

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 149 Fantasy Contests & Fantasy Contest Operators

SPONSOR(S): Brodeur

TIED BILLS: **IDEN./SIM. BILLS:** SB 592

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism & Gaming Control Subcommittee	10 Y, 0 N	Sarsfield	Barry
2) Ways & Means Committee			
3) Commerce Committee			

SUMMARY ANALYSIS

A fantasy contest (also called fantasy sports or fantasy game) is a type of contest in which participants assemble, own, and manage imaginary teams made up of actual professional sports players. The fantasy teams compete based on the statistical performance of actual players in actual sports games. Participants can play fantasy contests at home or online, through a fantasy contest operator or with friends, with or without an entry fee, and over a full season or over a shorter period of time.

Although fantasy contests began as small-scale contests played amongst friends or co-workers, the advent of new technologies beginning in the 1990s allowed for broader access for the public to participate in fantasy contests because statistics could be easily and quickly compiled online. Additionally, news and information about players was more readily available through growing access to the Internet. Daily fantasy contests are an accelerated version of fantasy contests, which are played across a shorter period of time.

In recent years, the prevalence of daily fantasy contests has grown dramatically across the United States and abroad. As major advertising campaigns by operators of daily fantasy contests websites such as FanDuel and DraftKings have popularized the contests and led to millions of new participants, daily fantasy contests have attracted scrutiny from state officials concerning their compliance with state anti-gambling laws. In response, some states have pursued investigations and litigation to halt daily fantasy contests, while other states have proposed or passed legislation to allow such daily fantasy contests to continue.

The bill defines "fantasy contest" as a fantasy or simulated game or contest in which:

- The sponsor of the fantasy contest is not a participant in the fantasy contest.
- The value of all prizes and awards offered to winning participants are established and made known in advance of the contest.
- Winning outcomes must reflect the relative knowledge and skill of the players and are determined by accumulated statistical results of the performance of individuals, including athletes in the case of sporting events.
- Winning outcomes must not be based on the score, point spread, or any performance of any single sports team or combination of such teams or solely on a single performance of an individual athlete in a single sporting event.

The bill provides that "fantasy contests" are exempt from regulation under ch. 849, F.S., entitled "Gambling."

The bill does not have a fiscal impact on state or local government.

The bill provides for an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background of fantasy contest industry:

A fantasy contest (also called a fantasy sport or fantasy game) is a type of contest where participants assemble, own, and manage imaginary teams made up of actual professional sports players. The teams compete based on the statistical performance generated by the actual players in an actual sports game. The players' performances are converted into points that are compiled according to the participant's team roster. In fantasy contests, participants draft, trade, and cut players similar to a real team owner.

Although fantasy contests began as a contest played amongst friends or co-workers, new technology in the mid-1990s allowed for broader access to the public to participate in fantasy contests because statistics could be easily and quickly compiled online. Additionally, news and information about players was more readily available through growing access to the Internet.

Daily fantasy contests are an accelerated version of fantasy contests, which are played across a shorter period of time. For example, daily fantasy contests may be played over a single week in a season, rather than the entire season. Daily fantasy contests are typically played as "contests" which require an entry fee. The fee funds an advertised prize pool from which the fantasy contest operator (such as FanDuel and DraftKings) takes a percentage as revenue.¹

The legality of daily fantasy contests has been challenged in many states and jurisdictions, with some critics arguing that the contests more closely resemble proposition wagering on athlete performance than traditional fantasy contests.

The online fantasy contest industry is now a multi-billion dollar industry in the United States.² In 2015, an estimated 57.4 million people competed in fantasy contests in the United States and Canada.³

Current situation:

In general, gambling is illegal in Florida.⁴ Chapter 849, F.S., prohibits keeping a gambling house,⁵ running a lottery,⁶ or the manufacture, sale, lease, play, or possession of slot machines.⁷ Certain exceptions have been authorized, with restrictions on permitted locations, operators, and prizes, including penny-ante games,⁸ bingo,⁹ cardrooms,¹⁰ charitable drawings,¹¹ game promotions (sweepstakes),¹² and bowling tournaments.¹³

¹ THE WASHINGTON POST, *Daily fantasy sports Web sites find riches in Internet gaming law loophole*, (Mar. 27, 2015) https://www.washingtonpost.com/sports/daily-fantasy-sports-web-sites-find-riches-in-internet-gaming-law-loophole/2015/03/27/92988444-d172-11e4-a62f-ee745911a4ff_story.html.

