Wrong approach to DFS

Douglas Mishkin, SVP of legal affairs and business development at Metric Gaming, argues against the New York attorney general's ruling that DFS is "illegal gambling"

Pervasive marketing and high-profile partnerships with professional sports organizations are not the hallmarks of an illegal gambling ring. Yet, that is precisely what the New York Attorney General (NYAG) has effectively labeled daily fantasy sports (DFS) operators FanDuel and DraftKings, and it is rumored state attorney generals across the US are preparing to do the same. How did we end up here?

As has now been widely publicized, the DFS industry is facing an avalanche of legal claims, including for deceptive trade practices and fraud. But for the most part, these claims are based on alleged facts that were not previously well known – like DFS employees capitalizing on inside information. What is more perplexing are the recent allegations that DFS violates state gambling laws, particularly given that DFS contests have been public for many years. The inherent difficulty in applying these laws to DFS may help explain this disconnect, as further illustrated by a brief overview of the current legal battle in New York.

On November 10, the NYAG issued a cease-and-desist letter to FanDuel and DraftKings, claiming they were promoting illegal gambling. Shortly thereafter, the NYAG elaborated on that claim in lawsuits filed against both companies, formally seeking a court order to shut down their operations in New York pending the outcome of a full trial.

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> "Pervasive marketing is not the hallmark of an illegal gambling ring

Letter of the law

The NYAG's letter was based primarily on a provision of New York's penal code, under which DFS would constitute illegal gambling if at least one of the following statements were true:

- DFS is a "contest of chance" (defined as "any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein");
- DFS participants "stake or risk something of value" on the outcome of "a future contingent event" not under their "control or influence."

As may be clear from the above, reasonable minds could disagree over these characterizations. For example, with respect to point one, the NYAG argues that injuries, rain-outs, player suspensions, erroneous officiating and even incorrect box scores are material elements of chance that can dictate the results of a fantasy contest, while DFS operators point to the sophisticated drafting strategies and analysis that go into compiling a successful fantasy roster (emphasizing expert studies concluding that DFS contests are determined predominantly by the participants' skill).

But setting aside the relative merits of these arguments, the parties cannot even agree on the correct legal standard. As argued by the DFS operators, despite the "material degree" language in the statute, many New York courts have nevertheless applied a "dominant factor" test (which looks only to whether luck predominates over skill as the relevant inquiry). To settle this dispute will therefore entail not only identifying the proper legal standard, but also making an inherently subjective judgment call on where exactly DFS falls on the luck-skill spectrum.

Point two is no less controversial, as the parties are unable to agree on whether DFS participants even "risk something of value." DFS operators claim that contest entry fees do not actually qualify, as they are simply paid in exchange for contest administration – not "risked" like a traditional wager. The NYAG argues the money

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paid to enter DFS contests clearly constitutes something "of value," and the fees are risked in the basic sense that if the contest entrant does not win his or her contest, the fee is lost.

The NYAG also argues DFS players have no control or influence over athletes' performances, likening DFS to conventional sports betting. As the NYAG explains, "[a] DFS player can try to make an informed guess of how particular athletes might perform, but no DFS player can (legally) influence how those athletes will perform."

A matter of perspective

While DFS operators counter by simply stating their contests are games of skill and therefore "influenced" by the contestants, the more precise counterargument would appear to be that the NYAG is incorrectly defining the relevant "future contingent event." The amount of fantasy points accumulated by athletes is not – in and of itself – determinative of who wins a fantasy contest, in the sense that no fixed number of fantasy points can guarantee a win or a loss. Instead, winners are determined purely by comparison to other contest participants, and as such, the "future contingent event" is more accurately described as the relative accumulation of fantasy points compared to other contest participants.

When framed that way, it becomes harder to argue that DFS players have no influence over the "future contingent event," as only a small fraction of DFS players win routinely, and the most successful among them implement strategies aimed at, among other things, leveraging insights into how other contest participants are likely to play.

Indeed, the very scandal ultimately responsible for this legal dispute was based in part on allegations that a DFS employee used inside information regarding athlete ownership percentages – data that, if exploited properly, would undoubtedly increase one's chances of beating the competition (the alleged use of such information would otherwise likely never have created such controversy).

Also weakening the NYAG's argument is its public concession (both in its cease-and-desist letter and court filings) that season-long fantasy contests are perfectly legal under New York law. As such, even if the NYAG were correct in its identification of the relevant "future contingent event" as being merely the performances of real-world athletes, players' inability to control or influence those performances would hold equally true in season-long fantasy competitions, further undermining the government's position.

Locked in battle

The parties met in a New York state court on November 25 to argue the NYAG's motion for a preliminary injunction – effectively a court-ordered shutdown of FanDuel's and DraftKings' operations in New York. During the hearing, the judge appeared to express some skepticism over arguments from the DFS operators, but withheld any ruling from the bench and stated he would make his decision on the matter shortly.

Regardless of how these issues are ultimately resolved, however, nuanced statutory interpretations and fact-sensitive analyses around inherently subjective terms would ideally never dictate the fate of a multi-billion dollar industry, particularly one that's been operating openly for many years and that millions of consumers enjoy. But perhaps by drawing national attention to the inefficiencies of this system, and in particular the tenuous legal distinctions between various forms of gambling throughout the US, these lawsuits may motivate more legislators nationwide to consider a legalize-and-regulate approach to gambling in general, rather than the outright prohibition that has historically proven ineffective. ■