

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 223 Fantasy Contests

**SPONSOR(S):** Brodeur

**TIED BILLS:** **IDEN./SIM. BILLS:** CS/SB 374

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Tourism & Gaming Control Subcommittee	13 Y, 0 N	Bowen	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.

In recent years, a variation of fantasy contests known as daily fantasy contests has become very popular 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.

Under current law, Florida does not expressly allow or disallow daily fantasy contests to be conducted and Florida courts have not addressed whether fantasy contests violate Florida's prohibitions on gambling. However, Florida's Attorney General has opined in the past that fantasy contests appear to violate the prohibition on betting on contests of skill.

The bill provides that "fantasy contests" as defined in the bill are exempt from Florida's gambling statutes and are exempt from regulation by the Department of Business and Professional Regulation.

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

The bill provides for an effective date of October 1, 2018.

# 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.<sup>1</sup>

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.<sup>2</sup> In 2017, an estimated 59.3 million people competed in fantasy contests in the United States and Canada.<sup>3</sup>

#### **Current situation:**

Florida law generally prohibits gambling.<sup>4</sup> Exceptions to the general prohibition include the Florida Lottery,<sup>5</sup> pari-mutuel wagering<sup>6</sup> on three types of horseracing,<sup>7</sup> greyhound dog racing,<sup>8</sup> and jai alai,<sup>9</sup> slot machines at certain pari-mutuel facilities,<sup>10</sup> authorized cardrooms,<sup>11</sup> and specified gaming at certain tribal facilities.<sup>12</sup> Under s. 849.14, F.S., it is also unlawful to bet on any "contest of skill."

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<sup>1</sup> 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](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).

<sup>2</sup> 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>.

<sup>3</sup> FANTASY SPORTS TRADE ASS'N, <http://fsta.org/research/industry-demographics/> (last visited Jan. 19, 2018).

<sup>4</sup> s. 849.08, F.S.

<sup>5</sup> The Department of the Lottery is authorized by s. 15, Art. X, Florida Constitution. Section 24.102, F.S., creates the Department of the Lottery.

<sup>6</sup> "Pari-mutuel" means 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. S. 550.002(22), F.S.

<sup>7</sup> The definition of "horserace permitholder" specifies thoroughbred racing, harness racing, and quarter horse racing. S. 550.002(15), F.S.

<sup>8</sup> See s. 550.002(29), F.S.

<sup>9</sup> A ball game of Spanish origin played on a court with three walls. s. 550.002(18), F.S.

<sup>10</sup> See FLA. CONST. art. X, s. 23; ch. 551, F.S.

<sup>11</sup> Sections 849.086, F.S.

<sup>12</sup> ss. 285.710 and 285.712, F.S.

### *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.<sup>13</sup>

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.<sup>14</sup>

### *Legality of Fantasy Contests under Florida Law*

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. However, Florida's Attorney General has opined in the past that fantasy contests appear to violate s. 849.14, F.S., which prohibits betting on games of skill.

They may also be subject to the state's anti-bookmaking statute. Section 849.25, 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 depositary of money as part of such a stake, bet, or wager is also unlawful.

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.<sup>15</sup>

In 1991, the Attorney General of Florida issued a non-binding advisory legal opinion (AGO)<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup>

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.

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<sup>13</sup> FLA. HOUSE OF REPRESENTATIVES SELECT COMMITTEE ON GAMING, *Final Bill Analysis of 2013 CS/HB 155*, p. 1 (Apr. 19, 2013).

<sup>14</sup> s. 546.10, F.S.

<sup>15</sup> s. 849.25(1)(b), F.S.

<sup>16</sup> 91-03 Fla. Op. Att'y Gen. (1991).

<sup>17</sup> *Creash v. State*, 131 Fla. 111, 118 (Fla. 1938).

<sup>18</sup> 91-03 Fla. Op. Att'y Gen. (1991).

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."<sup>19</sup>

### *Legality of Fantasy Contests under Federal Law*

The federal Unlawful Internet Gambling Enforcement Act of 2006<sup>20</sup> (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"<sup>21</sup> 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.

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."<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> For instance, in 2015, the Attorney General of Nevada opined that daily fantasy contests constitute sports pools under Nevada law.<sup>25</sup> 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.<sup>26</sup>

### *Gaming Compact*

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<sup>19</sup> *Id.*

<sup>20</sup> 31 U.S.C. § 5361-5366 (2006).

<sup>21</sup> 31 U.S.C. § 5362(1) (2006).

<sup>22</sup> 31 U.S.C. § 5361(b) (2006).

<sup>23</sup> 28 U.S.C. § 3702 (1992).

<sup>24</sup> See LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Jan. 19, 2018).

<sup>25</sup> 2015-102 Nev. Op. Att'y Gen. 8 (2015).

<sup>26</sup> See LEGAL SPORTS REPORT, <http://www.legalsportsreport.com/dfs-bill-tracker/> (last visited Jan. 19, 2018).

In 2010 the State of Florida entered into a gaming compact with the Seminole Tribe of Florida (2010 Compact). Under the 2010 compact, in exchange for the exclusive authority to offer banked card games in Florida and for exclusive authority to conduct slot machine gaming outside Miami-Dade and Broward Counties, the Seminole Tribe makes revenue sharing payments to the State of Florida (approximately \$240 million per year). 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 under various circumstances, including 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. In December 2017, the Tribe sent a letter to the Legislature claiming that if the State of Florida allowed fantasy sports contests it would violate their exclusivity and allow the Tribe to cease all future revenue sharing payments under the 2010 compact.<sup>27</sup>

### **Effect of the bill:**

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

- The fantasy contest operator 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, but excludes individuals who serve as the commissioner of no more than 10 fantasy contests in a calendar year.

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 appear not to be excluded from the exemption from the prohibitions contained in ch. 849, F.S.

## **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 October 1, 2018.

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<sup>27</sup> Letter from Marcellus Osceola, Jr., Vice Chairman of the Seminole Tribe of Florida, to Senator Travis Hutson and Representative Mike La Rosa (December 5, 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.<sup>28</sup> Further potential consumer protection concerns arise from disparities in skill level

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<sup>28</sup> 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/iCzChEn1pfAduKuNuqLtM/story.html>.

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.<sup>29</sup>

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.<sup>30</sup>

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**

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<sup>29</sup> 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\\_skill223](http://www.mckinsey.com/insights/media_entertainment/for_daily_fantasy_sports_operators_the_curse_of_too_much_skill223). See DANIEL BARBARISI, *DUELING WITH KINGS: HIGH STAKES, KILLER SHARKS, AND THE GET-RICH PROMISE OF DAILY FANTASY SPORTS* 56-57 (2017).

<sup>30</sup> 28 U.S.C. § 3702 (1992).