

DEPAUL LAW SYMPOSIUM: PRESENTATION MATERIALS

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Daily Fantasy Sports (DFS) in New York

1. November 10: cease-and-desist letter from Attorney General to FanDuel and DraftKings
 - a. Companies' DFS contests are "illegal gambling" under New York law
 - i. New York Penal Law Sec. 225.00
 1. Contest participants place "bets" on an "event not under [their] control or influence"
 2. "Winning or losing depends on numerous elements of chance to a 'material degree'"
 - ii. New York State Constitution
 1. Prohibits "pool-selling, book-making, or any other kind of gambling"
 - iii. Other violations of criminal law
 1. Knowingly profiting from unlawful gambling activities
 2. Knowingly possessing instruments used in a bookmaking scheme
 3. Misrepresentations to the public, including "misrepresenting the likelihood that an ordinary player will win the jackpot" because "the top one percent of [the two companies'] winners receive the vast majority of the winnings"
 - b. "Legality of traditional fantasy sports has never been seriously questioned in New York," but season-long contests distinguishable from DFS
 - i. "The sites hosting DFS are in active and full control of the wagering," because they set the prizes, control relevant variables (such as "salary cap" prices), and "profit directly from the wagering"
 - c. Demand that the two DFS companies stop accepting "wagers" from New York residents
2. November 13: FanDuel and DraftKings independently file lawsuits against Schneiderman and the State of New York
 - a. Seek for New York state court to declare DFS operations legal under New York law and enjoin the Attorney General from taking any enforcement actions
 - b. Rely on *Humphrey v. Viacom*, 2007 WL 1797648 (D. N.J. 2007)
 - i. Humphrey brought a qui tam action to recover alleged gambling losses against a group of companies operating online, season-long fantasy sports leagues
 - ii. New Jersey district court held that participants in traditional fantasy sports leagues were not participating in gambling
 1. "The success of a [full-season] 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 for his or her team, and deciding who among his or her players will start and which players will be placed on the bench"
 - a. As in traditional fantasy sports contests, DFS games test the relative proficiency of contest participants in evaluating and selecting (often from within the restraints of a salary cap and in light of the scoring criteria used by contest operator) real-world athletes for their fantasy teams
 2. "As a matter of law, the entry fees for Defendants' fantasy sports leagues are not 'bets' or 'wagers' 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."

- a. DFS participants compete against other participants, not against the DFS contest operator
 - b. DFS operator has no stake in outcome of contest and pays winner(s) unconditionally
 - c. Flawed analysis and contradictions in Schneiderman's letters
 - i. On one hand, the Attorney General argues that the DFS contests are game of chance, not skill; but in the same breathe, he criticizes the companies for offering games in which only the top professionals profit at the expense of "casual players"
 1. That a minority of experienced players reap the vast majority of winnings necessarily confirms that their DFS contests are skill-based, because if chance was determinative, prizes would be distributed more evenly between experienced and inexperienced players
 - ii. Incorrect for the Attorney General to claim traditional, season-long fantasy sports as legal while at the same time determining that DFS is somehow distinct, and illegal
 1. DFS requires at least the same amount of skill, and possibly even more skill, than season-long contests
 2. Empirical evidence: independent study commissioned to compare the results achieved by top-earning DraftKings' users (skilled participants) against computer lineups generated at random (unskilled participants)
 - a. In those simulations, the skilled users dramatically outperformed the unskilled participants
3. November 17: Schneiderman files suit against DraftKings and FanDuel
 - a. Cases consolidated
4. December 11: New York Supreme Court Justice Manuel Mendez grants a "preliminary injunction" against the DFS operators
 - a. Preliminary Injunction: a temporary order made by a court at the request of a party that prevents the other party from pursuing a particular course of conduct until the conclusion of a trial on the merits
 - i. Normally a preliminary injunction remains in effect until a trial takes place and a final judgment on the merits of the case is rendered – something which could take months, if not years, to occur
 - ii. Often described as an "extraordinary remedy" and is usually difficult to obtain
 - iii. To be granted, a party must demonstrate a likelihood of success on the merits; that it would suffer "irreparable harm" without an injunction; and that the "balancing of equities" favors the granting of the injunction
 - b. Prohibits FanDuel and DraftKings from accepting entry fees from New York consumers for the games on its websites
 - i. Judge Mendez concluded that the payment of entry fees associated with FanDuel's and DraftKings' games probably ran afoul of New York's constitutional and statutory prohibition of gambling
 - ii. Reasoned that the Attorney General was not required to show irreparable harm because it was implied in desire to prevent the effects of fraudulent and illegal conduct on the general public
 - iii. Also found that balancing of the equities also favored Schneiderman, whose interest in protecting the public, "particularly those with gambling addictions," outweighed any potential loss of business by the DFS companies
5. December 11: DraftKings and FanDuel granted "emergency stay" by appellate court
 - a. Stay: suspension of a particular proceeding within a case

- b. Stay granted by Judge Paul Feinman of the appellate division
 - i. Delayed, in the interim, the enforcement of Judge Mendez’s order granting a preliminary injunction in favor of Schneiderman
 - ii. Preserved the operators’ ability to engage in their businesses of providing DFS contests to New York residents while an appeal of the lower court’s decision was pending
- c. January 11:
- 6. December 31: Schneiderman files amended complaint
 - a. New allegations regarding false or misleading advertising
 - b. Seeks an order requiring that all the money DraftKings and FanDuel made in New York be repaid to customers who lost money
 - c. Asks that the sites pay a fine of up to \$5,000 per case
- 7. January 11: Following briefing by both parties, a panel of appellate judges orders the stay of Judge Mendez’s order to remain in place until a full hearing on the appeal can take place in May
- 8. Potential Impact
 - a. Eilers Research estimates 12.8% of active DFS players reside in New York, the most of any state in the country
 - i. Loss of New York market would be big blow to companies
 - b. Precedent setting?
 - i. No courts have rendered a decision regarding legality of DFS
 - ii. If the court’s ruling is upheld, while not necessarily binding in other jurisdictions, it may be considered persuasive in the eyes of other courts analyzing DFS under their respective states’ gaming laws
 - iii. It may also encourage other political leaders and law enforcement officials to undertake a closer assessment of DFS
 - c. Limited reach?
 - i. New York is one of only a minority of states that uses the “material element” test to analyze whether a pay-to-play game qualifies as gambling
 - 1. Most states have adopted the “predominant factor” test in their analysis, a more lenient and less subjective test that deems an activity to be one of skill – and therefore legal under most state laws – where more than 50 percent of the result is derived from skill
 - ii. Few other state statutes mirror the language contained in New York’s anti-gambling law, in which a contest is prohibited if “something of value” is risked on a future contingent event
 - 1. To be considered illegal gambling, many states require the placement of a “bet” or “wager” – see *Humphrey*
 - d. Proposed legislation
 - i. Legislators across the country, including in New York, continue to propose and consider legislation that would clarify the legal status of DFS and impose certain regulations, including practical consumer protections and, in some cases, taxes or licensing fees
 - ii. Short-term timing is uncertain, but there appears to be a strong push in many states to specifically exempt DFS from gambling prohibitions
 - 1. But PASPA concerns?
 - iii. Piecemeal regulation may not be ideal, but it’s far preferred to an outright ban