

Living in a Fantasy

Joseph M. Kelly

COURTS HAVE GIVEN a major victory to the fantasy sports industry against those professional athlete player and owner associations that have sought to maintain control over licensing of all professional sports player data. Specifically, the First Amendment freedom to use player statistics and other information has been found to trump any major league player or owner right to publicity in that information. While the litigation did not address wagering or gambling in any significant way, recent decisions have opened the door to entrepreneurs who will increase marketing of fantasy sports, especially since federal law has exempted fantasy sports leagues under certain conditions from criminal liability under the 2006 federal anti-Internet gambling act.

Fantasy sports presently attract about 18 million players from the United States.¹ Approximately 80 percent play fantasy football, 30 percent play fantasy baseball, and 86 percent are male.² Station Casinos, the fifth largest U.S. sports book, is accepting “wagers based on players’ projected fantasy statistics.”³ Fantasy sport leagues have been extended to bowling, darts, celebrity leagues, and even “fantasy Congress leagues.”⁴ Fantasy Fishing Awards is offering a \$1 million grand prize and 4,000 other prizes in its online game.⁵

Typically, a fantasy sports baseball league is formed by “a handful of baseball fanatics who are willing to wheel and deal throughout the course of the baseball season.”⁶ There should be between 10 and 20 teams of 23 players, the selection of the commissioner, and the drafting or auctioneering of play-

ers for teams.⁷ Often in a privately run fantasy league, a player will submit an entry fee and hope to win a prize or money. The entrance fee and the winning of prizes could be considered a bet and therefore be possible illegal gambling.

Fantasy sports is said to have developed at a dinner conversation at La Rotisserie Francaise, a Manhattan restaurant, in 1980 when a group of friends developed baseball leagues with a \$250 salary cap.⁸ The first widely played fantasy baseball game became known as the Rotisserie League Baseball.⁹ The concept of a fantasy league became especially popular as a result of the Internet:

[T]he burgeoning internet age transformed fantasy baseball into the billion-dollar industry it is today. Putting fantasy sports online made the onerous task of manually manipulating data unnecessary, thereby heightening

¹ Fantasy Sports Trade Association, <<http://www.fsta.org/>> (last visited June 20, 2008).

² Bill Shea, *Reality of fantasy: Yes, they're playing Fantasy Sports at work, but is that bad? Some executives bet not*, CRAIN'S DETROIT BUS., Mar. 17, 2008 at 11; see also Fantasy Sports Trade Association, *supra* note 1.

³ John McFarland, *Vegas Sports Book to Take Fantasy Bets*, AP, Aug. 29, 2007.

⁴ Jon Boswell, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, And Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1259 (2008).

⁵ Press release, FLW Fantasy Fishing, 7.3 Million FLW Fantasy Fishing Awards Second \$100,000 prize, PR Newswire (Apr. 18, 2008). Participation is free.

⁶ Fantasy Sports Trade Association, *How To Play Fantasy Baseball*, <<http://www.fsta.org/faq/howtoplay/baseball.php>> (last visited June 20, 2008).

⁷ *Id.*

⁸ Answering brief of Appellee at 3, *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, No. 06-3357* (8th Cir. Mar. 16, 2007).

⁹ *Id.*

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fantasy baseball's appeal to the public at large and allowing fantasy managers to obtain fresh data during ongoing ballgames rather than wait for the next day's newspaper.¹⁰

THE EIGHTH CIRCUIT WEIGHS IN

In 1992, CBC Distribution and Marketing, Inc. (CBC) founders Carol Matthews, Brian Matthews, and Charlie Wiegert "developed one of the first 'salary cap' fantasy games", which "allows multiple fantasy game participants to have the same baseball player on his or her fantasy team."¹¹ CBC profited from utilizing the Internet for fantasy sports and eventually had 35 employees and operated fantasy sports games in football, golf, hockey, and other sports. On July 1, 1995, CBC contracted with the Major League Baseball Players Association (MLBPA) to allow CBC to use ballplayers' names, signatures, and other biographical data. The license was renewed for two years in 2002 with a "no challenge" clause prohibiting CBC from challenging the validity of the license.¹²

