of the season than the first half. Moreover, because teams are rarely balanced or complete after the draft, this strategy needs to extend to adding, releasing and trading players throughout the course of the season.<sup>78</sup> Therefore, the fantasy owner may want to assure that either his team has both early and late season performers or has a trading strategy to accommodate seasonal deviations.

Additionally, the fantasy owner must use strategy in assessing the other team owners. For example, do you risk bidding on players that you do not want simply to drive up their price and to reduce the amount of money that other teams have to bid on players that you want? Further, the team owner must prepare to make adjustments in the course of the draft to accommodate the players chosen and the price paid.<sup>79</sup>

After the draft, the team owner must manage the team over the course of the season. This involves trading, determining which players to play, and dropping and adding players. This involves consistent review of play and statistics to assess performance swings, injuries, and difficulty of schedule.<sup>80</sup> This may involve researching or otherwise obtaining better information than one's opponents.<sup>81</sup> Research can include watching or listening to sports shows, monitoring hometown newspapers, watching games, reading expert commentary, subscribing to injury reports, trending player performances, watching match ups and other research methods. The existence of significant literature on fantasy sports, the valuation of players, and strategies for playing, attest to at least the assertion by those that participate that skill is a critical element to the game.

Once trading begins, the negotiation skills of the various team owners are important. Negotiation skills include

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76. *Id.* at 42.

77. *Id.* at 33.

78. HENRY LEE, *FANTASY BASEBALL STRATEGY* 37 (2005).

79. HARMON, *supra* note 9, at 29-30.

80. *Id.*

81. Lee, *supra* note 78, at 22-24.



understanding the other team owner's needs, overall strategies, the impact of the trade on both teams, and simply good trading skills (including bluffing).<sup>82</sup> Likewise, adding and dropping players requires vigilance in knowing who is available, what their performance potential may be, and how that potential may help the performance of your team.

The totality of these skill elements must be overcome by the chance elements involved in fantasy sports to fail the Dominant Factor test. Opponents may argue that fantasy sports contests involve more chance than skill because, while the performance of athletes depends upon skill, attempts by third parties to predict the future performances of athletes involve chance guesses because fantasy sports contestants lack the ability to control the performances of athletes.

The most significant chance element is injury or other circumstances that would prevent the player from performing. A loss of a high priced or early draft choice places the fantasy team at a significant disadvantage. For instance, while a participant can draft or trade for the most talented athletes, the chance of injury to those athletes may eliminate his or her opportunity to win. This would be particularly significant in a fantasy sports league where the number of players is small, such as basketball, or where a single skilled position player can account for significant statistics. Furthermore, the unpredictability of betting on sporting events has also been attributed to "the weather, the health and mood of the [athletes] and the condition of the playing field."<sup>83</sup>

Does the balance of these factors determine whether Fantasy Sports are games of skill or chance? The answer is simply not definable outside the context of the individual fantasy game being examined. Each has different characteristics that may lend themselves more toward a skill or chance determination. For example, in a fantasy contest using a stock market methodology that allows team owners to replace injured superstars with other players of equal value, the injury to a star player may have less of an impact on who wins the contest.

The length of the fantasy contest also should have a significant factor in assessing whether the contest is a game of skill or a game of chance. A "law of large numbers" is one of several theorems expressing the idea that, as the number of trials of a process increases, the percentage difference between the expected and actual values goes to zero.<sup>84</sup> So, suppose skill is only

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82. *Id.* at 37.

83. *Nat'l Football League v. Governor of State of Del.*, 435 F. Supp 1372, 1385 (D. Del. 1977); *see also* *Seattle Times Co. v. Tielsch*, 495 P.2d 1366, 1367 (Wash. 1972) (citing different factors that influence a team's likelihood for success).

84. WolframMathWorld, <http://www.mathworld.wolfram.com/LawofLarge>

slightly more dominant than chance in a particular fantasy contest. As the number of instances where skill is exercised by the team owners increases, the likelihood that the more skilled player will win also increases. If the number of trials is very small, then a random event like an injury may be more than a skilled player can overcome.

