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Traditional Fantasy Sports v. DFS, and Why the Former is Escaping Scrutiny

BY [MICHAEL KAR](#) / ON APRIL 26, 2016

On November 10, 2015, New York Attorney General Eric Schneiderman (pictured) ordered daily fantasy sports (DFS) sites like FanDuel and DraftKings to immediately cease New York operations on the grounds that their businesses constitute illegal gambling. The general public, as well as the companies themselves, believed DFS to be an entirely legal form of fantasy sports wagering. Although discourse has arisen about the legality of DFS, traditional fantasy sports seem to have escaped scrutiny by both Schneiderman and the general public.

Fantasy sports, playable online, have been in existence for two decades. The traditional sports include season-long wagers, mostly between friends and colleagues, which can result in a one-time monetary payout in a sum of money limited to what was provided by these same friends and colleagues. Fantasy football will be our focus: a game-type that consists of about four months of play by up to twenty players. Traditional fantasy football has become a common household activity, and although money may be exchanged, it is perceived in the same “gambling” light as picking a box at a Super Bowl party. This perception used to be matched by a lack of enforcement.

In 2006, however, the federal legislature addressed this gray area by enacting the Unlawful Internet Gambling Enforcement Act (UIGEA). This act, while simultaneously enforcing restrictions on illegal online gambling, carved out an exception for fantasy sports—§ 5362(1)(E)(ix) of the UIGEA makes lawful “participation in any fantasy or simulation sports game....” Following this, DFS sites jumped on the opportunity to change the landscape of fantasy sports wagering. This landscape changed from solely traditional fantasy sports to a distinction between traditional and DFS.

The meteoric rise of DFS sites like FanDuel (first paying customer in 2009 and mega-partnership with NBC in 2013) is attributable to an entirely different fantasy sports experience. On DFS sites, payouts can come within 24 hours of the wager, and the winnings consist of money put up by thousands of other players, not just friends and colleagues. Players can place bets daily and weekly, as opposed to the traditional multiple-month wager lifespan. DFS’s short wager lifespan is the source of its popularity. A short lifespan allows fantasy enthusiasts to put up more money more often, and fantasy amateurs, who otherwise could not complete a season-long activity, to play sporadically. However, this short lifespan also works against DFS in unearthing two arguments that call for the legalization of DFS.

First, from a public policy standpoint, this ability to put up more money more often awakens the anti-gambling fervor that some states hold. Supporters of Mr. Schneiderman, and those

against DFS, claim that the exception carved out in the UIGEA was meant, in the context of legislative intent, to protect only traditional fantasy sports games and not the lucrative expanse that DFS has become. The second argument, the legal argument used to protect policy, is that the short timespan of wagers opens up the all-powerful game of skill v. game of chance argument. Game of skill v. game of chance is the discourse that is used by the judiciary and legislature to determine whether or not different gambling games are considered legal or illegal. Skill-based games are awarded designation as the former, and therefore have a stronger legal argument of legality.

Therefore, the question becomes whether or not DFS are based on skill or chance in relation to traditional fantasy sports – specifically, in New York, the question becomes whether or not a material issue of chance exists in DFS. Supporters of the AG will claim that more chance exists in DFS than traditional games because of the difference in both the length of the wager and the amount of action taken by players. Keeping with our football base, a traditional season would consist of: a) drafting athletes for your team; b) selecting which of these athletes to play, over others that you own, seventeen times a season; c) replacing athletes who become injured or unproductive throughout the course of the season with other athletes not owned by competing teams; d) trades with other teams; and more. Conversely, a DFS wager consists solely of picking one team, from an unlimited amount of athletes, for one game each. Due to the fact that more action is required by the player in traditional games, the argument rests that more skill is required to end the season victorious traditionally as opposed to ending the week victorious in DFS. How rock solid is this reasoning?

Well, the same exact factors raised above that lend credibility to the argument that traditional games have less chance and take more skill than DFS, can also be used to argue just the opposite: a) as for the draft, the players can spend as much time as they want creating a skill-based strategy to get the best athletes, but if other teams happen to by chance take those athletes right before you, skill is thrown out the window by chance; b) the season consists of seventeen games, but a team can win the first sixteen, by chance lose the last one, and not win any money at all; c) one needs skill to replace injured or unproductive athletes, but any injury itself is a direct result of chance; d) trading with other teams takes the skill of negotiation and team building, but one player can collude with another to create an unfair advantage through trading. None of these listed sources of chance exist in DFS. Therefore, the argument that traditional games take more skill than DFS is suspect.

Where does this leave us? In reality, the legal arguments that are going to be made will not be a distinction between traditional and DFS, but instead of the legality of DFS alone. Does this or does this not raise questions about the legality of traditional fantasy sports? If DFS is found in New York State to be materially based on chance, and therefore illegal, do traditional games also become illegal? Regardless, this entire conversation would be perplexing in the questioning of the legality of DFS, but not the same questioning of traditional games.

DFS sites have been operating under the true belief that they are legal forms of gambling, and now their legality is being questioned by Mr. Schneiderman. Why are traditional fantasy sports left out of the conversation? Food for thought.

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