On Jan. 19, 2005, Major League Baseball Advanced Media (Advanced Media) contracted with MLBPA to acquire exclusive license and sublicense rights to use players' statistics, "Rights and Trademarks," etc. That day, Advanced Media informed CBC to stop using professional baseball statistics. Advanced Media refused to allow CBC a sublicense and would only allow CBC to have minimal involvement with fantasy baseball. On Feb. 17, 2005, CBC then sued Advanced Media in Missouri federal court and requested a declaratory judgment and an injunction that it had a right to use players' statistics. On June 8, 2005, the Major League Baseball Players Association was allowed to intervene.¹³

The four-count complaint alleged violation of the Lanham Act, Copyright Law, the right of publicity, and Missouri unfair competition/false advertising law. Advanced Media counterclaimed alleging, among other things, that CBC violated the players' right of publicity, state trademark and unfair competition laws. Advanced Media also claimed CBC was barred by the "no challenge" clause. On July 7, 2006, the parties agreed to dismiss with prejudice all counts except for plaintiff's right of publicity count and Advanced Media's publicity claims.

On Dec. 23, 2005 and on Mar. 10, 2006, plain-

tiff and defendants moved and cross-moved for summary judgment. The district court magistrate summarized the issues and granted plaintiff's motion on Aug. 6, 2006:¹⁴

[T]he only remaining issues before this court are whether the players have a right of publicity in their names and playing records as used in CBC's fantasy games; whether, if the players have such a right, CBC has, and is, violating the players' claimed right of publicity; whether, if the players have a right of publicity and if this right has been violated by CBC, such a violation is preempted by copyright law; whether, if the players have a right of publicity which has been violated by CBC, the First Amendment applies and, if so, whether it takes precedence over the players' claimed right of publicity; and whether CBC has breached the 2002 Licensing Agreement.¹⁵

The district court concluded that CBC did not use the players' names in its fantasy baseball games "with the intent to obtain a commercial advantage"¹⁶ and thus there was no violation of a right of publicity. CBC's use of players "simply involves historical facts . . ." ¹⁷ and, if anything, "actually enhances the marketability of the players."¹⁸

Even if the players' right to publicity had been violated, the court concluded CBC would be protected under the First Amendment, which protects commercial speech. The court decided to balance the First Amendment with the players' publicity right:

Moreover, assuming, *arguendo*, that the players have a right of publicity in their names and

¹⁰ Dana Howells, *CYBERLAW: A Note: Log Me in to the Old Ballgame: C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, LP*, 22 *BERKELEY TECH. L.J.* 477, 487-88 (2007).

¹¹ Answering brief of Appellee at 9-10, *C.B.C. Distribution*, *supra* note 8.

¹² *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, 443 F. Supp. 2d 1077, 1080-82 (E.D. Mo. 2006).

¹³ *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media*, No. 4:05CV252MLM, 2005 U.S. Dist. Lexis 24900 (E.D. Mo. June 8, 2005).

¹⁴ *CBC Distribution*, 443 F. Supp. 2d 1077.

¹⁵ *Id.* at 1082-83.

¹⁶ *Id.* at 1089.

¹⁷ *Id.*

¹⁸ *Id.* at 1091.

playing records and that CBC has and is violating the players' right of publicity, the court finds, in the circumstances of this case, that the players' right of publicity must give way to CBC's First Amendment right to freedom of expression.¹⁹

The district court, rejecting CBC's argument that federal copyright had preempted the rights of publicity, concluded that players' names and records "are not copyrightable."²⁰ Finally, the court concluded that the "no-challenge" provision in the CBC Players Association 2002 agreement was unenforceable because of federal public policy, which favors "the full and free use of ideas in the public domain."²¹