When faced with the challenge, the fantasy game organizer must be prepared to show that, while unskilled contestants may enjoy a rare victory, the contestants' skills normally determine the winners. The number of trials is directly related to the number of games and the length of the season. In full fantasy leagues that run the length of the season, obvious differences exist between baseball (one hundred and sixty-two game seasons) and football (sixteen games). Likewise, "weekly" fantasy contests are less likely to be skill based than seasonal contests. Even within fantasy games of the same sport and of the same length, differences in rules can impact skill levels. For example, "homerun only" leagues in baseball only measure a single statistical category and therefore take less strategy, planning, analysis, trade acumen, and other skills needed for leagues that track seven statistical categories.

### *B. Bookmaking Laws*

Most states expressly prohibit bookmaking.<sup>85</sup> These prohibitions are typically applied to a circumstance where one "stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under [the person's] control or influence."<sup>86</sup> The difference between bookmaking and most other gambling/lottery laws may be explained as follows: notwithstanding a state's exclusion of skill gaming from its general gambling prohibitions, if a contestant wagers on someone else's skill, not his or her own, a bookmaking violation may have occurred.<sup>87</sup> For example, in those states that have adopted the Dominant Factor Test, a player in a chess tournament can probably wager on his or her own performance by paying an entry fee into a contest in which he or she hopes to finish first, but cannot wager on the expected performance of someone else in that chess tournament.<sup>88</sup>

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Numbers.html (last visited Nov. 19, 2007).

85. See Cabot & Csoka, *supra* note 48, at 200-01 (discussing the legal history of gambling in the U.S.). See generally 38 AM. JUR. 2D GAMBLING §§ 44-47 (characterizing bookmaking).

86. N.Y. PENAL § 225.00(2) (1965).

87. See *infra* notes 90-92 (offering a clear illustration of the distinction).

88. See *Grant v. State*, 44 S.E.2d 513, 515 (Ga. Ct. App. 1947) (offering an *apropos* baseball analogy).

Georgia laws provide a good example of this requirement.<sup>89</sup> A Georgia court drew a sharp distinction between a game of skill, baseball, and the wagering on such game of skill, which then becomes a game of chance, stating:

A game of chance may be found under certain circumstances to be played between persons who wager or bet . . . upon the outcome of a game although not actually participating in the game itself, which may or may not have been inaugurated primarily for the purpose of affording an opportunity for wagering or betting, even though the game is a game of skill between the players who participated therein.<sup>90</sup>

Thus, case law still suggests that wagering on one's own personal skill, so long as the game played is a game of skill on its own, is not prohibited gambling.<sup>91</sup> On the other hand, wagering on the outcome of a game of skill where you are not a participant, can be a violation of bookmaking laws.<sup>92</sup>

With that basic framework on bookmaking laws in mind, several reputable operators offer fantasy sports contests based on the theoretical premise that fantasy sports are competitions between team owners, independent of the skill of the athletes or team performances in such sports. This is subtly different from the question of whether the game is a game of skill or chance. For example, a hole-in-one contest where persons attempt to win a prize by getting a hole-in-one on a two-hundred-yard par three hole is not bookmaking because the person is not wagering on the outcome of a contest played by others. Whether it is a game of skill or chance is an entirely separate question.

In this respect, the participants in a fantasy contest must "control or influence" the outcome of the competition to fall outside the sports betting prohibitions in most states. As such, contestants are not betting on the outcome of sporting or contingent events outside of their control, but they are actual participants in the activity that happens to use the contestants' abilities to determine the result of sporting events. The key to the distinction between fantasy sports and sports wagering is that fantasy sports require the consistent and recognizable involvement of the contestants, almost to the point of immersion, into the contest to achieve success such that the activity transforms from something outside their control to something within their control.

