SHOULD THE KENTUCKY LEGISLATURE FOLLOW MONTANA’S LEAD IN REGULATING FANTASY SPORTS?

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I. INTRODUCTION

Who is a male, Caucasian, not married, in their mid thirties, has a college degree, and consumes more than seventeen hours of sports per week? The answer is the average fantasy sports player.¹ There are currently more than 41.5 million fantasy sports players in the United States and Canada, and these individuals spend more than $3.6 billion dollars on fantasy sports leagues a year.² However, are fantasy sports “just another form of illegal gambling,” and should states enter into the realm of regulating such a lucrative industry?³ Montana is the lone state in the United States that has established specific legislation to make a profit off of fantasy sports, and Kentucky could easily follow suit. Such legislation could be the spark that Kentucky needs to take the chance at other gambling ventures, which could generate significant revenue and economic development. Further, the revenue earned from fantasy sports legislation could go toward helping the horse racing industry or education programs such as the Kentucky Educational Excellence Scholarship.

II. GAMBLING LAW

The determining factor regarding the legality of a betting game is “skill.”⁴ The amount of skill versus chance, in relation to playing the game, is the primary analysis of a gambling issue.⁵ Whereby, “the more skill that is involved, the more likely the game is legal.”⁶ Gambling regulations are mostly a function of state law and can vary considerably.⁷ While there are federal gambling laws, the federal statutes do not attempt to create uniformity among the states, and the primary purpose behind such federal statutes is to aid the states in controlling

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². Id.
⁴. Id.
⁵. Id.
⁶. Id.
⁷. Id.
gambling. In most states a gaming activity is legal unless three elements are present: consideration, reward, and chance.

Consideration focuses particularly on whether an individual provided money or a valuable item of property in exchange for the chance of greater winnings. Reward is the prize that one receives after winning a game of chance. Chance looks at whether the outcome of the game depends upon factors out of a player’s control. When looking at chance, the courts have applied three different tests: (1) the “dominant factor test,” (2) the “any chance test,” and (3) the “gambler’s instinct test.”

The majority of states use the “dominant factor test,” which analyzes whether the dominant factor in a participant’s success is beyond his control, even though the participant exercises some degree of skill. Thus, it is a threshold test that looks to see if chance affects the outcome by more than 50%. Some states use the “any chance test,” which determines an activity is a game of chance if any element of chance is present. Finally, a few states use the “gambler’s instinct test,” which determines an activity is a game of chance if the game appeals to the “gambling spirit,” without regard to whether skill or chance dictates the outcome.

III. FANTASY SPORTS LEGISLATION

Fantasy sports present a challenge to the standard analysis of gambling law because fantasy sports are different from other gambling activities. Further, there is the constant debate as to whether fantasy sports are an activity of skill or chance. Plus, fantasy sports are also different from each other when you consider the particular sport such as football, baseball, basketball, or racing and the different kinds of leagues people join. Thus, it has been argued that a better
One approach to reign in fantasy sports is for states to pass specific fantasy sports legislation.\textsuperscript{21} One state that has emerged to take up the challenge is Montana.\textsuperscript{22}

Montana passed legislation in 2007, which directly regulates fantasy sports leagues.\textsuperscript{23} In fact, Montana has a specific section in its annotated code that addresses fantasy sports under “gambling.”\textsuperscript{24} For starters, it defines a “fantasy sports league” as a gambling activity conducted in the following manner:

(1) A fantasy sports league consists of a limited number of persons or groups of persons who pay an entrance fee for membership in the league. The entrance fee may include an administrative fee.

(2) Each league member creates a fictitious team composed of athletes from a given professional sport, such as baseball, basketball, or football. Player selection is conducted through random drawings, a bidding process, or by selection from a roster prepared by the parimutuel network coordinator.

(3) Except for fantasy sports leagues operated under Title 23, chapter 4, after the initial teams are selected, interim replacement of players may occur by trade or purchase. A specific fee, which may not exceed the total entrance fee, is charged for each transaction.

(4) A method, as defined by league rules, is devised to permit each team to compete against other teams in the league. Points are awarded to a team according to the performance of individual players or teams or both during a designated time period.

(5) A league member may be eligible to receive a payout based on the number of points accumulated. Payouts, which may be in the form of cash or prizes, are awarded according to league rules.

(6) The roster of eligible participants prepared by the parimutuel network must be provided to each league member.

(7) Rules governing the conduct of the fantasy sports league must be provided in writing to each league member.\textsuperscript{25}

Further, in Montana it is “lawful to conduct or participate in a fantasy sports league, including a fantasy sports league that is operated under a parimutuel system of wagering” by the state.\textsuperscript{26} However, “it is unlawful to wager on a

\textsuperscript{21} See Buerger, supra note 3.

\textsuperscript{22} See id.