Predictably defendants appealed to the Eighth U.S. Circuit Court of Appeals. Amici curiae briefs were filed for NBA Properties, Inc., NHL Enterprises, L.P., NFL Ventures, L.P., National Association for Stock Car Auto Racing, Inc., PGA TOUR, Inc., and WNBA Enterprises, LLC. A separate appearance was also entered for the National Football League Players Association. At oral argument on June 14, 2007, the three-judge panel of the Eighth Circuit appeared most hostile toward lawyers representing Advanced Media. Chief Judge James Loken, addressing defendant's counsel, stated, "If your clients have the exclusive rights to license the purveyors of the billion and a half [dollar a year] fantasy sports world, we're looking at concerted action by owners and players to monopolize a collateral market through conduct that's not protected by the labor anti-trust exemption."²²

On Oct. 29, 2007, the Eighth Circuit affirmed the district court's conclusion that the First Amendment protected plaintiff's activity, but for different reasons.²³ The Eighth Circuit reversed the lower court's determination that there was no player right to privacy:

Because we think that it is clear that CBC uses baseball players' identities in its fantasy baseball products for purposes of profit, we believe that their identities are being used for commercial advantage and that the players therefore offered sufficient evidence to make out a cause of action for violation of their rights of publicity under Missouri Law.²⁴

The Eighth Circuit however, concluded that the First Amendment outweighed players' right to privacy:

The Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations, see *Zacchini v. Scripps-Howard Board.*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977), and here we conclude that the former must give way to the latter. First, the information used in CBC's fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a first amendment right to use information that is available to everyone. It is true that CBC's use of the information is meant to provide entertainment, but "speech that entertains, like speech that informs, is protected by the First Amendment because '[t]he line between the informing and the entertaining is too elusive for the protection of that basic right.'"²⁵

The appeals court, in a 2–1 decision, affirmed the lower court determination that the no-challenge provision was invalid, but also for a different reason:

This is quite obviously a representation or warranty that the Players Association did in fact own the state law publicity rights at issue here. For the reasons given above, the Players Association did not have exclusive "right, title and interest" in the use of such information, and it therefore breached a material obligation that it undertook in the contract. CBC is thus relieved of the obligations that it undertook, and the Players Association cannot enforce the contract's no-use and no-challenge provisions against CBC.²⁶

Defendants-appellants petitioned for a rehearing en banc²⁷ claiming, *inter alia*, the appellate court

¹⁹ *Id.* at 1100.

²⁰ *Id.* at 1103.

²¹ *Id.* at 1106.

²² Greg Ambrosius, *Realities of Fantasy: Appeals Heard in Case Between MLB, Fantasy Provider*, SPORTS ILLUSTRATED, June 15, 2007, available at <<http://sportsillustrated.cnn.com/2007/fantasy06/15/fantasy.lawsuit/index.html>>.

²³ C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, 505 F.3d 818 (8th Cir. 2007).

²⁴ *Id.* at 822–23.

²⁵ *Id.* at 823.

²⁶ *Id.* at 825.

²⁷ Brief of Defendants-Appellants at 16, C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, No. 06-3357, 2007 WL 4207747 (8th Cir. Oct 29, 2007).

determination “that CBC Has a First Amendment Right to Use Players’ Identities in Commercial Fantasy Baseball Products, Conflicts with Numerous Decisions and Disrupts Settled Commercial Expectations and Relations.”²⁸ When the petition for rehearing was denied on Nov. 26, 2007,²⁹ the defendants-appellants then sought certiorari from the U.S. Supreme Court. The major argument of petitioners was that “The Courts are in conflict about the appropriate legal rule for weighing state-law publicity rights against first amendment interests” and that “only review by this Court can bring coherence to this body of law.”³⁰ On June 2, 2008, the Supreme Court denied the petition for certiorari.³¹ According to the president of the Fantasy Sports Trade Association, the decision “marks potentially the single biggest day in the history of the Fantasy Sports industry.”³² What is remarkable about the CBC case is that gambling or wagering was rarely mentioned in any of the briefs. Thus, whether payment for participation in fantasy sports for a prize might be prohibited by law has yet to be determined.

