

FANTASY SPORTS TRADE ASSOCIATION WINTER CONFERENCE 2011

The Politics of Fantasy Sports Gaming: 2010 Year in Review
and Goals for 2011

By Travis I. McCoy Esq.
Founder and Principal
McCoy Governmental Affairs and Legal Services

Presentation Overview

- What I do for the Fantasy Sports Trade Association
- Legislative highlights (or lowlights) from the past year
- The FSTA legislative agenda for 2011
- Political Action Committee creation

Duties

- Use lobbying and communication techniques to preserve the UIGEA fantasy sports gaming carve out
- Keep the FSTA abreast of all legislative actions involving the fantasy sports industry; including fantasy gaming
- Provide insight on national and state level legislation, the effect of proposed legislation, and the probability of a bill's passage
- Create strategies to overturn state laws that are offensive to the FSTA goals and FSTA members' business interests
- Handle the creation of a Political Action Committee for the FSTA
- Formulate strategies for funding the FSTA's PAC

2010 Legislative Highlights

- House Resolution 2267: “Internet Gambling Regulation Consumer Protection & Enforcement Act”
- Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010

2010 Legislative Highlights

- House Resolution 2267: “Internet Gambling Regulation Consumer Protection & Enforcement Act”
 - Proposed by Rep. Barney Frank
 - Would have legalized, regulated, and taxed online gambling in the United States
 - Rep. King amended the bill to specifically outlaw betting on “Sporting Events” (excluding pari-mutuel racing where permitted)
 - How would have this law have affected the Fantasy Gaming Industry? Use of legislative canons (devices that courts use to interpret statutes) sheds some light, though not dispositive.
 - ***Generalia specialibus non derogant*** (The general does not detract from the specific)
 - This means that if a later law and an earlier law are potentially - but not necessarily - in conflict, courts will adopt the reading that does not result in an implied repeal of the earlier statute. Lawmaking bodies usually need to be explicit if they intend to repeal an earlier law.

2010 Highlights; continued

- Senate Majority Leader Harry Reid's "Internet Gambling Prohibition, Poker Consumer Protection, and Strengthening UIGEA Act of 2010"
- Would have specifically legalized online poker games while also categorically illegalizing all other forms of online gambling
- Used UIGEA definition for "bet or wager" and therefore fantasy sports carve out would have been preserved

FSTA Legislative Goals for 2011

- PAC Creation
- Federal Legislation
- State Legislation
 - Maryland
 - Montana
 - Washington

FSTA Legislative Goals for 2011

- Creation of the Political Action Committee
 - Political Action Committees (PACs) act as a sword and shield for trade associations and other special interest groups
 - Gives the smaller interest groups a bigger voice in legislation creation/destruction both on the state and national level
 - How do we fund the PAC?
 - PAC funds do NOT come out of the FSTA's coffers.
 - Currently working with FSTA Board of Directors to create a fundraising strategy that makes sense for the FSTA and its members

PAC; Continued

- The FSTA-PAC will allow the FSTA to raise money for candidates in both state and national elections in order to further our political objectives so that FSTA member businesses can realize larger profits
- In the long term the FSTA-PAC will give the FSTA legitimacy on the political stage
- PAC contribution activity by fantasy sports enthusiasts/consumers will foster a greater sense of “belonging” to the fantasy community which should translate to larger profits for FSTA member businesses
 - Gives contributors a connection to the industry that will keep them going to websites, paying for analysis and information services, and participating in pay-to-play games and leagues

Any Federal Legislation on the Horizon?

- During the last Congressional legislative session Democrats controlled the Senate, House, and Presidency
- Republicans now control the House of Representatives
 - What does this mean for FSTA members?
 - Gridlock which should keep the status quo in place
 - UIGEA carve-out likely safe as any change in U.S. gambling laws by Democrats would likely not make it through the House

What's On Tap on the State Level in 2011?