² THE BOSTON GLOBE, *Fantasy sports book gives insider view of DraftKings' explosion*, (Mar. 6, 2017) <https://www.bostonglobe.com/business/2017/03/06/fantasy-sports-book-gives-insider-view-draftkings-explosion/qntMQJiIW2IKhrBNXPx2SK/story.html>.

³ FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> (last visited Mar. 24, 2017).

⁴ s. 849.08, F.S.

⁵ s. 849.01, F.S.

⁶ s. 849.09, F.S.

⁷ s. 849.16, F.S.

⁸ s. 849.085, F.S.

⁹ s. 849.0931, F.S.

¹⁰ s. 849.086, F.S.

¹¹ s. 849.0935, F.S.

¹² Section. 849.094, F.S., authorizes game promotions in connection with the sale of consumer products or services.

¹³ s. 546.10, F.S.

Lotteries

Lotteries are generally prohibited by the Florida Constitution.¹⁴ The constitutional prohibition is codified in statute at s. 849.09, F.S. Other than the statement in the Florida Constitution that indicates that the term "lottery" does not include "types of pari-mutuel pools authorized by law as of the effective date of this constitution," the term "lottery" is not defined by the Florida Constitution or statute. Generally, a lottery is a scheme which contains three elements: consideration, chance, and prize. As to consideration, while most states view consideration narrowly as a tangible asset, such as money, Florida views consideration broadly, as the conferring of any benefit.¹⁵ Thus, even if players do not pay to participate in a game where they have a chance to win a prize, it may be an illegal lottery.

In 1986, Florida voters approved an amendment to the Florida Constitution to allow the state to operate a lottery. This lottery is known as the Florida Education Lotteries and directs a portion of the proceeds to the State Education Lotteries Trust Fund.¹⁶

To allow other activities that would otherwise be illegal lotteries, the Legislature has carved out several narrow exceptions to the statutory lottery prohibition. Statutory exceptions are provided for charitable bingo, charitable drawings, and game promotions. Charities use drawings or raffles as a fundraising tool. Organizations suggest a donation, collect entries, and randomly select an entry to win a prize. Under s. 849.0935, F.S., qualified organizations may conduct drawings by chance, provided the organization has complied with all applicable provisions of ch. 496, F.S. Game promotions, often called sweepstakes, are advertising tools by which businesses promote their goods or services. As they contain the three elements of a lottery: consideration, chance, and prize, they are generally prohibited by Florida law unless they meet a statutory exception.¹⁷

Pari-Mutuel Wagering, Cardrooms, and Slot Machines

Chapter 550, F.S., authorizes pari-mutuel wagering at licensed tracks and frontons and provides for state regulation. Pari-mutuel is defined as "a system of betting on races or games in which the winners divide the total amount bet, after deducting management expenses and taxes, in proportion to the sums they have wagered individually and with regard to the odds assigned to particular outcomes."¹⁸ A license to offer pari-mutuel wagering, slot machine gambling, or a cardroom at a pari-mutuel facility is a privilege granted by the state.¹⁹

Chapter 849, F.S., authorizes cardrooms at pari-mutuel facilities, subject to certain restrictions.²⁰ An authorized game is defined as "a game or series of games of poker or dominoes which are played in a nonbanking manner."²¹

Slot machines have been generally prohibited in Florida since 1937.²² Section 849.16, F.S., defines a slot machine as a machine or device that requires the insertion of a piece of money, coin, account number, code, or other object or information to operate and allows the user, whether by application of skill or by reason of any element of chance or of any other outcome of such operation unpredictable by him or her, to receive money, credit, allowance, or thing of value, or secure additional chances or rights to use such machine, apparatus, or device. However, following a constitutional amendment in 2004,

¹⁴ Article X, s. 7, FLA. CONST. *But, see*, Article X, s. 15, FLA. CONST., authorizing lotteries operated by the state.

¹⁵ *See Little River Theatre Corp. v. State ex rel. Hodge*, 135 Fla. 854 (1939).

¹⁶ *See* FLA. LOTTERY, *Education*, <http://www.flalottery.com/whereMoneyGoes> (last visited Mar. 24, 2017).