FANTASY SPORTS VIOLATE LAWS PROHIBITING GAMBLING?

Is fantasy sports gambling or wagering?

Gambling traditionally involves prize, consideration, and chance. If a player does not pay money to enter a fantasy sports league or contest, there is no consideration. The Fantasy Sports Trade Association, which represents about 120 to 150 of the industries’ companies, suggests in its online “How to Play Fantasy Baseball” that real money not be utilized, and instead allot each player \$260 in start-up play money:

Step 12: Each league has to make decisions on how they want to play and for what price. We do not recommend you play for money; think of the \$260 figure as a form of Monopoly money. But a league traveling trophy is a good idea, so that at least you have something concrete to play for.³³

Much has been written concerning the lack of negative effects from fantasy sports: there is no increase in bankruptcies, crime, or negative impact on

“the moral fiber of society” compared with other gambling.³⁴ Most fantasy sports operations do charge fees, which might be as high as \$1,500. Typical would be “Mid Session Fantasy Baseball,” which charges \$29.95 for a cash grand prize of \$10,000.³⁵ The National Football League (NFL), which was the most effective lobbyist in passing of the Unlawful Internet Gambling Enforcement Act,³⁶ insisted “fantasy football is a game of skill, and gambling is not.”³⁷ The NFL has no restrictions against its players engaging in fantasy sports and also “runs its own fantasy football site, and gets royalties from others.”³⁸

Gaming experts are puzzled by the NFL attitude. According to Professor I. Nelson Rose, the NFL position “doesn’t make sense to me how anti-gambling the pro and college sports have always been.” Arnie Wexler, who works to help recovering gambling addicts, stated he has “seen more than a few addicts get lured in by fantasy football. ‘I had a guy who was 27 years in recovery, and all of the sudden, he started picking fantasy football teams for his grandchild . . . the next thing you know, it gets his juices flowing, and it happens[.]’ ”³⁹ The change of the attitude of the NFL from hostility to acceptance of fantasy sports

²⁸ *Id.* at 1.

²⁹ C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, No. 06-3357 (8th Cir. order denying petition for rehearing Nov. 26, 2007).

³⁰ Petition for certiorari by Major League Baseball Advanced Media et al., No. 07-1099, (Feb. 22, 2008).

³¹ Major League Baseball Advanced Media v. C.B.C. Distribution & Mktg., Inc., No. 07-1099, 2008 U.S. LEXIS 4574 (June 2, 2008).

³² Tim Lemke, *Court upholds fantasy ruling*, WASHINGTON TIMES, June 3, 2008, at D3.

³³ Fantasy Sports Trade Association, How to Play Fantasy Baseball, <<http://www.fsta.org/faq/howtoplay/baseball.php>> (last visited June 20, 2008).

³⁴ Jon Boswell, *Fantasy Sports: A Game of Skill That Is Implicitly Legal Under State Law, And Now Explicitly Legal Under Federal Law*, 25 CARDOZO ARTS & ENT. L.J. 1257, 1259 (2008).

³⁵ Fanball.com, <<http://msbaseball.fanball.com/>> (last visited June 20, 2008).

³⁶ Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367.

³⁷ Jason La Canfora, *Beating Yourself Takes New Meaning; Reality of Fantasy Football Touches Lives of NFL Players in Some Way*, WASHINGTON POST, Aug. 13, 2006, at E1.

³⁸ Geoff Earle, *NFL Makes Fantasy Pass*, N.Y. POST, Oct. 10, 2006, available at <http://www.nypost.com/seven/10102006/business/nfl_makes_fantasy_pass_business_geoff_earle.htm>.