An opponent may, of course, argue that, while the performance of athletes depends upon skill, attempts by third parties to predict the future performance of these athletes involves

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89. *Id.*

90. *Id.*

91. See generally *Lewis v. State*, 189 S.E. 566, 566 (Ga. Ct. App. 1937) (evaluating a game in which players used rifles to shoot at a target).

92. *Grant v. State*, 44 S.E.2d 513, 515 (Ga. Ct. App. 1947).

mere guesses (not educated predictions) of activities over which they have no control. One may respond that fantasy sports are in reality a fantasy talent scout game. Specifically, if recognizing, judging, and managing talent and performance possibilities were not a skill, then talent scouts would not be able to demand substantial salaries.

### *C. Federal Gambling Laws Potentially Impacting Fantasy Sports*

Federal gambling laws that may impact fantasy sports can be divided into two groups. The first group includes laws that have direct prohibitions associated with them.<sup>93</sup> The second group includes laws that are merely supplemental in nature.<sup>94</sup> Even those laws that have direct prohibitions, however, should probably be construed in accordance with broader common law principles discussed above.<sup>95</sup>

#### *1. Direct Prohibitions*

Federal laws that could present a direct prohibition include: the Professional and Amateur Sports Protection Act; UIGEA; Federal Lottery Laws; and the Wire Act.

On its face, the Professional and Amateur Sports Protection Act ("PASPA") appears to provide one of the greatest obstacles to any fantasy sports contest. Specifically, in relevant parts, PASPA provides that:

It shall be unlawful for . . . a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.<sup>96</sup>

Notwithstanding such broad and ambiguous statutory language, PASPA should not apply to a fantasy sports contest for four reasons.

First, by reading PASPA literally, a person violates PASPA only if he or she operates sports wagering that is specifically authorized by state law ("pursuant to the law . . . of a governmental entity").<sup>97</sup> As a corollary to that argument, a person would

93. See discussion *infra* Part III.C.1 & 2 (offering examples of direct and supplemental prohibitions that could potentially face the fantasy sports leagues).

94. *Id.*

95. See *infra* Part III.C.1 (mentioning that the statutory schemes can be interpreted differently in the context of traditional tests such as the Dominant Factor test).

96. 28 U.S.C. § 3702 (1992) (emphasis added).

97. *Id.*

not violate PASPA if the skill game is not expressly authorized by state law but merely exempted from gambling prohibitions as a result of lacking the element of chance.<sup>98</sup>

At the same time, there are extremely few cases and Attorney General Opinions on PASPA, and none that we could locate which have evaluated a fantasy sports contest or sports sweepstakes under PASPA. Until a prosecutor brings charges against a privately-sponsored fantasy sports operator or a sports sweepstake under PASPA, it is difficult to conclusively opine on the validity of this first argument.

The second argument against the application of PASPA is based on a potential exemption found at 28 U.S.C. § 3704.<sup>99</sup> Specifically, that section provides:

[PASPA's prohibition] shall not apply to a lottery, sweepstake, or other betting . . . in operation in a State . . . to the extent that the scheme was conducted by that State or other governmental entity at any time . . . [from] January 1, 1976 . . . [to] August 31, 1990.<sup>100</sup>

Therefore, provided that evidence can be located showing that a governmental entity conducted a fantasy sports contest similar to the one proposed during the above-specified time period, fantasy sports may also qualify for explicit exemption from PASPA. In the absence of such evidence, however, fantasy sports may still face risk exposure under PASPA.

The third argument against the applicability of PASPA is based on industry consensus, evidenced by the wide proliferation of fantasy sports prize contests over the Internet.<sup>101</sup> Specifically, such contests typically rely on a strategic skill component (and sometimes a free method of entry, which probably would not otherwise make a difference for purposes of PASPA), to exempt themselves from state gambling prohibitions which typically incorporate the three classic elements of prize, chance, and consideration.<sup>102</sup> Stated differently, fantasy sports contests appear to operate by construing the foregoing ambiguity in PASPA to mean only a prohibition of sports sweepstakes expressly authorized by state law, but not such contests that state law indirectly exempts because they contain a predominant skill element or an alternative method of free entry.<sup>103</sup>

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98. *Id.*

99. 28 U.S.C. § 3704 (1992).

