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ATTORNEY GENERAL OPINION NO. 2015- 9

The Honorable Mark A. Kahrs  
State Representative, 87<sup>th</sup> District  
State Capitol, 286-N  
300 S.W. 10th Avenue  
Topeka, Kansas 66612

Re: Constitution of the State of Kansas—Miscellaneous—Lotteries

Synopsis: If fantasy sports leagues fall within the definition provided in 2015 Senate Substitute for HB 2155, then fantasy sports leagues are games of skill and therefore are not lotteries. Further, because the Legislature has the exclusive authority to legislate and may determine what conduct may be punished as a crime, we conclude that Section 19 of 2015 Senate Substitute for HB 2155 does not violate the constitution. Cited herein: K.S.A. 2014 Supp. 21-6403; 21-6404; Kan. Const., Art. 2 § 1; Art. 15 § 3a, 3b, 3c, 3d; 31 USC 5361 *et seq.*

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Dear Representative Kahrs:

As State Representative for the 87<sup>th</sup> District, you ask our opinion on three questions concerning the Fantasy Sports League. First, you ask whether “the Fantasy Sports League is a lottery under Kansas law.” Second, you ask if the Fantasy Sports League is determined not to be a lottery, “is [2015 Senate Substitute for] HB 2155 constitutional.” Third, you ask if the Fantasy Sports League is determined to be a lottery, “does the Legislature have the authority to state, ‘A bet does not include . . . a fantasy sports league as defined in [2015 Senate Substitute for] HB 2155?’” We will answer your questions in turn.

The Legislature has determined that gambling is a crime defined as “[m]aking a bet; . . . or entering or remaining in a gambling place with intent to make a bet, to participate in a lottery or to play a gambling device.”<sup>1</sup> A lottery is a specific form of gambling which is prohibited by Article 15, § 3 of the Constitution of the State of Kansas. Article 15, § 3 provides, “[l]otteries and the sale of lottery tickets are forever prohibited.”<sup>2</sup> “[T]he term lottery, as used in Art. 15, § 3 of the Kansas Constitution, has been broadly defined by [the Kansas Supreme Court] as any game, scheme, gift, enterprise, or similar contrivance wherein persons agree to give valuable consideration for the chance to win a prize or prizes.”<sup>3</sup> The Legislature defines “lottery” under the criminal code to mean “an enterprise wherein for a consideration the participants are given an opportunity to win a prize, the award of which is determined by chance.”<sup>4</sup> While the two definitions are not identical, the judicially and legislatively created definitions consistently identify the essential elements of a lottery as: (1) prize, (2) consideration, and (3) chance.<sup>5</sup> For convenience, we use the term “enterprise” to refer to “any game, scheme, gift, enterprise, or similar contrivance.”

If the enterprise is a lottery, and the enterprise does not fall within one of the four voter-approved exceptions,<sup>6</sup> the constitutional ban is self-executing<sup>7</sup> and the enterprise is prohibited. If an essential element of a lottery is missing, then the enterprise is not a lottery and thus does not violate the constitutional ban against lotteries. In that case, the enterprise is not prohibited, *per se*. However, the enterprise may still violate the broader criminal law against gambling in this State.<sup>8</sup>

### ***Elements of a Lottery***

In your first question, you ask whether the Fantasy Sports League is a lottery under Kansas law. We were not provided any facts on how the Fantasy Sports League operates. However, legislative testimony indicates that “participants select a team of real world athletes and accumulate points based on how their players perform in an actual game. The goal—regardless of format—is to select a team of players that will score the most possible points.”<sup>9</sup>

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<sup>1</sup> K.S.A. 2014 Supp. 21-6404(a).

<sup>2</sup> This provision was adopted by convention on July 29, 1859, and was ratified by the electors on October 4, 1859.

<sup>3</sup> *State ex rel. Stephan v. Finney*, 254 Kan. 632, 644 (1995).

<sup>4</sup> K.S.A. 2014 Supp. 21-6403(b).

<sup>5</sup> *Id.* See also *State v. Nelson*, 210 Kan. 439, 444 (1972) and *State ex rel. Stephan v. Finney*, 254 Kan. 632, 640 (1995).

<sup>6</sup> Article 15 §§ 3a, 3b, 3c, and 3d; See Attorney General Opinion No. 2015-6.