³⁹ Eddie Pells, *Billion-dollar fantasy football business is no gamble to NFL*, AP, Dec. 15, 2006

is puzzling especially since “for three decades the NFL distanced itself from fantasy football[.]”⁴⁰

Federal law. In October 2006, the Unlawful Internet Gambling Enforcement Act was suddenly enacted into law when it was attached to unrelated legislation. While it is uncertain what new offenses were created by the statute, there are two major exemptions from liability: interstate interactive horse-race wagering and fantasy sports. While the interstate horse race exemption did create controversy,⁴¹ there was minimal interest in the fantasy sports exemption, which states:

(ix) participation in any fantasy or simulation sports game or educational game or contest in which (if the game or contest involved 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:

(I) All prizes and wards 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.

(II) 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 event) in multiple real-world sporting or other events.

(III) No winning outcome is based-

(aa) on the score, point-spread, or any performance or performances of any single real-world team of any combination of such teams; or

(bb) solely on any single performance of an individual athlete in any single real-world sporting or other event.⁴²

An exception to the lack of interest in the exemption would be the Traditional Values Coal-

tion’s Rev. Louis P. Sheldon, who wrote on Apr. 5, 2006 that a proposed Internet gambling prohibition act would actually expand gambling by allowing interstate horseracing “and on-line wagers on fantasy sports teams.”⁴³ Sheldon maintained:

In the past, the National Football League has had two very different interests in this legislation—one, to protect the integrity of professional football by prohibiting online betting on NFL games, and, two, to line their pocket with royalties by preserving the legality of wagers involved in the growing fantasy sports industry. The NFL succeeds in protecting both interests in the Goodlatte legislation, which expressly exempts from illegality on-line wagers on fantasy sports teams. . . . It is disingenuous for the National Football League to present their position as anti-gambling when in fact they support carve outs for Fantasy Sports gambling as well as other forms of gambling.⁴⁴

Interestingly, an earlier unsuccessful Internet gambling bill, The Internet Gambling Prohibition Act of 1997⁴⁵ was opposed by the Major League Baseball Players Association because the bill had no exemption for fantasy sports. In her testimony, the association’s lawyer stated, “The Major League Baseball Players Association does not condone gambling. Sports gambling is a threat to the very sport that employs our members. But neither do we consider fantasy baseball gambling.”⁴⁶ She stated fan-

⁴⁰ Jerry Magee, *It’s no fantasy—NFL puts its stamp on gambling*, COPLE NEWS SERVICE, Aug. 19, 2003

⁴¹ There was a heated debate in the House of Representatives concerning the striking of the Interstate Horseracing exemption. The opponents of the bill tried to strike the Horseracing exemption and thus kill the bill. The attempt on July 11, 2006, failed by 114–297.

⁴² Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. § 5362(E)(1x). The prohibition of an “actual team” might be to prevent any possibility of game fixing.

⁴³ Letter from Rev. Sheldon to Members of Congress, Re: Internet Gambling Growth and Opportunity Explosion (Apr. 5, 2006).

⁴⁴ *Id.* There have been allegations that the TVC has been subsidized by lobbyists who wanted to defeat the anti-internet gambling bill.

⁴⁵ H.R. 2380/S. 474, 105th Cong. (1997–1998).

⁴⁶ *Hearing on H.R. 2380, :Internet Gambling Prohibition Act of 1997 Before the H. Comm. on the Judiciary Subcomm. on Crime*, 1998 WL 12761645, 105th Cong. (June 24, 1998) (testimony of Marianne McGettigan).

tasy sports may require payment of “nominal transaction fees” but “the outcome . . . depends predominantly on skill[.]” However, S. 474 (the proposed bill) would “make all commercial sports fantasy leagues on the Internet illegal.” By 1999, “Marianne McGettigan, an attorney representing the Major League Baseball Players Association, testified that her client has recently reversed its position, and now supports the bill.”⁴⁷ Sen. Jon Kyl (R-Ariz.), perhaps the most zealous anti-Internet gambling senator, was reported to have “won the baseball players’ support by redrafting the bill to exclude fantasy sports games, from which the players receive license fees.”^{47a}

In her testimony before the Senate Judiciary Committee subcommittee in 1999, McGettigan stated:

Applying this fitting shorthand of the policy to fantasy sports, while participants may “Click the Mouse,” they do not “Bet the House.” There are two reasons for this. First, no bet is made in Fantasy Sports. Rather, consideration is rendered for the statistical services and analysis provided by the sponsoring web site and any prize awarded is done do on the basis of skill, not chance. Second, even if one considers the entry fee and transaction fees to be a bet, which we do not, the amount by the participant can be likened more appropriately to “Bet a Lunch,” or at worst a lunch for two. Hardly a danger of the kind or magnitude that has prompted the Subcommittee’s review.

The second legitimate governmental concern is to protect the integrity of the game or contest itself. But, because of the structure of fantasy sports leagues, no individual baseball player’s performance or team’s performance can ever be influenced by the existence of a fantasy sports league. There is absolutely no incentive for any participant to attempt to influence the outcome of a game, or a baseball player’s performance. . . .

We have reviewed Senator Kyl’s proposed bill for introduction in this Congress. Unlike prior bills, it has been written so as to remove the vagueness and doubt about its application to Fantasy Sports leagues on the Internet. It neither legalizes games or contests that may be considered to be illegal under the law of some

states, nor does it criminalize fantasy games or contests that are otherwise legal. In other words, it appears to preserve the status quo.”⁴⁸

Perhaps the attitude toward the fantasy sports exception by Congress may be best explained by a spokesperson for Rep. Bob Goodlatte (R-Va.), one of the most extreme anti-Internet gambling advocates, who stated in an interview with a reporter, “The way this bill was approached was to look at internet gambling as gambling defined as games of chance. . . . Congressman Goodlatte viewed fantasy football as more skill-based than a game of chance.”⁴⁹ The reporter then concluded, “In fact, none of the bill’s sponsors in the House or Senate would say how the exemption for fantasy football ended up in the Unlawful Internet Gambling Act.”⁵⁰

State law. The Unlawful Internet Gambling Enforcement Act did not legalize fantasy sports but did create an exemption from federal prosecution if fantasy sports operators followed the statutory requirements. The legislative history of a prior Internet gambling prohibition bill suggests that Congress wanted to leave the regulation of fantasy sports to the states. For example, a Congressional report in 1999 made it clear that “Section 1085 does not make a Fantasy Sports league game or contest illegal in all States simply because it is illegal in one State. Conversely, section 1085 does not make a game or contest legal in all States simply because it is legal in one State.”⁵¹

Montana has legalized fantasy sports leagues but has limited the administration fee to 15 percent.⁵² This has effectively kept fantasy sports operators from accepting Montana participants. It is doubtful that any state attorney general would have any interest in prosecuting fantasy sports even if the player paid money to participate. Written opinions by three separate state attorneys general have concluded that

⁴⁷ *Senate Committee holds hearing on internet gambling*, TECHLAWJOURNAL.COM, Mar. 24, 1999, <<http://www.techlawjournal.com/internet/19990324.htm>>.

^{47a} *Id.*

⁴⁸ Hearing on Internet Gambling Before the S. Comm. on the Judiciary Subcomm. on Terrorism, Technology and Government Information, 106th Cong. (Mar. 23, 1999) (testimony of Marianne McGettigan).

⁴⁹ Pells, *supra* note 39.

⁵⁰ *Id.*

⁵¹ S. REP. NO. 106-121 (1999).

⁵² MONT. CODE ANN. § 23-5-801 (2007).

fantasy sports were illegal. The attorney general of Florida, a state that prohibits skill games, stated that it is unlawful to bet or wager money that “have been staked wagered or bet on the result of a contest of skill.”⁵³ A similar result was reached by the attorney general of Louisiana who opined concerning a 1-900 number and a fantasy team, that it would be an offense since Louisiana prohibits a game where “a person risks the loss of anything of value in order to realize a profit[.]”⁵⁴ The attorney general of Arizona has also determined that fantasy sports are illegal since they fail to qualify under the amusement, gambling or any other statutory exception:

The individuals wagering are not the football players performing in the game . . . The outcome is in the control of the actual football teams, not the individuals making the wager . . . Most fantasy football tournaments offer prizes, some ranging from million dollar purses to Super Bowl packages. . . . The companies and individuals that organize and tabulate the calculations generally derive a fee for their service. . . . Therefore, fantasy football does not satisfy every required element of amusement gambling exclusion.⁵⁵

Attorney general opinions are not law, but they are viewed often by courts as persuasive authority.