100. *Id.*

101. See *supra* note 73 and accompanying text (listing some of the popular sites).

102. See Cabot & Csoka, *supra* note 48, at 199-207.

103. *Id.*; see also 28 U.S.C. § 3702 (1992) (emphasis added). See generally M. Christine Holleman, *Fantasy Football: Illegal Gambling or Legal Game of Skill?* 8 N.C. J.L. & TECH. 59 (2006) (offering policy concerns over fantasy sports).

Most significantly, for several years, without any challenge from the Department of Justice, several major United States corporations have offered fantasy sports prize contests over the Internet.<sup>104</sup> These corporations included CBS, CNN, ESPN, Fox News, USA Today, and Yahoo.<sup>105</sup>

Last, as will be discussed below in detail, a strong argument can be made that the UIGEA has clarified PASPA and that certain fantasy sports contests are now exempt from federal gambling prohibitions.<sup>106</sup>

As briefly introduced further above in this article, UIGEA has clarified that certain internet fantasy sports contests were not intended to be classified as illegal gambling.<sup>107</sup> As such, one could argue that, *a fortiori*, they would also be exempt from PASPA, i.e., the above-referenced predecessor legislation. More specifically, the relevant UIGEA provisions provide in full that certain fantasy sports activities do not amount to illegal betting or wagering.<sup>108</sup> More specifically, UIGEA provides that:

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 (as those terms are defined in section 3701 of title 28) and that meets the following conditions:

(1) 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.

(2) 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 . . . [and]

(3) No winning outcome is based—on the score, point-spread, or any performance or performances of any single real-world team or any combination of such teams; or solely on any single performance of an

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104. *Id.* at 69.

105. *See supra* note 73 and accompanying text (listing the addresses for these popular sites).

106. *See infra* note 118 and accompanying text (elaborating on the Wire Act and its inapplicability to fantasy sports contests)

107. *See supra* note 106 (mentioning UIGEA's inapplicability to fantasy sports contests).

108. 31 U.S.C. § 5362(1)(E)(ix) (2006).

individual athlete in any single real-world sporting or other event . . . [is not "betting" or "wagering"].<sup>109</sup>

These requirements echo the requirements announced for true skill gaming under the Dominant Factor Test espoused by individual state law.<sup>110</sup> More specifically, the first criterion under UIGEA for exempt fantasy sports contests echoes the requirement announced by some of the more conservative state courts that skill gaming events and tournaments should have their prizes announced in advance, and not be based on the number of participants in that event.<sup>111</sup>

The second criterion under UIGEA appears to echo the requirement under state bookmaking and lottery laws that it is the participants' skill (and not the athletes' skill) that should ultimately matter in the outcome of the contest.<sup>112</sup> Last, the third criterion under UIGEA, divorcing actual results in single game events from fantasy sport events, is probably calculated to provide some minimum guarantees that it is the contest participant's skill and relative control (and again not the athletes' skill) that will ultimately determine the contest's outcome.

Finally, any proposed fantasy sports contest should be carefully examined to ensure that it clearly fits within the foregoing criteria carved out for fantasy sports and provided by UIGEA. If a contest meets UIGEA's requirements, it is likely also exempt under PASPA.<sup>113</sup>

In addition to PASPA and UIGEA, three federal statutes that restrict lotteries should be considered in relation to fantasy sports.<sup>114</sup> Specifically, these statutes concern the prohibition of (1) the interstate transportation of lottery tickets; (2) the distribution of lottery material through the United States mail; and (3) the broadcasting of lottery information.<sup>115</sup> Because a lottery requires a predominant element of chance, these laws would not likely apply

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109. *Id.* (new internal numbering and emphasis added).