¹⁷ *See Little River Theatre Corp.*, *supra* note 17, at 868.

¹⁸ s. 550.002(22), F.S.

¹⁹ *See* s. 550.1625(1), F.S., "...legalized pari-mutuel betting at dog tracks is a privilege and is an operation that requires strict supervision and regulation in the best interests of the state."

²⁰ s. 849.086(2)(c), F.S., defines "cardroom" to mean a facility where authorized card games are played for money or anything of value and to which the public is invited to participate in such games and charges a fee for participation by the operator of such facility.

²¹ S.849.086(2)(a), F.S.

²² s. 849.15, F.S., originally enacted by s. 1, ch. 18143, L.O.F. (1937).

slot machines were introduced at certain pari-mutuel facilities in Broward and Miami-Dade Counties and are regulated under ch. 551, F.S.²³

Gaming Compact

Chapter 285, F.S., ratified the gaming compact with the Seminole Tribe of Florida (2010 Compact). It provides that it is not a crime for a person to participate in raffles, drawings, slot machine gaming, or banked card games (e.g., blackjack or baccarat) at a tribal facility operating under the compact.²⁴ The 2010 Compact provides for revenue sharing. For the exclusive authority to offer banked card games on tribal lands at five locations and to offer slot machine gaming outside Miami-Dade and Broward Counties, the Seminole Tribe pays the State of Florida a share of "net win" (approximately \$240 million per year). Section 285.710(1)(f), F.S., designates the Division of Pari-mutuel Wagering of the Department of Business and Professional Regulation as the "state compliance agency" having authority to carry out the state's oversight responsibilities under the 2010 Compact. The 2010 Compact took effect when published in the Federal Register on July 6, 2010, and lasts for 20 years, expiring July 31, 2030, unless renewed.

Notably, the 2010 Compact provides for a reduction in revenue sharing if "internet/online gaming (or any functionally equivalent remote gaming system that permits a person to game from home or any other location that is remote from a casino or other commercial gaming facility)" is offered in the state.

Legality of Certain Other Activities in Florida

In recent years, the advent of new technologies and new products in Florida led to questions about whether certain new activities were permissible activities or illegal gambling under Florida law.

In 2013, the Legislature clarified that Internet café style gambling machines were illegal in the state. The legislation clarified existing sections of law regarding slot machines, charitable drawings, game promotions, and amusement machines and created a rebuttable presumption that machines used to simulate casino-style games in schemes involving consideration and prize are prohibited slot machines.²⁵

In 2015, the Legislature determined that the regulation of the operation of skill-based amusement games and machines would ensure compliance with Florida law and prevent the expansion of casino-style gambling. The Legislature clarified the operation and use of amusement games or machines to ensure that regulations would not be interpreted as creating an exception to the state's general prohibitions against gambling.²⁶

Legality of Fantasy Contests in Florida

Currently, there is no constitutional, statutory or regulatory framework expressly allowing for fantasy contests to be conducted in the State of Florida. Moreover, Florida courts have not addressed whether Florida's constitutional and statutory prohibitions on gambling apply to fantasy contests.

Regardless of whether fantasy contests are games of skill or games of chance, they may be otherwise subject to the state's gambling laws and anti-bookmaking statute. Section 849.14, F.S., provides that a stake, bet, or wager of money or another thing of value placed "upon the result of any trial or contest of skill, speed, power, or endurance of human or beast" is unlawful. Receiving money or acting as the custodian or depository of money as part of such a stake, bet, or wager is also unlawful.

²³ See Article X, Section 23, FLA. CONST.; ch. 2010-29, L.O.F. and chapter 551, F.S.

²⁴ s. 285.710, F.S.

²⁵ FLA. HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON GAMING, *Final Bill Analysis of 2013 CS/HB 155*, p. 1 (Apr. 19, 2013).

²⁶ s. 546.10, F.S.