- In 2011 we will attempt to attack offensive state laws with fantasy gaming friendly legislation in the following states:
 - Maryland
 - Montana
 - Washington
 - These states are in very different regions of the country. This should help quiet our lobbying activities and the response in each region will better inform us of which regions to focus on in the future (i.e. Mid-Atlantic, Pacific Northwest, etc.)
 - Avoids southern states in an effort not to galvanize right-wing groups opposed to gambling
 - They have a lot of funding and can become a problem nationwide very quickly

Maryland Gambling Laws Recap

- **“Gambling”** is defined as wagering or betting in any manner to receive something of value dependent upon the result of any race, contest or contingency.
- Specific Online Gambling Statute: No
- Strict Approach or Dominant Factor Test: Strict Approach
- Pay-To-Play: Maybe
- Free-To-Play: Probably Legal
- Cause of Action to Recover a Player’s Illegal Gambling Losses: No

Why Maryland?

- In several articles, Maryland legislators have admitted that they don't know exactly how their laws would affect the Fantasy Sports gaming industry
- Legislation has already been proposed and NOT voted down in the state
- Not a red state

Montana Gambling Laws Recap

- **“Gambling” or “gambling activity”** means risking any money, credit, 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.
- Specific Online Gambling Statute: Yes
 - “It is unlawful to wager on a fantasy sports league by telephone or by the internet.”
- Strict Approach or Dominant Factor Test: Probably Strict Approach
- Pay-To-Play: Statutorily Legal...but illegal if played over the internet
- Free-To-Play: Probably Legal
- Cause of Action to Recover a Player’s Illegal Gambling Losses: Yes
- The Montana state lottery runs a Fantasy Football game

Why Montana?

- Already has a Fantasy Football game run by the state lottery
- Goals:
 - Legalize all internet based fantasy gaming; or
 - Legalize all internet based fantasy gaming besides football
 - Can argue that UIGEA carve-out makes criminalizing Fantasy Sports gaming in the US unlawful because such laws have been preempted by Federal law.
 - Fantasy Sports gaming is legal in the state so long as it does not involve telephones or the internet. We can argue that this is unreasonable and contrary to the UIGEA and therefore may run afoul of preemption laws. Because Montana allows for Fantasy Gaming when the telephone and internet are not involved and because the Montana State Lottery already sanctions a fantasy game, we can argue that Montana has waived its' police powers argument
 - Can further argue that the Montana law encourages bookies to run "back-room" games and that these games will never earn the state a dime of tax revenue; while honest internet games run by respected businesses would bring in tax revenue
 - Runs afoul of the Dormant Commerce Clause because out of state, legal fantasy gaming operators cannot operate in state?
 - Can argue for Fantasy Sports gaming in the other major sports not controlled by the state lottery commission. Essentially, bartering with the state. "If you allow us to do A we will not attack you with B"

Washington

- “Gambling”...means staking or risking something of value upon the outcome of a contest of chance or a future contingent event not under the person's control or influence, upon an agreement or understanding that the person or someone else will receive something of value in the event of a certain outcome.
- Specific Online Gambling Statute: Yes
- Strict Approach or Dominant Factor Test: Dominant Factor Test
 - Caveat: State policy : "It is the policy of this state to prohibit all forms and means of gambling, except where carefully and specifically authorized and regulated. With the advent of the internet and other technologies and means of communication that were not contemplated when either the gambling act was enacted in 1973, or the lottery commission was created in 1982, it is appropriate for this legislature to reaffirm the policy prohibiting gambling that exploits such new technologies."
- Pay-To-Play: Illegal
- Free-To-Play: Probably Legal
- Cause of Action to Recover a Player's Illegal Gambling Losses: Yes

Why Washington State?

- Russo v. State of Washington (September 2010) may have inadvertently given proponents of Fantasy gaming ammo in the fight to make fantasy gaming legal in the state
 - “Congress has not delegated to the states its authority to regulate interstate Internet gambling”
 - “Here, the State argues two Congressional acts manifest “unmistakably clear” intent to delegate to the states the authority to regulate on-line gambling. Neither of these acts manifests such intent. The acts cited recognize and expressly preserve a state's authority to criminalize some or all gambling activities *within the state's borders*, **but nothing more.**”
 - This holding creates a strong Commerce clause argument, in my opinion as Congress expressly authorized the Fantasy Sports carve-out
- Can use the example of “Fantasy Thunder” as a reason fantasy sports gaming should be expressly authorized, regulated, and taxed.
 - This may galvanize the legislature to pass a law that regulates fantasy sports gaming