110. *See generally* Cabot & Csoka, *supra* note 48 (discussing the common law tests to determine the legality of gambling practices).

111. *See Am. Holiday Ass'n.*, 727 P.2d at 809 (finding it important that the "prizes were for a definite, guaranteed sum, without regard to the amount of entrance fees received").

112. *See supra* Part III.A.1 (distinguishing between the skill of the player and that of the contestant).

113. *See supra* notes 111-12 (setting forth the UIGEA criteria).

114. *See* 18 U.S.C. § 1301 (1994) (prohibiting the interstate transportation of certain lottery materials); *see also id.* § 1302 (prohibiting the mailing of lottery materials); *id.* § 1304 (prohibiting the broadcast of lottery information; recognized as unconstitutional in *Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061 (10th Cir. 2001)).

115. 18 U.S.C. §§ 1301-02, 1304 (1994).

to fantasy sports, unless, of course, a particular fantasy sports contest is found to involve a game of chance.<sup>116</sup>

For final consideration, under federal law, sports-wagering that utilizes interstate telephone lines or the Internet is clearly prohibited.<sup>117</sup> Such activities have been successfully prosecuted in the United States under the Wire Wager Act (the "Wire Act").<sup>118</sup> Nevertheless, the existence of a "wager" is a requisite element to a violation of the Wire Act.<sup>119</sup> In a slightly different context, a federal court specifically held that a "wager" only exists where a person "is risking his . . . [or her] money in a game of chance in which he . . . [or she] may win, or lose, depending on the eventuality."<sup>120</sup> Accordingly, the Wire Act is probably inapplicable to fantasy sports, unless, again, the particular fantasy sports contest is found to involve a game of chance.

## 2. *Supplemental Prohibitions*

Besides these direct prohibitions, other federal laws often enhance the penalties associated with any violation of a state gambling law.<sup>121</sup> Two prominent examples are the Travel Act and the Illegal Gambling Business Act.<sup>122</sup> Specifically, the Travel Act prohibits any person from using any facility in interstate or foreign commerce, with the intent to promote, manage, establish, carry on or facilitate unlawful activity.<sup>123</sup> Unlawful activity is

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116. See *supra* note 116 and accompanying text (discussing applications of the Dominant Factor Test, and whether skill or chance is the strongest factor influencing the outcome).

117. 18 U.S.C. § 1084 (1994).

118. See, e.g., *United States v. Cohen*, 260 F.3d 68 (2d Cir. 2001) (holding that online sports wagering violates the Wire Act); see also 18 U.S.C. § 1084 (1994) (setting forth the restriction against placing wagers via telephone or other federally regulated means); *United States v. Segal*, 867 F.2d 1173 (8th Cir. 1989) (holding that betting related to football games is prohibited); *United States v. Campagnuolo*, 556 F.2d 1209 (5th Cir. 1977) (holding that betting related to various sports events is prohibited). With respect to other forms of wagering, however, there is currently a disagreement between the DOJ and the courts as to whether the Wire Act would prohibit them. For example, while the DOJ maintains that the Wire Act would also prohibit casino wagering activity, the courts, given the Wire Act's language and legislative history, have disagreed with the DOJ's broad interpretation in a civil dispute. *In re Mastercard Int'l, Inc.*, 313 F.3d 257 (5th Cir. 2002) (holding that the Wire Act only applies to sports wagering).

119. 18 U.S.C. § 1084 (1994).

120. *Rahke v. United States*, 180 F. Supp. 576, 578 (Ct. Claims 1960) (chance); see also 26 U.S.C. § 4401 (setting forth the elements for a violation).

121. See *infra* notes 122-27 and accompanying text (noting the Travel Act and the Illegal Gambling Business Act).

122. 18 U.S.C. §§ 1952, 1955 (1994).