<sup>7</sup> *State ex rel. Stephan v. Finney*, 254 Kan. 632, 643 (1995).

<sup>8</sup> See K.S.A. 2014 Supp. 21-6403 *et seq.*

<sup>9</sup> See Testimony presented by Jeremy Kudon on behalf of the Fantasy Sports Trade Association before the Senate Federal and State Affairs Committee on March 10, 2015 on 2015 SB 267. The provisions of 2015 SB 267 were placed into 2015 Senate Substitute for HB 2155 by the Senate Committee of the Whole.

Further, because current Kansas law does not define “fantasy sports league,” we presume that the definition of “fantasy sports league” in 2015 Senate Substitute for HB 2155 comports with your use of the term in this request. Section 19(d) of the bill, as of this writing, defines “fantasy sports league” to mean:

[A]ny fantasy or simulation sports game or contest in which no fantasy or simulation sports team is based on the current membership of an actual team that is a member of an amateur or professional sports organization and that meets the following conditions: (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; (2) all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events; and (3) no winning outcome is based: (A) On the score, point spread or any performance or performances of any single real-world team or any combination of such teams; or (B) solely on any single performance of an individual athlete in any single real-world sporting event.<sup>10</sup>

For a fantasy sports league to constitute a lottery, the elements of a lottery must be present: prize, consideration and chance. A prize is something of value received for winning the enterprise.<sup>11</sup>

Consideration is defined in K.S.A. 2014 Supp. 21-6403(c), which states in pertinent part:

“[C]onsideration” means anything which is a commercial or financial advantage to the promoter or a disadvantage to any participant. Mere registration without purchase of goods or services; personal attendance at places or events, without payment of an admission price or fee; listening to or watching radio and television programs; answering the telephone or making a telephone call and acts of like nature are not consideration. . . .

The element of chance is not defined. The common and ordinary meaning<sup>12</sup> of a “game of chance” is “[a] game (as a dice game) in which chance rather than skill determines

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<sup>10</sup> This language appears to be modeled off of the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA), specifically 31 U.S.C. § 5362(1)(E)(ix), which excludes, *inter alia*, fantasy or simulation sports games, from the definition of bet or wager.

<sup>11</sup> See *Games Mgmt., Inc. v. Owens*, 233 Kan. 444, 449 (1983).

<sup>12</sup> “In attempting to discover the legislature’s intent, we examine the language of the statute, giving common words their common and ordinary meanings.” *Davis v. Winning Streak Sports, LLC*, 48 Kan. App. 2d 677, 682 (2013).

the outcome.”<sup>13</sup> Similarly, Black’s Law Dictionary defines a “game of chance” as “[a] game whose outcome is determined by luck rather than skill.”<sup>14</sup> Put simply, chance is the opposite of skill. Skill, on the other hand, requires a plan, design or the exercise of volition or judgment to actually cause a desired outcome of a game when the game is played.

In between games of chance and games of skill is a spectrum of enterprises that have a mixture of varying degrees of both skill and chance. A factual determination is required before a decision on a particular enterprise can be made, because, to our knowledge, no Kansas Court has determined, as a matter of law, that fantasy sports leagues are games of chance and are therefore lotteries.<sup>15</sup>

To determine how to categorize the enterprises in the middle of the spectrum, we believe Kansas has adopted the “dominant factor doctrine.”<sup>16</sup> To be considered a game of chance, chance must generally predominate over skill in the results of the game.<sup>17</sup> It is generally for the courts to determine, on a case-by-case basis, whether skill or chance dominates in an activity, and therefore, whether the activity is prohibited as being in the nature of a lottery.<sup>18</sup>

When chance is “an integral part which influences the result,” chance dominates the game.<sup>19</sup> Chance is not “integral” to the result where “skill override[s] the effect of the chance.”<sup>20</sup> Although chance may be present in a game of skill, its influence cannot be so great as to influence the outcome. For a court to consider skill dominant in a game, “[s]kill or the competitors’ efforts must sufficiently govern the result. Skill must control the final result, not just one part of the larger scheme.”<sup>21</sup>

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<sup>13</sup> “Game of chance.” Merriam-Webster.com. [http://www.merriam-webster.com/dictionary/game of chance](http://www.merriam-webster.com/dictionary/game%20of%20chance) (accessed 4/21/2015).

