

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

January 29, 2016

Allen Godfrey, Executive Director
Mississippi Gaming Commission
Post Office Box 23577
Jackson, Mississippi 39225-3577

Re: Fantasy Sports Wagering in the state of Mississippi

Dear Mr. Godfrey:

Attorney General Jim Hood has received your request for an opinion and has assigned it to me for research and response.

Issues Presented

I write today to request an Opinion of the Mississippi Attorney General with regard to the legality of fantasy sports wagering pursuant to Mississippi state law.

While the play of fantasy sports has an extensive history, it is only with the proliferation of daily fantasy sports wagering that this issue has become of interest to the gaming industry in Mississippi. Fantasy sports (also known less commonly as rotisserie or roto) are games where participants assemble imaginary or virtual teams of real players participating in sporting events. These teams compete based on the statistical performance of those real players in actual games. These games may take place over a variety of different time periods ranging from one day to an entire season.

This agency has received numerous requests for guidance on fantasy sports wagering both from Mississippi licensed gambling establishments and the general public. The Mississippi Gaming Commission is charged with the regulation of licensed gambling and the enforcement of illegal, unlicensed gaming. Currently, daily and season long fantasy sports games are being offered to Mississippians via computers and mobile devices without regulation. Participants may play for free, but the websites offering the games also allow for wagers and the chance to win cash prizes wherein the website takes a percentage of the total prize. This activity has been banned in an increasing number of jurisdictions.

As such, the Commission requests that the Office of the Attorney General address

whether fantasy sports wagering is legal on a licensed gaming floor and/or outside of licensed gaming floors.

Response

Fantasy sports wagering is illegal in the state of Mississippi under current law both on a licensed gaming floor and outside of a licensed gaming floor. Any change to the law would be a matter within the purview of the Legislature.

Applicable Law and Discussion

I. Is Fantasy Sports Wagering Legal on a Licensed Gaming Floor?

Mississippi Code § 97-33-1 makes gambling illegal in the state of Mississippi, but it does not apply to licensed gaming activities. The Mississippi Gaming Control Act, Miss. Code Sections 75-76-1 et. seq., outline licensed gaming in Mississippi. Miss. Code Section 75-76-33(3)(a) states that:

Notwithstanding any other provision of law, each licensee shall be required to comply with the following regulations:

- (a) No wagering shall be allowed on the outcome of any athletic event, nor on any matter to be determined during an athletic event, nor on the outcome of any event, which does not take place on the premises.

In this instance, a fantasy sports wager is controlled by matters that are determined during an athletic event, and by an event which does not take place on the premises. Specifically, the statistical performance of athletes is determined during an athletic event or events. See *Mississippi Gaming Com'n v. Imperial Palace of Mississippi, Inc.* 751 So.2d 1025 (Miss. 1999) (gambling on a horse race which occurred off premises was illegal).

II. Is Fantasy Sports Wagering Legal off of a Licensed Gaming Floor?

The statute that makes gambling illegal is Miss. Code Section 97-33-1, which states that it is a crime if,

"any person shall encourage, promote or play at any game, play or amusement, other than a fight or fighting match between dogs, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting of any money or other valuable things, upon any game, play, amusement, cockfight, Indian ball play or duel, other than a fight or fighting match between dogs, or upon the result of any election, event or contingency whatever..."

In *Stubbs v. State*, 40 So. 2d 256, 258 (Miss. 1949), the Court examined this statute¹ and found it is a crime when a person has a wager on his play at any game, play or amusement or when a person has a wager upon any game, play, amusement -- in this case, a dice game. When a player places a wager and picks a lineup for a Daily Fantasy Sports contest, each selection is locked-in once the chosen athletes begins their real world competition. In a Season Long Fantasy game, a participant may make any number of changes over the course of a season. In either case, winners are selected based on the tally of points earned by the athletes. This method of play is similar to betting on a horse race or making a parlay bet (which, though not allowed in Mississippi, is defined by Nevada Gaming Regulations as a "wager on the outcome of a series of 3 or more games, matches or similar sports events or on a series of 3 or more contingencies incident to a particular games, matches or similar sports events." *NV GAM REG 22.090*)². It is different from betting on the outcome of a regular football game only in that the player can choose from any number of hypothetical "teams" which the player can possibly pick or create, rather than being limited to picking from the teams available as they actually exist in the NFL. It is argued that the amount of skill is greater than that needed to pick which real sports team will win a particular game, or to win a game of poker, or to pick the best horse in a race. Assuming that is true, it is irrelevant because, as proscribed by Miss. Code Section 97-33-1, the fantasy sports model involves a wager "upon any game, play, amusement ... or upon the result of any ... event or contingency whatever," namely, upon how the selected players perform.

Additionally, as stated in your letter, Daily Fantasy games are currently being offered via computer and/or mobile phone to players in Mississippi. These games require an entry fee and the operator takes a percentage of the total prize. Miss. Code Section 75-76-5(k) defines a gambling game as "any banking or percentage game played with cards, with dice or with any mechanical, electromechanical or electronic device or machine for money, property, checks, credit or any representative of value." Mississippi law doesn't expand upon the definitions of banking or percentage games, but Nevada case law states that "[e]xamples of banking games are craps, roulette and twenty-one, where the casino wagers against the patron. Percentage games are poker, panguingui and similar games where patrons wager against each other and the house takes a percentage of each wager as a "rake-off." *Hughes Properties, Inc. v. State*, 680 P.2d 970, 971 (Nev. 1984). Daily Fantasy games are offered via electronic device, wherein patrons wager against each other and the operator takes a percentage of each wager. Therefore, the game as offered is a gambling game and is illegal pursuant to Miss. Code Section 75-76-55, which prohibits gambling games as defined under Miss. Code Section 75-76-5(k), unless conducted pursuant to a state gaming license.

