

# Paxton ruling on fantasy sports is good for Texans

By James C. Ho - Special Contributor

This week, Attorney General Ken Paxton assured sports fans he respected the limits of his office and would not take legal action against fantasy sports. He told ESPN Radio: “We’re not going after anybody ... unlike in New York, where the attorney general there is trying to shut down fantasy sports” — echoing Gov. Greg Abbott’s statement that he would “be apprehensive about a state coming out and imposing regulations” on fantasy sports.

So it was a good day for Texans who love football, fantasy sports and freedom — and oppose the abuse of executive power. As if to reinforce the point, Paxton reminded listeners that the Supreme Court just agreed to hear his landmark abuse of executive power case against President Barack Obama.

On the other hand, Paxton also made a prediction that courts might rule negatively if confronted with a challenge to fantasy sports.

The fantasy sports community disagrees with his prediction, but, more importantly (and to his credit), Paxton made some significant concessions that deserve recognition and respect — and provide further assurance that fantasy sports are lawful in Texas.

He acknowledged he was simply assuming certain facts about fantasy sports, which may or may not be correct. Moreover, he conceded that “absolutely, there’s definitely skill involved” in fantasy sports.

That should be fatal to any challenge to fantasy sports. After all, Texas law explicitly authorizes prizes for “actual contestants” in a “bona fide contest ... of skill.”

Despite this authorization, opponents of fantasy sports suggest that bona fide contests of skill should still be prohibited, if they involve “any” element of chance — that is, if they partially involve chance.

But that is a policy argument, not a legal one. Texas law authorizes bona fide contests of skill — period — regardless of whether chance plays a meaningful role too.

Furthermore, courts construe statutes in context. The Legislature prohibited games that partially involve chance — and then added a carve-out for bona fide contests of skill. These two provisions must be read together. And that is devastating to opponents of fantasy sports.

Just think about it: Opponents claim that the Legislature meant to prohibit contests of skill that partially involve chance. But if that’s right, then what’s the point of the second provision? Under their view, the second provision adds nothing that wasn’t already true under the first — if it partially involves chance, it’s still unlawful, even if it is also a bona fide contest of skill. But as Paxton has said, it’s wrong to construe statutes “in a manner that renders any part of the statute meaningless or superfluous.”

What’s more, there’s yet another problem with the attorney general’s prediction. Even if we were to simply ignore the second provision (as no good textualist would), statistical experts agree that chance is “overwhelmingly immaterial” to success in fantasy sports in any event.

After all, succeeding as a fantasy general manager requires the same skills as real-life GMs. The best GMs can earn commanding salaries for their skill (think Billy Beane from “Moneyball”). Likewise, fantasy GMs are actual contestants engaged in bona fide contests of skill. Sports gambling, by stark contrast, involves passive spectators (not actual contestants) wagering on someone else’s performance.

And because fantasy sports is a contest of skill, it does not matter whether people play for free or for a fee. Indeed, the very fact that so many people play fantasy sports for free only further proves: This is a bona fide contest of skill that people enjoy for its own sake.

This debate is not just about fantasy sports. Texans enjoy many other activities that, like fantasy sports, involve entry fees and prizes for contests of skill — bass fishing tournaments, surfing contests, bull riding and figure skating competitions, beauty and talent pageants, stock picking contests.

Those contests likewise involve chance — the caprice of the fish, the swell of the wave, the vigor of the bull, the subjective preferences of judges, the vicissitudes of the market. Bass fishing teams, figure skating pairs, stock picking — all involve the performance of another human being.

So either all of these beloved (if not quintessentially Texan) competitions are lawful — or none are.

Even if reasonable minds could disagree with the experts, fantasy sports are still lawful. To quote Justice Antonin Scalia, when the law is in doubt, “the tie must go” to the citizen over the state. Prosecutors cannot create new crimes on their own.

And that is precisely the point. Texans cherish our football — almost as much as we cherish our freedom.

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