

# Sports Litigation Alert

Reprinted from *Sport Litigation Alert*, Volume 6, Issue 15 August 28, 2009. Copyright © 2009 Hackney Publications.

## Will Fantasy Sports Always Be Exempted From Gambling Laws? Don't Bet On It

By Mitchell C. Stein

Fantasy sports has mushroomed from a hobby for a handful of die-hard fans a few years ago to a massive business enterprise that now includes some of the biggest brand names in sports. Current estimates suggest that Americans are spending over a billion dollars each year playing fantasy sports. According to the Fantasy Sports Trade Association there are more than 18 million fantasy sports players in the United States.

Participants in the fantasy sports leagues typically pay a fee, select professional players in their particular sports, and win (in some instances, substantial) cash and non-cash prizes based on the results of their fantasy team's performance at the end of the season. Some leagues award prizes on a weekly basis, others typically award prizes at the end of a sport's season.

The internet has fueled the explosive growth of fantasy, as web site software can easily manage, manipulate, and present the voluminous amounts of statistics fantasy sports participants rely on in selecting their teams and deciding whether and when to trade players. Large, publicly traded companies such as ESPN and CBS sponsor fantasy sports leagues, and have done so for some time. Fantasy sports may also be expanding. For instance, CBS Sports invites participants to set up a "Mobile Fantasy Football Companion," where players can access their fantasy sports team on their cell phones. In addition, a new company, FanDuel, provides players with the ability to play a daily fantasy sports game — not a weekly or seasonal game — for cash prizes.

American pro leagues also have traditionally embraced and encouraged fantasy sports, seeing them as powerful sources of advertising revenue and for encouraging fan interest in their sports. The leagues' embrace of fantasy sports stands in stark contrast to their unflinching opposition to other forms of sports betting, which the leagues view as damaging to the integrity of their sports. Acting on these beliefs, the leagues

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helped lobby for passage of federal legislation in 2006, the Unlawful Internet Gambling Enforcement Act (the "2006 Act"), which curbs the use of credit cards and other financial instruments to pay bets and gambling debts (including sports betting), but specifically exempts fantasy sports from its definition of "gambling."

The problem is that fantasy sports still may qualify as illegal gambling under state laws and a host of other federal laws, none of which are affected by the 2006 Act. As a general rule, state and federal anti-gambling laws define gambling very broadly. New York State, for instance, defines gambling as occurring whenever a person stakes or risks something of value (i.e., a bet or wager) upon the outcome of a contest of chance or future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome. NY Penal Law §225.00(2). Many other states have similar definitions.

The broad application of state gaming laws raises uncertainty regarding whether these laws apply to fantasy sports. For instance, does paying an entrance fee to join a fantasy sports league constitute a "bet or wager?" In 2007, a federal court in New Jersey concluded that entrance fees in large-scale fantasy sports games organized by Viacom where cash and non-cash prizes were available did not constitute bets or wagers. See *Humphrey v. Viacom, Inc.*, 2007 WL 1797648 (D.N.J. June 20, 2007). It is far from clear, however, that the *Humphrey* decision would apply equally to fantasy sports games where only cash prizes are awarded, especially if the cash prize was based on the amount of entrance fees collected.

Also undecided is whether fantasy sports would be considered "games of chance." Clearly the outcome of fantasy sports leagues depend on events outside the control of the fantasy sports participants. For example, professional sports players who are "drafted" onto fantasy sports teams may be



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injured, or suspended from play, thereby affecting a fantasy teams' overall performance in a league. Proponents of fantasy sports claim that fantasy sports are games of skill because the fantasy sports participant acts like a team manager, and his or her strategy in accounting for such risks and random events is what determines his or her success in the league. This "risk management" argument, however, applies equally to poker and blackjack, whose players are dealt cards at random and make strategic decisions based in part on the laws of probability and risk analysis. Poker and blackjack traditionally have been held to be classic examples of gambling.

Major on-line fantasy sports portals seem to be aware of the potential for running afoul of state and federal gambling laws, and the portals' responses show the level of confusion and uncertainty that exists. For instance:

ESPN's fantasy site, <http://games.espn.go.com/frontpage>, states for its fantasy baseball game that residents of Arizona, Iowa, Louisiana, Maryland, Montana, North Dakota, Tennessee, Vermont, or Washington State may purchase and participate in the game, but are not eligible to win any of the prizes. Also, the ESPN rules proclaim that, "This Promotion is strictly for entertainment purposes and may not be used in connection with any form of gambling."

CBS's fantasy site, <http://www.cbssports.com/fantasy>, offers several types of "Contests". One "contest" states that "eligible legal residents of Canada, Arizona, Iowa, Louisiana, Maryland, Montana and Vermont may play Fantasy Basketball Gold, but are not eligible to win any prizes." The basketball "Platinum and Diamond" contests are not open to residents of "Arizona, Iowa, Louisiana, Maryland, Montana and Vermont and Puerto Rico." The web site further includes the disclaimer that, the "Contest may not be used for any form of gambling."

These rules and disclaimers create the impression that these games are permitted under state and federal gambling law except in those states specifically identified on the web site. This impression, however, is subject to dispute. Even among the web sites identified above, there is little agreement about which states prohibit or limit either fantasy sports, or awarding prizes in connection with such games. Both sites identify Arizona, Iowa, Louisiana, Maryland, Montana, and Vermont as states that prohibit the awarding of prizes for on-line fantasy sports gaming. ESPN, however, also identifies North Dakota, Tennessee, and Washington State. CBS also identifies Puerto Rico.

Finally, the 2006 Act containing the fantasy sports exemption is currently under challenge on at least two fronts. First, in a lawsuit filed in federal court in New Jersey, Interactive Media Entertainment and Gaming Association, Inc. v. Alberto Gonzales, The Federal Trade Commission and the Federal Reserve System, 07cv02625 (MLC), plaintiff, a trade association made up of gaming promoters, argues that the Act is unconstitutional and violates US treaty obligations. While the New Jersey District Court has dismissed the action, the action is currently on appeal. Additionally, US Representative Barney Frank is spearheading efforts in Congress to repeal the Act. If the Act were to be struck down or repealed, its fantasy sports exemption would vanish as well.

So far, law enforcement has shown little to no interest in pursuing fantasy sports promoters under current gambling laws, perhaps because fantasy sports are considered harmless, promoted by the leagues and are generally viewed to be different from traditional sports betting and other gambling that carry more of a moral stigma and which have historically been prosecuted with considerable vigor. Given other circumstances, for example, if fantasy sports gamers were caught attempting to affect outcomes of games or player performance as has happened in cases of organized crime gambling, or if the pro leagues withdrew their support of the games, or if trends began appearing that showed fantasy sports gamblers suffering the same social and health problems associated with so-called traditional gambling, then law enforcement officials could be prompted to take a closer look, and it's possible they would have the tools to do so. And then all bets are off.

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