Interestingly, one Internet Web site, HeySportsFans.com,⁵⁶ charges \$30 “budget” entrance to fantasy football with a \$250 first place prize. It excludes payment from residents of Arizona, Florida, Louisiana, Maryland, Montana, and Vermont. CBSSports.com Fantasy Sports,⁵⁷ which also charges to register, excludes residents of Arizona, Iowa, Louisiana, Maryland, Montana, and Vermont as paying customers. ESPN Networks exclude Arizona, Connecticut, Florida, Louisiana, Montana, and Vermont.⁵⁸ Yahoo Sports excludes Arizona, Arkansas, Florida, Maryland, Montana, Louisiana, New Jersey, and Tennessee.⁵⁹ CDM fantasy sports in its auto racing sports excludes Arizona, Iowa, Louisiana, Maryland, Montana, Minnesota, North Dakota, Colorado, Florida and Vermont.⁶⁰ All of the above sites exclude Arizona, Louisiana, Montana,⁶¹ and Vermont.⁶² States that are excluded often have a statute that prohibits contests that require payment or wagers even though the game is “pure” skill or predominantly one of skill. These state restrictions might be unconstitutional. One commentator, Mark

Dubnoff, persuasively suggests that state anti-Internet gambling laws that criminalize online gambling “probably violate the constitution’s so-called ‘dormant commerce clause.’”⁶³

CHALLENGES TO FANTASY SPORTS

It is doubtful whether any attorney general or district attorney would bring criminal charges against a fantasy sports club that complies with the Unlawful Internet Gambling Enforcement Act. Instead, legal action is often brought by plaintiffs seeking easy money. Seven states and the District of Columbia allow individuals to recover gambling losses, sometimes even if the litigation is brought by strangers to the transaction.⁶⁴ The first major challenge to the legality of fantasy sports was brought by Charles Humphrey, a Colorado lawyer who filed a complaint⁶⁵ in New Jersey federal court against 10 defendants, including CBS Corp. and Walt Disney. The complaint was based on diversity and alleged

⁵³ 1991 FLA AG LEXIS 3 (1991).

⁵⁴ La. Atty. Gen. Op No.1991-14, 1991 LA AG LEXIS 133 (1991).

⁵⁵ 1998 Ariz. AG LEXIS 1 (1998).

⁵⁶ HeySportsFans.com, <<http://www.heysportsfans.com>> (last visited June 20, 2008).

⁵⁷ CBSSports.com Fantasy Sports, <<http://www.sportsline.com/fantasy>> (last visited June 21, 2008).

⁵⁸ ESPN Fantasy Sports, <<http://games.espn.go.com/>> (last visited June 20, 2008).

⁵⁹ Yahoo! Fantasy Baseball, <<http://sports.yahoo.com/fantasy>> (last visited June 21, 2008).

⁶⁰ CDM Fantasy Sports, <<http://playoffautoracing.cdmsports.com/rules/prizes>> (last visited June 20, 2008).

⁶¹ Montana is excluded because the administrative fee cannot exceed 15 percent of the entry fee. MONT. CODE ANN. § 23-5-805(2)(a) (2007).

⁶² Vermont prohibits “bookmaking or pool selling, except deer pools or other pools in which all of the monies paid by the participants, as an entry fee or otherwise, are paid out to either the winning participants based on the result of the pool or to a non-profit organization. . . .” Vt. Stat. Ann. tit. 13, § 2151(a)(1). Vermont caselaw does not require payment to satisfy the requirement of consideration. *State v. Wilson*, 136 A. 757 (Vt. 1938).

