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The Legality of Fantasy Sports

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THE LEGAL STATUS OF FANTASY SPORTS has long been unclear, with most experts opining that it was not illegal. The Unlawful Internet Gambling Enforcement Act (UIGEA)[1], passed as part of the Safe Harbor Port Security Bill in late October 2006, stated that fantasy sports games were exempt from prohibition as long as the following conditions were met:

> (1) All prizes and awards 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.
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> (II) All winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events.
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> (III) No winning outcome is based—
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> > (aa) on the score, point-spread, or any performance or performances of any single real-world team or 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.[2]

On June 20, 2006, approximately four months before the enactment of the UIGEA, one lawyer, Charles E. Humphrey Jr., decided to sue 10 defendants, including Walt Disney Company, Viacom, and CBS Corp., Humphrey's 26-page complaint claimed that the fantasy sports games were basically games of chance rather than skill and that he could recover not only money lost pursuant to eight state statutes, but in some cases, treble damages.

In his complaint,[3] Humphrey admitted he did not engage in any of the gambling activities of which he complained.[4] Instead, he claimed he could recover "individual gambling losses of others [pursuant to] the state qui tam gambling-loss recovery laws[.]"[5] Interestingly, these laws derive from the Statute of Queen Anne § 2 (1710), which allows the loser or any other party a unique remedy to recover gambling losses:

> [A]ny person . . . who shall . . . by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides of hands of such as do play any of the games aforesaid, lose to any . . . person . . . so playing or betting in the whole, the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person . . . losing, and paying or delivering the same, shall be at liberty, within three months then next, to sue for

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[1] Unlawful Internet Gambling Enforcement Act of 2006, 31 U.S.C. §§ 5361–5367.
[2] 31 U.S.C. § 5362(1)(E)(IX).
[3] Complaint, Humphrey v. Viacom, No. 2:06 CV 02768 (D.N.J. filed June 20, 2006).
[4] *Id.* at ¶ 9.
[5] *Id.* at ¶ 65.

> and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner . . . thereof, with cost of suit, by action of debt . . . [A]nd in case the person or persons who shall lose such money or other thing as aforesaid, shall not within the time aforesaid, really and bona fide and without covin or collusion, sue, and with effect prosecute for the money or other thing, so by him or them lost, and paid or delivered as aforesaid, it shall and may be lawful to and for any person or persons, by any such action or suit as aforesaid, to sue or suit, against such winner or winners as aforesaid; the one moiety thereof to the use of the person or persons that will sue for the same, and the other moiety to the use of the poor of the parish where the offence shall be committed.[6]

While Parliament has repealed § 2 of the Statute and much of § 1, many states still enforce one or both sections of the Statute, notwithstanding the independence of the United States from Great Britain. While about half of the U.S. states do not allow gambling debts to be enforced, approximately eight states and the District of Columbia permit a stranger to sue to recover gambling losses if the gambler does not sue personally. Interestingly, when the attorney general of New Jersey brought civil action in 2001 against online gambling operators, one cause of action was based on New Jersey law, which allowed a stranger to recover gambling losses.

To sue in federal court based on a state cause of action pursuant to diversity, the plaintiff must sue for at least $75,000 in damages and not be from the same state as the defendant. In the *Humphrey* case, the plaintiff was a Colorado resident and none of the defendants had its principal place of business in New Jersey.

The defendants, instead of filing an answer to Humphrey's complaint, filed motions to dismiss, which meant that, assuming all facts alleged by the plaintiff were true, the plaintiff could not succeed as a matter of law. By June 2007, the plaintiff had agreed to dismiss voluntarily all defendants except for ESPN, Sportsline, and Vulcan Sports Media. The federal judge, on June 20, 2007, dismissed the complaint after making the following factual determination based largely on the plaintiff's complaint allegations:

> Fantasy sports leagues allow fans to use their knowledge of players, statistics and strategy to manage their own virtual team based upon the actual performance of professional athletes through a full season of competition. . . . Today, the rapid growth of the internet fostered additional services, such as those offered by Defendants, that provide an internet environment and community for playing and discussing fantasy sports. The technology also allows for automatic statistic updates for players and teams and access to expert fantasy sports analysis. As a result, fantasy sports have become much more accessible and popular throughout the country.
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> . . . [Generally] participants pay a fee to purchase a fantasy sports team and the related services. The purchase price provides the participant with access to the support services necessary to manage the fantasy team, including access to "real-time" statistical information, expert opinions, analysis and message boards for communicating with other participants. . . .
>
> 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. Nominal prizes, such as T-shirts or bobble-head dolls, are awarded to each participant whose team wins its league.

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[6] For further information on the statute of Queen Anne, see Joseph M. Kelly, *Enforcement of Casino Gambling Debts*, AM. JUR. PROOF OF FACTS 3D (2006).

> Managers of the best teams in each sport across all leagues are awarded larger prizes, such as flat-screen TVs or gift certificates. These prizes are announced before the fantasy sports season begins and do not depend upon the number of participants or the amount of registration fees received by defendants.[7]

First, the court concluded that the archaic Queen Anne recovery statutes are penal in nature "because they provide" a remedy in derogation of the common law and especially in the case at bar where "[p]laintiff seeks to recover unspecified losses to which he has no personal connection."[8] Thus, they must be strictly construed against recovery. The decision also stressed the plaintiff's failure to plead specificity concerning losses.

Even if the plaintiff had met the threshold pleading requirement, the court concluded as a matter of law there was no bet or wager "because (1) the entry fees are paid unconditionally; (2) the prizes offered to fantasy sports contestants are for amounts certain and are guaranteed to be awarded; and (3) defendants do not compete for the prizes."[9] Even if there was wagering or gambling, there could be no recovery because they were not "winners" as required by the Queen Anne Statutes. Since defendants were only administrators in the transaction, they "cannot be considered 'winners' as a matter of law."[10] Moreover, participants in the activity suffered no loss by engaging in the fantasy leagues and only paid a one-time fee.[11] Finally, the Unlawful Internet Gambling Enforcement Act specifically exempted this type of fantasy sports league from liability.

Plaintiffs generally have been unsuccessful in recovery based on the loss of others. The most interesting suit against a credit card company for an Internet gambling debt based on the Statute of Queen Anne is *Reuter v. MasterCard International,* No. 00-L-8 (Ill. Cir. Oct. 19, 2001). In *Reuter*, a gambler lost $49,500 while wagering on the Internet using credit cards. While the gambler did not try to recover his losses, plaintiff, a stranger to the transaction, sued to recover three times the losses pursuant to Illinois law. The court concluded that the credit card companies were not winners and not involved in the gambling enterprise.

In granting the credit card company's motion to dismiss, the trial court emphasized that the statute was penal in nature and thus should be strictly construed against a third party. However, the statute would be construed as remedial had the action been brought by the actual loser. It is also interesting to speculate what the result would be had the third party sued the offshore casino directly.

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[7] Humphrey v. Viacom, Inc., No. 06-2768, 2007 WL 1797648 at *1–*2 (D.N.J. June 20, 2007) (citations omitted).
[8] *Id.* at *4.
[9] *Id.* at *9.
[10] *Id.*
[11] *Id.* at *10.