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### Daily Fantasy sites engage in a legal war for survival

Danni R. Santana

*CUNY Graduate School of Journalism*

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## **Headline:** Daily Fantasy sites engage in a legal war for survival

By Danni Santana

It has been a traumatic few months for the daily fantasy sports industry.

One by one, lawmakers continue to introduce legislation to regulate and ban the rapidly growing business, citing fantasy sports as a form of gambling. In New York, Attorney General Eric Schneiderman is in an ongoing battle to push DFS sites out of their largest market. States such as Florida and Massachusetts have also introduced heavy regulations of their own in the past month.

As the industry fights for survival, debates have surfaced over whether winning at daily fantasy requires any actual skill. State authorities argue no. It is a dangerous game of chance that requires its own set of rules.

Legal issues aside, daily fantasy sports are about the fans that play it. Winning on DraftKings or FanDuel, however, is not as easy as TV advertisements make it seem.

Success in high-stakes contests like Millionaire Maker on DraftKings and Guaranteed Prize Pool on FanDuel is less about picking the best players than it is making picks that will help the least amount of participants. In other words, choosing as many sleepers as possible.

Chris Pansini works as a fulltime barber at Master's Style Shop in Staten Island. To him, his colleagues and the shop's 500 weekly visitors, identifying this week's "sleeper" is always a guaranteed topic of conversation.

"What makes daily fantasy so hard to win is it's difficult to find a sleeper no one else knows about," he said. "There are tons of posts online each week identifying them."

Pansini, a former alcohol and drug addict turned YMCA spokesperson, frequently played online poker before federal law banned it in 2006. Now, he looks for that rush in anything he does. He has won more than 20 times on DraftKings, never playing more than a couple of dollars in entry fees.

"The most I've won at one time is \$300 in low-stakes games," said Pansini. "It's a little more of a rush to play fantasy than to bet on a traditional game because it's more personal. When a player you need to go off goes off it's really exciting."

For every player like Pansini that wins on FanDuel or DraftKings there are several others who have yet to taste success.

Brian Delph is one of those players. He plays daily fantasy everyday, mainly NBA and NFL games. If the name sounds familiar, it is because he is a professional video gamer, previously featured on ESPN's reality TV show "*Madden Nation*" in 2007.

“I was going to quit for good until a friend of mine won \$150,000 in an NFL game not too long ago,” said the Sandusky, Ohio resident. “A friend of his later won \$40,000.”

There are several benefits to playing daily fantasy sports, according to Delph. Primarily, it’s a low-risk, high-reward game. Most times players receive their money back if they crack the top 40,000 in high-stakes games. These contests typically have up to a million participants and offer \$2.5 million in cash prizes.

Players also receive a guaranteed commission from first-time winners just by referring them to the site. However, commercials promoting that FanDuel or DraftKings will match a player’s first \$200 entry are misleading, Delph said. The money is matched—little by little—over time, not all at once.

“You really have to know your stuff to win on here,” he said. “I feel like I refresh my phone every five seconds to see how many points I have. It’s addicting.”

### **Marketing: A necessary evil**

Part of the appeal of daily fantasy sports is the weekly cash payouts. An aspect DraftKings and FanDuel marketed to perfection, experts say. Unfortunately, aggressive marketing also put a huge bullseye on their backs.

By design, the industry targets fans that regularly consume sports news and broadcasts, making them more susceptible to advertisements. Although DraftKings and FanDuel ads became too much for even sports junkies to handle, the companies had little choice but to overdo it, says one former marketer.

“They aggressively marketed themselves to build their brand. If they hadn’t, they wouldn’t have broken through,” said Jon Last, **founder and president of the Sports & Leisure Research Group**. “They wanted to recruit as many loyal users as possible and they succeeded. Repeat business is more profitable than finding new business.”

The smartest move made by DraftKings and FanDuel in their ascent to the top was seeking the blessing of major sports leagues, Last says. By partnering up with NFL owners as well the NBA and MLB, it gave the industry a sense of legitimacy.

“Why do Nike and Under Armor spend on athletes? Because it works. You want proximity and affiliation to legitimate brands,” said Last, a 20-year-veteran who previously oversaw marketing for the PGA of America.

A commitment to marketing also served a greater purpose for DraftKings and FanDuel. It weeded out all of their competition. Multiple startups have entered the industry over the past 18 months and so far they have been little match.

On average, DraftKings and FanDuel accept more than \$20 million in entry fees for NFL games each week. Yahoo is a distant third at roughly \$950,000 followed by

newcomers FantasyDraft and FantasyAces, according to SuperLobby, a fantasy sports analytics firm.

Factoring in cash payouts, FanDuel is the only DFS site in 2015 to record a profit each of the first 13 weeks of the NFL season. It has handed out at least \$15 million in winnings for NFL games each week.

"Advertising was a very natural course for us," FanDuel CEO Nigel Eccles said in conference call with reporters last month. "It's fair to say it put us on everyone's radar as we became mainstream."

But FanDuel and DraftKings' ad campaigns have been more subdued of late. Presumably, in efforts to save their resources for the legal battles ahead, not to mention the current one in New York. The industry is facing more than a dozen civil lawsuits over false advertising claims as well.