⁶³ Mark B. Dubnoff, *State Bans on Internet Gambling May Be Unconstitutional*, 12 GAMING L. REV. & ECON. 207-219 (2008).

⁶⁴ Georgia, GA. CODE ANN. § 13-8-3(b); Illinois, 720 ILL. COMP. STAT. 5/28-8; Kentucky, KY. REV. STAT. §§ 372.020, 372.040; Massachusetts, MASS. ANN. LAWS. ch. 137, §1; New Jersey, N.J. STAT. ANN. § 2A:40-6; Ohio, OHIO REG. CODE § 3763.02; South Carolina; S.C. CODE ANN. §32-1-20; Washington, D.C., D.C. CODE § 16-1702.

⁶⁵ Complaint, *Humphrey v. Viacom, Inc.*, No. 2:06 CV 02768 (D.N.J. filed June 20, 2006).

damages in excess of \$75,000. Humphrey admitted he did not engage in fantasy sports but demanded recovery based on New Jersey's adoption of the Statute of Queen Anne, which allowed a stranger to recover gambling losses of others. Humphrey stressed that winning in fantasy sports leagues "is based predominantly on chance rather than skill."⁶⁶

All but three defendants were dismissed (ESPN, Sportsline, and Vulcan Sports Media), and they filed a motion to dismiss, which was granted on June 20, 2007. Much of the complaint was dismissed because it did not comply with the technical requirements of a Queen Anne *qui tam* action. The court, in applying New Jersey law, stated:

New Jersey courts have not addressed the three-factor scenario of (1) an entry fee paid unconditionally, (2) prizes guaranteed to be awarded and (3) prizes for which the game operator is not competing. Courts throughout the country, however, have long recognized that it would be "patently absurd" to hold that "the combination of an entry fee and a prize equals gambling," because if that were the case, countless contests engaged in every day would be unlawful gambling, including, "golf tournaments, bridge tournaments, local and state rodeos or fair contests . . . literary or essay competitions . . . , livestock, poultry and produce exhibitions, track meets, spelling bees, beauty contests and the like," and contest participants and sponsors could all be subject to criminal liability. *State v. Am. Holiday Ass'n, Inc.*, 151 Ariz. 312, 727 P.2d 807, 809, 812 (Ariz. 1986) (*en banc*).⁶⁷

The court then dismissed the skill/chance issue since that issue applied only to a lottery and not wagering.

The second case brought under the Queen Anne statute had nothing to do with fantasy sports but did involve an attempt to recover monies paid to enter a contest of chance. In *Hardin v. NBC Universal Inc.*,⁶⁸ participants who paid text-message charges sought federal class action status to recover gambling losses pursuant to Georgia's Queen Anne statute. The federal district court, sitting in diversity, certified the question concerning Georgia law to the Georgia Supreme Court. The defendant had sponsored Lucky Case Game, and plaintiffs could have avoided the text messaging fee of \$.99 by utilizing the Internet. The Georgia Supreme Court cited *Humphrey v. Viacom*⁶⁹ as authority that there was no bet or wager since defendants did not compete for the prize.⁷⁰

Since it is doubtful whether any governmental prosecution of fantasy sports operators would be successful, entrepreneurs will seek creative ways to expand the parameters of fantasy sports. The fantasy sports litigation might also open the door to the legality of other games of skill.

⁶⁶ *Id.* at ¶¶ 3, 49–63.

⁶⁷ *Humphrey v. Viacom, Inc.*, No. 06-2768 (DMC), 2007 U.S. Dist. LEXIS 44679 (D.N.J. 2007).

⁶⁸ *Hardin v. NBC Universal Inc.*, No. 208Q0323, 2008 WL 1774036 (Ga. Apr. 21, 2008).

⁶⁹ *Id.* at *2.

⁷⁰ *Id.*