\textsuperscript{24} MONT. CODE ANN. 23-5-801 (West, 2014).

\textsuperscript{25} Id.

\textsuperscript{26} Id. § 23-5-802.
fantasy sports league by telephone or by the internet” through companies such as DraftKings.com or FanDuel.com, for example.27

Parimutuel betting is a betting system in which those holding winning tickets divide the total amount bet in proportion to their wagers, less a percentage for the management and taxes of such bets.28 In Montana, a “fantasy sports parimutuel system” is a computerized system or component of a system that is used to receive wagering information from and transmit pool data to a parimutuel network.29 A “fantasy sports parimutuel wager” is a wager at a licensed parimutuel facility in Montana, through a fantasy sports league, on professional sporting events offered as part of a common parimutuel pool.30

There are two types of licensed entities in Montana that are authorized to facilitate and monitor wagering on fantasy sports leagues within the state.31 The first is a “parimutuel facility,” which is a facility licensed by the Board of Horse Racing, where fantasy sports leagues are conducted and wagering on the outcome of fantasy leagues is permitted.32 The second is a “parimutuel network,” which is an association licensed by the Board of Horse Racing to compile and distribute fantasy sports league rosters and weekly point totals for licensed parimutuel facilities, and to manage statewide wagering pools on fantasy sports leagues.33 “In addition, a parimutuel network includes a person engaged in providing the parimutuel fantasy sports system or service directly related to the reconciliation of a common fantasy sports parimutuel pool and transfer of funds between the participating fantasy sports parimutuel facilities.”34

Thus, in layman’s terms, Montana has turned fantasy sports into a lottery game.35 Essentially, a fantasy sports player can walk into a Montana bar that is licensed to engage in fantasy sports gambling and place a bet.36 For example, a “league member,” which Montana defines as a person at least eighteen years of age who participates in fantasy sports parimutuel wagering at a Montana-licensed fantasy sports parimutuel facility,37 can engage in a weekly fantasy football

27. Id.  
32. MONT. CODE ANN. § 23-4-101(10).  
33. Id.  
34. MONT. ADMIN. R. 32.28.2201(14) (2014).  
36. For the purposes of this comment I will use fantasy football as the primary example to show how Montana’s fantasy sports lottery works.  
37. MONT. ADMIN. R. 32.28.2201(10).
league within Montana by creating his own fantasy team. The league member selects five eligible football players and a defensive unit from the Montana Lotter Commission’s official roster. The league member chooses a Quarterback, Running Back, Wide Receiver, Tight End, Kicker, and a Defensive Unit. The first five positions are represented with individual four-digit numbers. The first two digits represent the football player’s team, and the last two digits represent the football player’s jersey number. The Defensive Unit is only represented by two numbers, which identify the NFL team. After the league member builds his team, he chooses an amount to wager: $5, $10, $20, $50, or $100. The amount that the league member wagers determines the number of shares of prize money that the winning league member receives. The league member will receive a play slip, similar to a horse bet, which identifies the football players that make up the fantasy team.

Scoring mirrors that of a traditional fantasy football league. However, the game will pay out like a traditional lottery. The payout divides the total prize pool, 74% of ticket sales for the week, into first, second, and third prizes, with first place going to the fantasy football team with the highest point total. 50% of the pool goes to the first prize, 30% goes to the second prize, and 20% goes to the third prize. In the event of multiple tickets with the same point totals, the prize level will be split depending on the number of shares each player chose. Winning tickets for the prior week are paid after the Montana Lottery issues the official results the following Tuesday morning. Winners can redeem tickets up to $599.99 at any fantasy sports wagering facility, but winners must claim tickets that are $600 or more from the Montana Lottery Headquarters.

26% of the ticket sales that were waged on fantasy sports that week are taken out of the pool and distributed as follows:

(i) 15.3846% to the parimutuel facility licensee;

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39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
45. Id.
46. Difino, supra note 34.
47. Montana Sports Action Fantasy Football, supra note 37.
48. Id.
49. Id.
50. Id.
51. Id.
(ii) 23.0769% to the parimutuel network licensee as an administrative fee; and

(iii) 61.5385% to the board’s special revenue account (state’s percentage). 52

However, no more than 10% of the amount collected by the state may be appropriated by the legislature for administration of such activities. 53 The state must deposit the remaining portion in a special revenue account for distribution to live horse racing purses and for other purposes that the Horse Racing Board considers appropriate for the good of the existing horse racing industry in Montana. 54

Finally, the state may charge a person with a misdemeanor if he is operating any type of facility or network that conducts fantasy sports wagering without first being licensed, as well as any other individuals if they violate statutes under the fantasy sports laws of Montana. 55 Thus, daily fantasy sports leagues, such as DraftKings.com or FanDuel.com are illegal in Montana because these leagues offer cash prize awards that violate Montana’s regulations. 56 Yet, fantasy leagues on ESPN or Yahoo! are free from any liability in Montana because they do not charge entry fees to participants. 57