123. 18 U.S.C. § 1952 (1994).



defined as "any business enterprise involving gambling" in violation of state or federal laws.<sup>124</sup>

The Illegal Gambling Business Act prohibits any person from financing, owning or operating an illegal gambling business.<sup>125</sup> 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 thirty days or has a gross revenue of more than two thousand dollars in any single day.<sup>126</sup> Therefore, if a particular fantasy sports contest violates any state or federal anti-gambling laws, the Travel Act and the Illegal Gambling Business Act may also be implicated.<sup>127</sup>

#### IV. CONCLUDING THOUGHTS

Legal distinctions between lawful skill games and illegal gambling have strong historic roots in American Jurisprudence. The advent of the Internet has caused the Congress to consider whether federal intervention is necessary to prohibit the proliferation of online gambling. This new federal debate culminated in the passage of the Unlawful Internet Gambling Enforcement Act. While ostensibly not impacting the legality of any form of online activity, the presence and the impact of the powerful professional sports industry attempted to shape the law regarding the legality of one particular form of online activity, fantasy sports. More specifically, the UIGEA excludes fantasy sports from the definition of UIGEA under the argument that it is a skill-based activity and therefore not unlawful gambling. Yet, the UIGEA does not mention, exclude, or even debate whether any other type of skill-based games are excluded from the Act. For example, is online chess any less deserving of a specific legislative exemption than fantasy sports?

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124. *Id.*

125. *Id.* § 1955.

126. *Id.*

127. Other statutes discussed in this context include the federal aiding and abetting and conspiracy statutes as well as the Racketeer Influenced Corrupt Organizations Act ("RICO"). Because a RICO or a conspiracy charge requires additional elements for a prosecutor to prove, they are less likely candidates. Additionally, because case law under the Illegal Gambling Business Act and the Travel Act is significantly better developed in this context than under the federal aiding and abetting statute, the Illegal Gambling Business Act and the Travel Act, if applicable, are much more likely candidates to be relied upon by a potential opponent. *See* AM. JUR. 2D CONSPIRACY § 3 (1998) (stating that aiding and abetting has been adjudged a separate and distinct offense from conspiracy, because conspiracy involves the additional element of pre-concert and connivance not necessarily inherent in the mere joint activity common in aiding and abetting); *see also* *Mastercard*, 132 F. Supp. 2d 468, 477 (discussing RICO's additional elements; subsequently, distinguished on different grounds).

By allowing powerful lobbies to shape federal gambling laws, federal policy shifts away from reasoned public policy that is fairly and consistently applied across all activities, to creating anomalies in the law that have no public policy justifications. This is exactly the situation with fantasy sports. UIGEA codifies an exemption for fantasy sports that is not soundly based in existing jurisprudence, nor justified by sound policy distinctions.

Under the prevailing tests that distinguish legal skill games from unlawful games of chance and bookmaking, properly constructed fantasy sports competitions should already be able to pass legal scrutiny under the laws of most states and be permitted. This state law analysis, however, is very fact specific. In particular, while some iterations of fantasy sports may pass such test, others clearly will fail that test, given their lack of skill and lack of immersive elements in the particular competition, such as opportunities to draft, play, and trade players, the lack of the requisite length of the competition, and the lack of an appropriate scoring methodology for the contest.

Yet, the UIGEA exemption for fantasy sports recognizes few of the policy arguments surrounding the differences between skill games and unlawful gambling. Instead, it codifies certain criteria for exempted fantasy games that are inconsistent with historical tests and likely exist only because they favor the structure of specific types of fantasy contests that the sports leagues have licensed. For example, only sparse jurisprudence exists for the criteria that all prizes need to be known and established before the start of the contest. This is only applicable to a very few states that prohibit all skill games (with the exception of those that have pre-announced prizes). No reason exists for including this as part of the criteria for the exemption.

All told, the congressional process that resulted in the passage of UIGEA and its treatment of fantasy sports ultimately has done a great disservice to reasoned policymaking and, potentially, to the long-term future of the fantasy sports industry itself.