Section 849.25, F.S., Florida's anti-bookmaking statute, defines bookmaking as "the act of taking or receiving, while engaged in the business or profession of gambling, any bet or wager upon the result of any trial or contest of skill, speed, power, or endurance of human, beast, fowl, motor vehicle, or mechanical apparatus or upon the result of any chance, casualty, unknown, or contingent event whatsoever." The statute includes factors that are to be considered evidence of bookmaking, including charging a percentage on accepted wagers, receiving more than five wagers in a day, and receiving over \$500 in total wages in a single day or over \$1500 in a single week.²⁷

In 1991, the Attorney General of Florida issued a non-binding advisory legal opinion (AGO)²⁸ regarding whether participation in a fantasy sports league violated Florida's gambling laws. The AGO concluded that the operation of a fantasy league would violate s. 849.14, F.S. The AGO reasoned that since the fantasy sports league's entry fee was used to make up the prizes, it qualified as a "stake, bet, or wager" under Florida law.²⁹ The AGO stated that, "while the skill of the individual contestant picking the members of the fantasy team is involved, the prizes are paid to the contestants based upon the performance of the individual professional football players in actual games."³⁰

In addition, fantasy contests may be subject to Florida's anti-lottery laws. Players in daily fantasy contests are competing for a distribution of a prize that may be made from a pool of funds that are made up of players' contributions. This type of game may be considered pool betting or pari-mutuel betting.

However, the 1991 AGO concluded that contests, in which the skill of the contestant predominates over the element of chance, such as in certain sports contests, are not prohibited lotteries. As an example, the AGO noted that golf and bowling tournaments are contests of skill but are not prohibited under Florida law. AGO further stated that "it might well be argued that skill is involved in the selection of a successful fantasy team by requiring knowledge of the varying abilities and skills of the professional football players who will be selected to make up the fantasy team."³¹

Fantasy Contests in the United States

The federal Unlawful Internet Gambling Enforcement Act of 2006³² (UIGEA) prohibits the processing of certain online financial wagering to prevent payment systems from being used in illegal online gambling. UIGEA prohibits gambling businesses from knowingly accepting payments in connection with a "bet or wager" that involves the use of the Internet and that is unlawful under any federal or state law.

UIGEA expressly states that participation in fantasy or simulation sports contests is not included in the definition of "bet or wager"³³ when certain conditions are met. For purposes of UIGEA, participation in a fantasy or simulation sports contest is not a bet or wager when:

- Prizes and awards offered to winning participants are established and made known in advance of the game or contest and the value is not determined by the number of participants or amount of fees paid by the participants.
- Winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individuals.
- Winning outcomes are not based on the score, point spread, or any performance of any single sports team or combination of such teams or solely on a single performance of an individual athlete in a single sporting event.

²⁷ s. 849.25(1)(b), F.S.

²⁸ 91-03 Fla. Op. Att'y Gen. (1991).

²⁹ *Creash v. State*, 131 Fla. 111, 118 (Fla. 1938).

³⁰ 91-03 Fla. Op. Att'y Gen. (1991).

³¹ *Id.*

³² 31 U.S.C. § 5361-5366 (2006).

³³ 31 U.S.C. § 5362(1) (2006).

UIGEA exempts fantasy and simulation sports contests from the application of UIGEA, but does not make such contests legal generally. UIGEA does not change or preempt any other federal or state law. As expressed in the Rule of Construction in UIGEA, "no provision of this subchapter shall be construed as altering, limiting, or extending any federal or state law or tribal-state compact prohibiting, permitting, or regulating gambling within the United States."³⁴ Therefore, any other state or federal law could apply.

The federal Professional and Amateur Sports Protection Act of 1992 (PAPSA) states that it is unlawful for a governmental entity or person to operate or promote any gambling that is based directly or indirectly on one or more competitive sports games or on the performance of an amateur or professional athlete in a competitive sports game.³⁵

While federal law appears to not expressly prohibit them, the legality of daily fantasy contests under state law varies from state to state. Several states, including Arizona and Louisiana, have laws that have been interpreted as prohibiting fantasy contests in their jurisdictions.³⁶ For instance, in 2015, the Attorney General of Nevada opined that daily fantasy contests constitute sports pools under Nevada law.³⁷ Under the opinion, daily fantasy contest sites are required to apply to the Nevada Gaming Control Board for a license to operate a sports pool in the state. Conversely, many states have proposed or passed legislation to legalize and regulate fantasy contests.³⁸

Effect of the bill:

The bill defines the term "fantasy contest" to mean a fantasy or simulated game or contest in which:

- The sponsor of the game or contest is not a participant in the game or contest.
- The value of all prizes and awards offered to winning participants are established and made known in advance of contest.
- Winning outcomes must reflect the relative knowledge and skill of the players and are determined by accumulated statistical results of the performance of individuals, including athletes in the case of sporting events.
- Winning outcomes must not be based on the score, point spread, or any performance of any single sports team or combination of such teams or solely on a single performance of an individual athlete in a single sporting event.