IV. KENTUCKY’S CALL TO ACTION

Montana implemented fantasy sports legislation in 2007 in order to allow the Board of Horse Racing to breathe some financial life into horse racing in Montana. 58 The popularity of horse racing had diminished significantly, and falling attendance had both forced the cancellation of races, and reduced betting, thus cutting the purses paid to owners of the winning horses. 59 The fantasy sports legislation allowed Montana’s Board of Horse Racing to enter into an interagency agreement to have Montana’s Lottery Commission provide fantasy sports gambling. 60 The first two years of fantasy sports legislation in Montana generated more than $181,000 on professional football and NASCAR fantasy sports wagers. 61 While this number is not significantly large, the curiosity from a new group of gamblers and an industry that generates more than $3.6 billion in

52. MONT. CODE ANN. § 23-4-302(5)(b) (West 2014).
53. Id. § 23-4-302(5)(b)(iii).
54. Id.
55. Id. § 23-4-202(1)(b).
58. Johnson, supra note 23.
59. Id.
60. Id.
61. Id.
revenue each year is still enticing. Thus, Kentucky should try its hand at regulating fantasy sports. Because such regulation may be the spark that leads to other gambling ventures within the state, which could generate significant revenue.

Kentucky essentially has two logical options in order to implement fantasy sports legislation within the state. The state legislature could either mimic Montana and put fantasy sports in the hands of the Kentucky Horse Racing Commission, or it could allow the Kentucky Lottery Corporation to implement and regulate fantasy sports.

A. Kentucky Horse Racing Commission

The legislature of Montana implemented statutes and regulations concerning fantasy sports under Montana’s general gambling and horse racing provisions to benefit Montana’s Board of Horse Racing. Kentucky could do the same thing by passing similar legislation and placing fantasy sports under the control of the Kentucky Horse Racing Commission under Chapter 230 of the Kentucky Revised Statutes.

The Kentucky Horse Racing Commission (“Commission”) is an independent agency, responsible for regulating the conduct of horse racing and parimutuel wagering on horse racing, and related activities within the Commonwealth of Kentucky. Due to the Commission’s familiarity dealing with parimutuel wagering on horse racing, it could easily regulate the parimutuel network needed to run a fantasy sports league lottery. In return for implementing and monitoring fantasy sports, the state could allow the Commission to use its share of the state’s takeout amount of the fantasy sports wagering proceeds to use for live horse racing purses, and for other purposes that the Commission considers appropriate in order to maintain the state’s pinnacle status within the horse racing industry.

B. Kentucky Lottery Corporation

Another logical way for Kentucky to regulate fantasy sports would be to pass legislation similar to Montana’s under chapter 154A of the Kentucky Revised Statutes, which governs the state lottery. The Kentucky Lottery Corporation conducts and administers lottery games within Kentucky. The Kentucky Lottery

62. See Difino, supra note 35.
65. Johnson, supra note 23.
68. KY. REV. STAT. ANN. § 154A.060(1).
Corporation is not only responsible for maximizing revenue for the state, but also for providing entertainment to Kentucky citizens.\(^69\) Thus, implementing a new fantasy sports lottery game similar to Montana’s would be easy for the Kentucky Lottery Corporation.

However, if Kentucky implemented a fantasy sports lottery under the oversight of the Kentucky Lottery Corporation, it should make sure that all revenue generated is included with all other lottery revenue. 27% of every dollar spent on fantasy sports would go to the Commonwealth of Kentucky to invest directly back in the state.\(^70\) Kentucky should then split the funds among two groups. 55% of the funds should go to grant and scholarship programs that help Kentucky students defray college educational costs, such as the Kentucky Educational Excellence Scholarship ("KEES").\(^71\) The remaining 45% should go towards the state’s general fund, and to the Support Education Excellence in Kentucky ("SEEK") program, which funds K-12 education.\(^72\) Therefore, not only would fantasy sports players win, but Kentucky students would also win from the revenue fantasy sports legislation could generate.

V. CONCLUSION

Fantasy sports are a very profitable industry, and states have been blind to see this as a potential revenue stream. Montana has established a legislation scheme centered on fantasy sports, and Kentucky could easily follow suit. The money generated from fantasy sports legislation could help the horse industry or provide more funds for education programs within the state of Kentucky. Additionally, this could be the spark our legislature needs to truly make a push towards legalizing other sources of gambling revenue. One way or another, Kentucky needs to continue to invest in the future of this state, and fantasy sports legislation could be a fun and easy way to generate more revenue.

\(^{69}\) Id.


\(^{71}\) Id.

\(^{72}\) Id.