Pursuant to Section 97-33-29 of the Mississippi Code, "[a]ll laws made or to be made for the suppression of gambling or gaming, are remedial and not penal statutes, and

¹Section 2190 of the Mississippi Code of 1942, the predecessor to 97-33-1.

²Mississippi's Act is modeled closely on Nevada's.

shall be so construed by the courts." As explained by both the Mississippi Supreme Court and the Fifth Circuit Court of Appeals, this provision clarifies that the state criminal statutes prohibiting gambling are to be construed liberally, as an exception to the normal rule of lenity requiring strict construction of criminal statutes in favor of the accused. In particular, Section 97-33-1 is "to be construed liberally — not liberally in favor of the culprit, but for the suppression of vice." *Trainer v. State*, 930 So.2d 373, 380(Miss. 2006); and *U.S. v. Stewart*, 205 F.3d 840, 843 (5th Cir.2000), citing *Fuller v. State*, 83 Miss. 30, 35 So. 214, 215 (1903).

There is a line of Mississippi cases wherein the court distinguishes between games of skill and games of chance. However, all but one of these cases are applying Section 97-33-7 and its predecessors which forbid the possession of slot machines and other gambling devices, as those are defined by statute. For example, *Mississippi Gaming Commission v. Henson*, 800 So. 2d 110, at 113 (Miss. 2001) applied the latest definition and held:

The Court recognizes that the definition of slot machines provided in Section 76-75-5(ff) of the Gaming Control Act is broader than that applied by this Court in pre-Gaming-Control Act cases. In *Rouse v. Sisson*, 190 Miss. 276, 282, 199 So. 777, 778 (1941), for example, in order for a device to be subject to the provisions of [Chapter 353, Laws of 1938, the predecessor to] Section 97-33-7, an uncontrolled and uncontrollable chance must have existed. As a result, those devices in which the outcome was determined solely by skill were not prohibited. Under the Gaming Control Act, however, "whether by reason of the skill of the operator or application of the element of chance, or both," amusement devices satisfying the elements of consideration and payoff are deemed illegal gaming devices and seized accordingly. Miss.Code Ann. § 75-76-5(ff) (2000).

None of this analysis specifically addressed whether activity constitutes illegal gambling under 97-33-1. However, even if the outdated, stricter *Rouse v. Sisson* analysis were applied to 97-33-1, "an uncontrolled and uncontrollable chance" exists in that the outcome, regardless of the skill of the fantasy sport participant, is determined by the play of others, i.e, the actual players of the sport. The outcome of the wager in fantasy sports is not, as was the case of the trivia or "IQ machine" in *Rouse*, "under the absolute control of the player from start to finish." As stated generally by our supreme court in a case involving the statute prohibiting lotteries, "gambling consists of a consideration, an element of chance and a reward." *Knight v. State of Mississippi*, 574 So.2d 662, 669 (1990). It is beyond reasonable dispute that daily fantasy leagues involve an element of chance regarding how a selected player will perform on game day. *Accord TX AG Op. to Crownover* (Jan. 19, 2016).

The only case applying a skill/chance analysis to a question other than whether a device was a gambling device was *Wortham v. State*, 59 Miss. 179 (1881), which also did not involve the predecessor to 97-33-1. The statute in question in *Wortham* was found in

Chapter 39 of the 1880 Code, which regulated the sale of liquors (Chapter 77 of the 1880 Code established crimes and misdemeanors, including Section 2844, the predecessor to 97-33-1). In particular, Section 1121 of the Code of 1880 stated, "If any person who sells vinous or spiritous liquors shall permit card playing, dice throwing or other game of chance on his premises..." he would be guilty of a misdemeanor. Notably, the statute did not require that any money be wagered on the games to hold the seller of liquors accountable. The *Wortham* court held that playing billiards was not a game of chance under the statute. It did not address whether betting upon such games would constitute a violation of the predecessor to 97-33-1. Again, this case is inapplicable to whether fantasy sports wagering violates Section 97-33-1.

Our opinion to Ringer of August 19, 1991, stated that participating in foosball and pool tournaments for prizes is not prohibited by 97-33-1, but that betting on such games would be. Similarly, in our opinion to the City of Hernando (MS AG Op., Stockton, Sept. 25, 2105), we stated that it was not illegal for teams of citizens to compete for prizes donated by local businesses in a scavenger hunt conducted by the city to create awareness of local businesses and organizations. Betting on the outcome of the scavenger hunt presumably would be, though that question was not asked. In contrast, fantasy sports, although in the form of a tournament or contest amongst players to pick the best teams, also involves a wager upon the performance of others. It is this element together with the nature of the game that brings fantasy sports within the prohibition of the statute³. In our opinion, the possible existence of an element of skill in picking players in a fantasy sports game (or in picking between real teams when wagering on regular NFL games, or in picking horses in a horse race, etc.) is irrelevant to any charge of gambling on Fantasy Sports under Section 97-33-1 of the Mississippi Code.

If our office may be of further assistance, please advise.

Sincerely,

JIM HOOD, ATTORNEY GENERAL

By:


Michael Lanford
Deputy Attorney General

³Our opinions to Ringer and Stockton are hereby modified to the extent they differ from our opinion herein.