



Montana Legislative Services Division
Legal Services Office

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TO: Economic Affairs Interim Committee Members

FROM: Jameson Walker, Staff Attorney

RE: Fantasy Sports Gambling

Introduction

Recently, the U.S. Supreme Court decided *Murphy v. Nat'l Collegiate Athletic Assn.*, 138 S. Ct. 1461 (2018). The decision addresses what states may offer by way of sports gambling schemes. This memo serves as a brief primer on Montana's sports gambling laws, internet sports gambling laws, and the potential application of the U.S. Supreme Court's recent decision.

Montana Gambling Law

General Laws

Article III, sec. 9, of the Montana Constitution and 23-5-151, MCA, provide that all gambling is prohibited unless otherwise allowed:

Section 9. Gambling. All forms of gambling, lotteries, and gift enterprises are prohibited unless authorized by acts of the legislature or by the people through initiative or referendum.

23-5-151. Gambling prohibited. Except as specifically authorized by statute, all forms of public gambling, lotteries, and gift enterprises are prohibited.

Historically, these provisions have been strictly construed by the Montana Department of Justice to allow only those types of gambling or gambling activity that are specifically and clearly allowed by law.¹ Thus, the default rule in Montana is gambling is illegal, unless otherwise authorized.

While the constitution generally prohibits gambling, the legislature has further defined "gambling", "illegal gambling enterprise", and "internet gambling":

23-5-112. Definitions. Unless the context requires otherwise, the following definitions apply to parts 1 through 8 of this chapter:

[...]

(13) (a) "Gambling" or "gambling activity" means risking any money, credit,

¹ 42 A.G. Op. No. 39, 158 (1987); 43 A.G. Op. No. 39, 158 (1989). *See Also*: 57 A.G. Op. No. 2 (2017) declaring that wagering on historical horseracing is not specifically authorized by Montana law and, therefore, is prohibited.

deposit, check, property, or other thing of value for a gain that is contingent in whole or in part upon lot, chance, or the operation of a gambling device or gambling enterprise.

[...]

(20) "Illegal gambling enterprise" means a gambling enterprise that violates or is not specifically authorized by a statute or a rule of the department. The term includes:

(a) a card game, by whatever name known, involving any bank or fund from which a participant may win money or other consideration and that receives money or other consideration lost by the participant and includes the card games of blackjack, twenty-one, jacks or better, baccarat, or chemin de fer;

(b) a dice game, by whatever name known, in which a participant wagers on the outcome of the roll of one or more dice, including craps, hazard, or chuck-a-luck, but not including activities authorized by 23-5-160;

(c) sports betting, by whatever name known, in which a person places a wager on the outcome of an athletic event, including bookmaking, parlay bets, or sultan sports cards, but not including those activities authorized in Title 23, chapter 4 [horseracing], and parts 2 [calcutta pools], 5 [sports pools], and 8 [fantasy sports leagues] of this chapter;

(d) credit gambling; and

(e) internet gambling.

(21) (a) "Internet gambling", by whatever name known, includes but is not limited to the conduct of any legal or illegal gambling enterprise through the use of communications technology that allows a person using money, paper checks, electronic checks, electronic transfers of money, credit cards, debit cards, or any other instrumentality to transmit to a computer information to assist in the placing of a bet or wager and corresponding information related to the display of the game, game outcomes, or other similar information.

[...]

Here, the Legislature specifically identified "sports betting" and "internet gambling" as prohibited gambling activities. Not only would it have otherwise been prohibited under the Montana Constitution, but it is also specifically identified and prohibited by the Montana Legislature.

Narrow Exceptions to Gambling Prohibitions

While the Legislature generally prohibits "sports betting" in 23-5-112(20)(c), it has allowed narrow exceptions. Sports pools, including calcutta pools under Title 23, chapter 5, are authorized if they are approved by the Gambling Control Division and provide a 100 percent payout from those types of gaming. Additionally, gambling governed by the Board of Horseracing under Title 23, chapter 4, is exempted.