Although this definition generally follows the exception provided in UIGEA, the requirement that the value of the prize not be determined by the number of participants in the contest or the amount of fees paid by the participants is not included. Also, the definition of "fantasy contest" does not limit contests to athletic contests or sports, which may leave open the possibility of legalizing other types of contests.

The bill defines the term "fantasy contest operator" to mean a person or entity that offers fantasy contests for a cash prize.

The bill provides that "fantasy contests" as defined in the bill is exempt from regulation under ch. 849, F.S., entitled "Gambling." Because the bill defines "fantasy contests" as only those operated by a sponsor who is not a participant in the contest, small groups of friends who traditionally organize to play a season-long fantasy contest may not be exempted from the prohibitions contained in ch. 849, F.S.

³⁴ 31 U.S.C. § 5361(b) (2006).

³⁵ 28 U.S.C. § 3702 (1992).

³⁶ See LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Mar. 24, 2017).

³⁷ 2015-102 Nev. Op. Att'y Gen. 8 (2015).

³⁸ See LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Mar. 24, 2017).

B. SECTION DIRECTORY:

Section 1: Specifies that fantasy contests are excluded from the statutory prohibitions on gambling set forth in ch. 849, F.S., and are exempt from regulation by the Department of Business and Professional Regulation.

Section 2: Provides for an effective date of July 1, 2017.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Indeterminate.

B. RULE-MAKING AUTHORITY:

There appears to be no rulemaking authority added or amended.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill specifies that daily fantasy contests are exempt from certain gambling statutes and are not subject to regulation by the Department of Business and Professional Regulation. However, it is unclear whether such contests may be subject to other restrictions or regulations.

Consumer protection concerns have been raised around the country regarding daily fantasy contests. Some states have proposed rules to provide consumer protections, including limiting each player to a deposit of a certain amount each month, requiring prominent disclaimers, requiring advertising indicating where participants experiencing addiction can get help, prohibiting daily fantasy contests based on the performance of high school and college athletes, and requiring participants to be at least 21 years old.³⁹ Further potential consumer protection concerns arise from disparities in skill level between participants in daily fantasy contests. One study indicates that professional, full-time fantasy contest participants may have a significant advantage over casual or recreational participants.⁴⁰

The bill does not restrict a contest participant from filling his or her fantasy team with a majority of players from the same actual team, which could create an argument that the participant has created a team based on the current membership of an actual team and thus is seeking a winning outcome based indirectly on a sports game or performance, which may violate PAPSA.⁴¹

The bill states that one of the conditions required to meet the definition of the term "fantasy contest" is that the value of all prizes and awards offered to winning players must be established and made known in advance of the contest. This condition differs from similar language in UIGEA, which states that the value of such prizes is not determined by the number of participants in the contest or the amount of fees paid by the participants. If the bill language is intended to conform to UIGEA language, this could be amended to conform.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

³⁹ BOSTON GLOBE, *Mass. AG proposes age limit for daily fantasy sports*, <https://www.bostonglobe.com/business/2015/11/19/healey-proposes-fantasy-sports-regulations-amid-scrutiny/iCzChEnIpfAduKuNuqLtM/story.html> (last visited Mar. 26, 2017).

⁴⁰ In one study, based on a portion of the 2015 baseball season, 91% of contest prizes were won by 1.3% of the participants. See McKinsey & Company, *For daily fantasy-sports operators, the curse of too much skill*, http://www.mckinsey.com/insights/media_entertainment/for_daily_fantasy_sports_operators_the_curse_of_too_much_skill (last visited Mar. 26, 2017). See DANIEL BARBARISI, *DUELING WITH KINGS: HIGH STAKES, KILLER SHARKS, AND THE GET-RICH PROMISE OF DAILY FANTASY SPORTS* 56-57 (2017).

⁴¹ 28 U.S.C. § 3702 (1992).