Neither DraftKings or FanDuel has eclipsed the top 10 in TV ad spending in five weeks, according to iSpot.tv, a TV ad measurement firm. By contrast, DraftKings and FanDuel spent a combined \$120 million on ads in September alone, on their way to cracking the top 10 for two consecutive months.

### **Fighting for the little guy**

As pressure from state legislators builds, FanDuel and DraftKings are fighting just as much for fantasy newcomers as they are their own livelihood.

Possible termination of daily fantasy sports in New York would cripple FanDuel and DraftKings, but not run them out of business. Valued at more than \$1.2 billion each, they are probably too big to fail. The same, however, could not be said for the young upstarts.

"FanDuel, DraftKings and Yahoo have all the money right now and are more equipped to deal with regulations," said Kevin Cochran, a legal analyst at GamblingCompliance, who focuses on the U.S. gaming market.

New York State accounts for an estimated 10 percent of DFS' total user base. Just like its peers, upstart DraftPot is largely dependent on the state. Founded in December 2014, DraftPot operates out of a four-bedroom apartment in Harlem just blocks from Columbia University.

CEO Joey Levy and his team of developers dropped out of Columbia to work on DraftPot full time. The startup raised \$2.2 million in initial rounds of funding in time for the 2015 NFL season. In just nine months, DraftPot was a full-fledged business with a twist; fantasy sports with no salary cap.

But now the company is in danger. Though it isn't alone, its fate lies in the hands of legislators and the lawyers representing the big boys.

In week 14 of the NFL season, DraftPot distributed just \$103,000 in cash prizes while taking in \$97,000 in entry fees. The result was a six percent loss in operating margin. That has been the norm of late. Additionally, the highest amount handed out by the company so far this year is \$225,000 in week 2, according to SuperLobby.

Levy and Draftpot failed to comply with numerous requests for interview over the past three months.

"Worst-case scenario, states will eventually require companies to be licensed to operate within its borders, similar to what Nevada did. That requires time and money smaller companies do not have," Cochran said.

### **What the future holds for DFS**

Imposed regulations on the industry are a certainty. Fifteen different states, including Massachusetts and Florida, have introduced strict legislation in the past month. All in response to FanDuel and DraftKings' aggressive marketing strategy and October's insider trading scandal.

Proposed guidelines touch on the same core ideas: a limit on monthly player deposits, confirmation all players are over 21 years of age and that sites be audited by third parties to prevent fraud.

In an open letter to players on FanDuel's website, Eccles said he is in favor of a set of rules that would allow his industry to flourish without the stigma of being labeled shady or illegal.

"It has become apparent to me that our industry has grown to a size where a more formal, industry-wide approach is needed," he wrote. "Our industry needs strong, common sense, enforceable consumer protection requirements to ensure its continued growth and success."

In 2006, the Unlawful Internet Gambling Enforcement Act banned all forms of online gambling, including poker. However, it exempted fantasy sports as long as it required skill and knowledge to win. To be sure, fantasy sports were a shell of what they are today and didn't warrant much discussion.

"In a lot of ways DFS does compare to poker," said Dustin Gouker, a reporter at Legal Sports Report, who covers the industry. "DraftKings used to play up the comparison and used to advertise directly to poker players while FanDuel shied away."

The Federal law also gave states the ability to dictate what constitutes gambling. In New York, the attorney general's case against DFS sites has now made its way up to

the Court of Appeals, the highest court in the state. The case will be heard in January, though no date has been set, according to Legal Sports Report.

New York is attempting to join Arizona, Iowa, Louisiana, Montana and Washington in banning daily fantasy games. With New York Supreme Court Justice Manuel Mendez granting Schneiderman's injunction request last week, chances are FanDuel and DraftKings will lose that battle, according to lawmakers.

"If companies agree to change their advertisements and offer more disclosures state governments could back off, but in a way we are kind of past that in New York," said *Sport Illustrated's* Legal Analyst Michael McCann. "Compromising might work in other states but not there because Schneiderman fully believes the game itself is illegal."

The largest legal threat facing fantasy sites is potential criminal charges if companies fail to abide by future state laws, McCann says.

Even if New York does rule against daily fantasy sites and impending court battles don't go the industry's way, there are talks the state could make it legal again. Of course, it would be on New York's terms with similar governance detailed above.

"New York is a gambling state," said New York State Assemblyman Gary Pretlow in an interview. "We have all sorts of wagering that happens in this state and if people want to play fantasy I don't see the harm in it. But it should be regulated just like anything else."

From the beginning, daily fantasy sites have argued winning at fantasy requires skill. Pretlow says the argument is irrelevant when it comes to New York. State law defines gambling as a placement of a wager on a game to win anything of value. To Pretlow and his colleagues, that includes fantasy.

"Call it an entry fee, call it whatever you want. At the end of the day it is a wager," he said.

The benefits of legalizing and regulating the industry in New York are two fold. First, it protects residents from being ripped off by creating a fair gambling environment. Second, tax revenue collected from sites would go a long way to helping the state's overall economy, Pretlow says.

But most importantly, the public will learn what companies are doing behind closed doors, helping prevent fraud or potential embezzlement.

"The way it is now only Wall Street types really win, sometimes by playing over 200 different lineups a week," Pretlow said. "The average person doing it for fun has no chance of winning."