In addition to horseracing gambling, the 2007 Legislature put fantasy sports league gambling within the Board's purview and gambling exemption.² These statutes allow the Board to offer

² Chapter 387, L. 2007.

sports gambling to licensed "parimutuel facilities" through a "parimutuel network."³ The 2007 Legislature provided narrow definitions of "fantasy sports league", "parimutuel facility", and "parimutuel network":

23-4-101. Definitions. Unless the context requires otherwise, in this chapter, the following definitions apply:

(6) "Fantasy sports league" has the meaning provided in 23-5-801.

[...]

(11) "Parimutuel facility" means a facility licensed by the board at which fantasy sports leagues are conducted and wagering on the outcome under a parimutuel system is permitted.

(12) "Parimutuel network" means an association licensed by the board to compile and distribute fantasy sports league rosters and weekly point totals for licensed parimutuel facilities and to manage statewide parimutuel wagering pools on fantasy sports leagues.

In authorizing the Board to allow certain types of fantasy sports league gambling, the 2007 Legislature also authorized certain fantasy sports leagues. These leagues, however, must meet the definition in 23-5-801 and may not offer wagers through the telephone or internet:

23-5-801. Fantasy sports leagues defined. 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.

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

³ The Board of Horseracing operates two fantasy sports betting games through the Montana Lottery.

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

23-5-802. Fantasy sports leagues authorized. 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 regulated under Title 23, chapter 4. It is unlawful to wager on a fantasy sports league by telephone or by the internet.

In Montana, fantasy sports gambling is generally prohibited unless it is done through facilities licensed by the Board of Horseracing. Telephone or internet gambling on sports is generally prohibited by the Montana Constitution and categorically prohibited by the Montana Legislature.

U.S. Supreme Court Decision

In *Murphy v. NCAA*, New Jersey sought to legalize sports gambling at casinos and horseracing tracks through a 2014 law generally repealing sports gambling prohibitions. However, the federal Professional and Amateur Sports Protection Act of 1992, 28 U.S.C. 3701 et seq. (Sports Act) essentially prohibited sports gambling schemes by preventing states from authorizing it through legislation. The Governor of New Jersey sued, alleging that the Sports Act was incompatible with the system of "dual sovereignty" embodied in the Constitution and violated the "anticommandeering principle" because it infringed on the state's sovereign authority.

The Supreme Court analyzed the language of the Sports Act, which made it unlawful for any state or any of its subdivisions to sponsor, operate, advertise, promote, license, or authorize a lottery, sweepstakes, or other betting, gambling, or wagering scheme based on competitive sporting events. While the Sports Act did not make sports gambling a federal crime, it allowed the Attorney General and professional and amateur sports organizations to enjoin violations. The Supreme Court noted that when the Sports Act was passed in 1992, only four jurisdictions allowed some form of sports gambling and were exempt: Nevada, Oregon, Delaware, and Montana.

The Supreme Court held that the "anticommandeering principle" prohibits the federal government from compelling states to action. The court noted: "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. [...] Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. [...] Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents." The Supreme Court further explained that the "anticommandeering principle" serves to protect liberty, sovereignty of the states, and accountability of the federal government.

The Supreme Court found that the Sports Act unconstitutionally prohibited state authorization of sports gambling by dictating what a state legislature may or may not do. The Court held that if

the federal government sought to prohibit sports gaming, it must do so directly. Importantly, the Court held that if Congress elected not to regulate sports gambling, each state is free to act on its own.

Thus, the *Murphy v. NCAA* decision was decided on narrow grounds. The Supreme Court did not necessarily outlaw federal regulation of sports gambling. Rather, the decision was tailored to the mechanisms through which the Sports Act sought to prohibit sports gambling. With the Sports Act held unconstitutional and no other federal anti gambling laws available, states are currently free to allow sports gambling.

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