December 29, 2010

Mr. C.A. Carruthers, Chairman
Board of Horse Racing
P.O. Box 200512
Helena, MT 59620-0512

Re: Fantasy Sports Leagues and Sports Pools

Dear Chairman Carruthers:

You have requested an opinion of the Attorney General on the following question:

> Is the fantasy sports game offered by the Board of Horse Racing through
> the Montana lottery a sports pool under Mont. Code Ann. tit. 23, ch. 5,
> pt. 5?

Since your question is clearly answered in statute, it has been determined that a letter of
advice rather than a formal opinion is appropriate in response to your request.

Montana Code Annotated § 23-5-501(1) defines "sports pool" as follows:

> "Sports pool" means a gambling activity, **other than an activity governed
> under chapter 4 . . . of this title**, in which a person wagers money for each
> chance to win money or other items of value based on the outcome of a
> sports event or series of sports events wherein the competitors in the sports
> event or series of sports events are natural persons or animals.

(Emphasis added). The Board of Horse Racing operates its fantasy sports leagues under
Title 23, chapter 4 of the code, see, e.g., Mont. Code Ann. §§ 23-4-104 (12) (Board to
adopt rules governing "the time, conduct, and supervision of . . . fantasy sports leagues
and parimutuel betting on simulcast races and fantasy sports leagues"), Mont. Code Ann.
§ 23-4-201(1) ("A person may not . . . conduct fantasy sports league wagering through a
parimutuel facility, parimutuel network, or a simulcast parimutuel network conducting a
fantasy sports league in this state without a valid license issued by the department under

this chapter."), 23-4-202(b) ("A person operating a parimutuel facility, parimutuel network, or simulcast parimutuel network that conducts fantasy sports league wagering without first being licensed under this chapter . . . is guilty of a misdemeanor."), 23-4-301(8) ("It is unlawful to . . . wager on a fantasy sports league other than by the parimutuel system and by being physically present at the licensed parimutuel facility"). A strong argument can therefore be made that the fantasy sports pools conducted by the Board are specifically excluded from the definition of "sports pool" by the exclusion in Mont. Code Ann. § 23-5-501(1) of "an activity governed under chapter 4 . . . of this title".

Beyond this, the "fantasy sports leagues" permitted to the Board under Chapter 4 are specifically defined in Mont. Code Ann. § 23-4-101(6) by reference to the definition found in the general statutes pertaining to fantasy sports leagues, Mont. Code Ann. § 23-5-801:

> As used in this part, a "fantasy sports league" means 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.
>
> ***

Teams in a fantasy sports league are "fictitious", id., (2). These fictitious teams "compete" for "points . . . according to the performance of individual players or teams", id., (4), and following this competition among fictitious teams "a league member may be eligible to receive a payout based on the number of points accumulated", id., (5).

In contrast, a "sports pool" involves the purchase of *chances* to win based on "a sports event or series of sports events wherein the competitors in the sports event or series of sports events are natural persons or animals." Mont. Code Ann. § 23-5-501(1). "Competitors in a sports event . . . must be randomly assigned to each participant in the sports pool." Mont. Code Ann. § 23-5-512(2). A player in a "fantasy sports league" does not purchase "chances to win" based on randomly assigned competitors in a real "sports event". The player purchases the right to assemble a fictitious team which then competes in a fictitious league and "may," but need not, be awarded a prize of value.

There is nothing "random" about the assignment of players in a fantasy sports league.

> The success of a fantasy sports team depends on the participants' skill in selecting players for his or her team, trading players over the course of the season, adding and dropping players during the course of the season and deciding who among his or her players will start and which players will be placed on the bench. The team with the best performance--based upon the statistics of the players chosen by the participant--is declared the winner at the season's end.

Humphrey v. Viacom, 2007 U.S. Dist. Lexis 44679 *4 (D.N.J. 2007). The element of skill involved in a fantasy sports league distinguishes the activity from a sports pool in which "each participant has an equal chance to win the pool." Mont. Code Ann. § 23-5-512(1)(b).

Moreover, Mont. Code Ann. § 23-5-512(3) leaves it to the Department of Justice to describe by rule types of sports pools authorized by part 5. Mont. Admin. R. 23.16.1701(8) defines "sports event" as "and athletic game, race, or contest involving two or more competitors who are natural persons …in which the winner is determined by score or placement." The sections of the rules that follow describe a game of chance based on the sale of squares on a board consisting of a square grid of vertical columns and horizontal rows, the intersection of which forms squares. The squares are sold until the board is filled, and then numbers are assigned to each row and column, so that each square sold corresponds to two numbers which relate in some way to the scores attained in the real sports event on which the pool is based. Mont. Admin. R. 23.16.1705(3).

This is simply not the same activity as a "fantasy sports league" as defined in Mont. Code Ann. § 23-5-801. Cf. Mont. Admin. R. 23.16.3201 to 3205 (describing and regulating fantasy sports leagues).

The Department's interpretation of its responsibilities under the gambling laws is entitled to some deference. See Glendive Med. Ctr. v. Montana Dep't of Pub. Health and Human Servs., 2002 MT 131, ¶ 14, 310 Mont. 156, 160, 49 P.3d 560, 562 (longstanding agency interpretation of administrative rule entitled to "respectful consideration"). It supports the apparent and plain meaning of the statutes. If the legislature had intended to regulate fantasy sports games as sports pools, it would have said so. In the absence of any statutory text to the contrary, the only conclusion that can rationally be reached is that a "fantasy sports league" as defined in Mont. Code Ann. § 23-5-801 is not a "sports pool." Since the definition in Mont. Code Ann. § 23-5-801 applies to fantasy sports leagues conducted by the Board of Horse Racing under Title 23, chapter 4, Mont. Code Ann. § 23-4-101(6), it follows that fantasy sports leagues conducted by the Board are not "sports pools."

I hope you find the above helpful. This letter of advice may not be cited as an official opinion of the Attorney General.

Sincerely,

CHRIS D. TWEETEN
Chief Civil Counsel

cdt/jym