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Fantasy sports gambling is illegal under state law

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By Mark A. Gottlieb

Since news of alleged “insider trading” at DraftKings broke last month, media attention focusing on daily fantasy sports has been nearly as pervasive as the fledgling industry’s unrelenting advertising. The scandal brought about a near-universal call for regulation of paid daily fantasy sports but, increasingly, questions have been raised as to whether these businesses are illegal.

Attorney General Maura Healey, whose office reportedly entertained a legal presentation by DraftKings, quickly concluded that there are no state or federal laws that prohibit daily fantasy sports sites from operating in Massachusetts. This determination is at odds with the legal conclusions reached by gambling officials in both Illinois and Nevada as well as several legal assessments quoted in recent news stories and columns on the topic.

The Public Health Advocacy Institute at Northeastern University School of Law, where I serve as executive director, undertook a thorough legal analysis under Massachusetts law. Along with the Stop Predatory Gambling Foundation, we submitted the analysis to Healey’s office to help inform her legal review. The answer we had arrived at was clear and conclusive: Daily fantasy sports games constitute illegal gambling operations in Massachusetts.

To summarize briefly, Massachusetts law (General Laws ch. 271, § 7) prohibits any lottery or gambling unless the Legislature has specifically allowed it. It has permitted specific exceptions by authorizing the lottery and casino gambling (ch. 10 § 24 and ch. 23K). The legal presumption in Massachusetts is that

gambling is banned. That the Legislature has not expressly banned daily fantasy sports wagering does not implicitly sanction it, or even provide a gray area.

Another statute, ([ch. 271, § 16A](#)) prohibits betting pools where winning is determined by the result of the performance of individual athletes, which it describes as any contest based upon “the skill, speed or endurance of man.” This goes to the heart of daily fantasy sports games, where success derives from the statistical performances of the athletes chosen by fantasy players.

Our Supreme Judicial Court has defined “lottery” as a scheme for distribution of prizes by chance. It found that a lottery involves three elements: (1) payment of price for (2) the possibility of winning a prize, depending upon (3) hazard or chance. Daily fantasy sports games such as DraftKings and FanDuel meet these three requirements. The fact, heavily relied upon by DraftKings, that fantasy games involve an element of skill does not, according to a definitive 1936 Massachusetts ruling, prevent such a scheme from being defined as an unsanctioned lottery.

While many believe that daily fantasy sports is relatively harmless, there are several reasons why it is bad policy to ignore the law and look the other way.

First, as currently operated, daily fantasy sports is a rip-off for consumers, who are encouraged to play by incessant advertising hyping big cash winnings. The reality couldn't be further from the truth. Research published in the Sports Business Journal found that a mere 1.3 percent of players win 91 percent of total player profits. These top players generally wager tens of thousands of dollars each week on hundreds of games. Their success relies on proprietary analytical software to choose their players and rapidly change their player lineups based on highly sophisticated algorithms.

Second, Massachusetts went through a long and contentious process to permit a very limited number of gambling establishments in an effort to create jobs and direct revenue to the state's coffers. Companies bypassing the licensing process and simply operating a specialized virtual sports casino was not what anyone had in mind during the Massachusetts casino debate.

Finally, what precedent does tolerating this illegal gambling operation set? How can the attorney general permit daily fantasy sports and not allow games such as a monetized Internet-based Candy Crush? Online gambling creates unlimited opportunities for compulsive gamblers as well as those at risk of becoming addicted to the games.

Despite its popularity and the money it generates for sports teams and those benefiting from its marketing dollars, daily fantasy sports should be shut down unless and until it is authorized by law in Massachusetts. It is simply not acceptable to allow a clearly illegal business to operate so flagrantly and with, apparently, the blessing of the Commonwealth's chief law enforcement officer.

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