<sup>14</sup> Black’s Law Dictionary (10th ed. 2014) (defining “game of chance”).

<sup>15</sup> We note, however, that the Kansas Racing and Gaming Commission concluded fantasy sports leagues are predominantly games of chance and issued a statement in their FAQ section on their website stating, “We do not argue that there are some elements of skill involved in fantasy leagues. Particularly, fantasy managers must be knowledgeable of player statistics, and must execute some strategy in selecting the best players for their fantasy team. On the other hand, a manager leaves to chance a number of things, including: (1) how a drafted athlete performs in a future event; (2) whether a drafted player is injured; (3) whether the player’s actual team in a given week executes a game plan that fits the player’s talents; whether the coach calls plays that favor the player; and (4) how opponents of the actual player (who may be drafted by another manager) actually play.”

<sup>16</sup> *Three Kings Holdings, L.L.C. v. Six*, 45 Kan. App. 2d 1043, 1050 (2011); *Games Mgmt., Inc. v. Owens*, 233 Kan. 444, 449 (1983).

<sup>17</sup> 54 C.J.S. *Lotteries* § 5 (2015).

<sup>18</sup> *Id.*

<sup>19</sup> *State ex rel. Tyson v. Ted’s Game Enters.*, 893 So. 2d 355, 374 (Ala. Civ. App. 2002), quoting *Sherwood & Roberts-Yakima v. Leach*, 409 P.2d 160, 163 (Wash. 1966).

<sup>20</sup> *Id.*

<sup>21</sup> *Morrow v. State*, 511 P.2d 127, 129 (Alaska 1973), citing *Commonwealth v. Plissner*, 4 N.E.2d 241 (Mass. 1936). See also *Sherwood & Roberts-Yakima*, 409 P.2d at 163 (discussing “control”).

We believe that if fantasy sports leagues fall within the definition provided in 2015 Senate Substitute for HB 2155, then fantasy sports leagues are games of skill and therefore are not a lottery. The definition of “fantasy sports leagues” in the bill specifically incorporates the dominant factor test by requiring that “all winning outcomes reflect the relative knowledge and *skill* of participants and are determined predominantly by accumulated statistical results of the performance of individual athletes in multiple real-world sporting events.”<sup>22</sup>

Our conclusion is bolstered by the fact that the UIGEA also specifically excludes fantasy sports leagues from the federal definition of betting. Under federal law, Congress has determined that fantasy sports leagues are games of skill.

### ***Constitutionality of 2015 Senate Substitute for HB 2155***

In your second question, you ask if the Fantasy Sports League is determined not to be a lottery, is 2015 Senate Substitute for HB 2155 constitutional?

Section 19 of 2015 Senate Substitute for HB 2155 is the section dealing with fantasy sports leagues. It amends K.S.A. 2014 Supp. 21-6403, which provides definitions for the criminal statutes on gambling. Specifically, the bill amends the definition of “bet” to exclude fantasy sports leagues from the definition as follows:

(a) “Bet” means a bargain in which the parties agree that, dependent upon chance, one stands to win or lose something of value specified in the agreement. A bet *does not* include:

....

(9) a fantasy sports league as defined in this section;<sup>23</sup>

The bill also defines “fantasy sports league.” The definition of fantasy sports league in the bill has been previously cited in this opinion.

Because we believe that a fantasy sports league that comports with the definition in Section 19 of 2015 Senate Substitute for HB 2155 is not a lottery, there is no constitutional provision prohibiting such a league. In addition, because the Legislature has the exclusive authority to legislate<sup>24</sup> and may determine what conduct may be punished as a crime, we conclude the Section 19 of 2015 Senate Substitute for HB 2155 does not violate the constitution.

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<sup>22</sup> Emphasis added.

<sup>23</sup> Emphasis added.

<sup>24</sup> Article 2, § 1 of the Kansas Constitution provides, “The legislative power of this state shall be vested in a house of representatives and senate.”

***Definition of Bet***

In your final question, you ask if the Fantasy Sports League is a lottery, “does the Legislature have the authority to state, ‘A bet does not include . . . a fantasy sports league as defined in HB 2155?’” Given our answers to your first and second question, we believe this question is moot.

Sincerely,

Derek Schmidt  
Kansas Attorney General

Athena E. Andaya  
Deputy Attorney General

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