



# Fantasy Sports Gambling - Problem States, Enforcement and Legislation

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## PROBLEM STATES

1. Arizona: Prior to the inception of fantasy sports leagues or the UIGEA, Arizona has restricted skill contests where a fee is required to participate. The Arizona Department of Gaming has since stated that fantasy sports games are illegal if the operator receives a fee.
2. Iowa: Iowa Stat. §99B:11 exempts certain bona fide skill contests from its gambling laws, but the exemption does not apply to fantasy sports leagues. A March 2015 bill to amend the statute to add fantasy sports leagues died in the Iowa house.
3. Louisiana: In a 1991 opinion, former Louisiana Assistant Attorney General Thomas A. Warner III stated that “a commercial fantasy sports game with prizes ... violated Louisiana’s state gambling law.” Louisiana Gambling By Computer Law (LA. Rev. Stat. §14:90.3) prohibits any online game or contest where money is risked. In 2015, the Louisiana House introduced a bill to exempt online fantasy sports leagues from this law.
4. Montana: Montana’s gambling law makes it expressly illegal to participate in an online fantasy sports league for money. (MT Stat. §23-5-802)
5. Washington: Online gambling is illegal in Washington. (RCW §9.46.240.) The Washington State Constitution only permits gambling that has been expressly authorized by statute. (Art. II Section 24)
6. Nevada and New York. See discussion below.
7. Other fantasy sports league operators have (not universally) exempted the following states: Arkansas, Kentucky, Florida, Michigan, Tennessee and Vermont. These states may have been exempted based upon a conservative interpretation of their gambling laws or the state’s aggressive regulatory enforcement reputation.

## **ENFORCEMENT**

There is currently (and increasingly) more scrutiny on online daily fantasy sports leagues. This is consistent with the argument that “daily” games are not demonstrative of the same degree of skill that can be exhibited over the course of a season.

1. In early October 2015, alleged insider trading involving DraftKings and FanDuel was disclosed. It was alleged that an employee of DraftKings used “inside” data on players not released to the public in order to place bets on FanDuel and win \$350,000. These allegations led to immediate scrutiny from a number of states and enforcement agencies.

2. **NEVADA**

On October 16, 2015, the Nevada Gaming Control Board released a memorandum from the State’s Attorney General holding that daily fantasy sports constitute sports pools (under NRS §463.0193) and gambling games (under NRS §463.0152) that require licensure. In addition, the Attorney General stated that online daily fantasy sports may also constitute illegal lotteries under NRS §462.105(1).

3. **NEW YORK**

On November 10, 2015, the New York Attorney General sent cease and desist letters to DraftKings and FanDuel to stop accepting bets from New York residents, since according to the Attorney General, online daily fantasy sports constituted illegal gambling under N.Y. Penal Law § 225.00(2) because there was a material element of chance involved.

On November 13, 2015, FanDuel and DraftKings filed separate lawsuits in New York State Court against the New York Attorney General.

On December 11, 2015, the New York Supreme Court issued an order enjoining FanDuel and DraftKings from operating DFS in New York. The companies plan to appeal.

On December 8, 2015 the New York State Assembly met to discuss the daily fantasy sports industry. The New York Legislature had already introduced four bills that could affect DFS. The State Assembly does not appear inclined to support banning DFS, but instead imposing some regulations, such as raising the minimum age to 21 and banning college sports.

4. MASSACHUSETTS

In October 2015, it was reported that the Massachusetts Attorney General is reviewing the legality of online daily fantasy sports leagues.

5. FLORIDA

In October 2015, the U.S. Attorney General's Office in Tampa convened a grand jury and issued a subpoena to the Fantasy Sports Trade Association which represents companies like FanDuel and DraftKings to investigate the legality of online daily fantasy sports leagues.

6. PENNSYLVANIA

On November 10, 2015, a Pennsylvania House committee convened to determine whether to regulate online fantasy sports league operators.

7. FBI

In October 2015 it was reported that the FBI office in Boston has been contacting customers of DraftKings and probing into the legality under federal law of online daily fantasy sports.

8. U.S. CONGRESS

In September, Rep. Frank Pallone (D-N.J.) requested that Congress hold hearings into the legality of the online fantasy sports industry. House Energy and Commerce Chairman Fred Upton (R-Mich.) indicated that he was open to this idea. Rep. Hakeem Jeffries (D-N.Y.) called on the House Judiciary Committee to hold its own hearing. Sen. Robert Menendez (D-N.J.) and Rep. Pallone wrote letters to Federal Trade Commission Chairwoman Edith Ramirez asking her to review the practices of DraftKings and FanDuel. Senate Minority Leader Harry Reid (D-Nev.) also called for increased federal examination of daily fantasy sports leagues.

9. OTHERS

- Many other states, including California, Georgia and Michigan, are considering how to address daily fantasy sports leagues.

- The NCAA has threatened to ban DFS ads from its tournaments.
- In December 2015, the National Conference of State Legislatures held a forum called “Out of Bounds? A Legal Analysis of Pay-to-Play Fantasy Sports.”

## **PENDING LEGISLATION**

There is currently legislation introduced or expected in the following states pertaining to expressly legalizing online fantasy sports (with conditions): Florida, Illinois, New Jersey, Pennsylvania, California, Washington, Indiana, Georgia and Minnesota and surely more to follow.

## **PENDING LITIGATION**

1. In October 2015, a putative class action lawsuit was filed against DraftKings and FanDuel in the Southern District of New York alleging that participants were fraudulently induced into playing because it was supposed to be a fair game of skill without the potential for insiders using non-public information to compete.
2. Similar class action suits have been brought in Ohio, Kentucky, California, North Carolina, New Hampshire, Florida and Illinois.
3. Washington Redskins’ wide receiver Pierre Garson filed suit against FanDuel in the U.S. District Court of Maryland claiming that the fantasy sports league operator improperly exploits players’ popularity and accomplishments and routinely uses players’ names and likenesses without authority.

## **NEW YORK LAWSUIT ARGUMENTS**

### **A. DFS Leagues – Factual Arguments**

1. DFS is now recognized as a legitimate form of competition. Played by millions of people.
2. Variety of forms
  - a. Head to head leagues, best-ball, victory points, survivor contests, tournaments.
  - b. Some last a day, a week, an entire season or years.

### 3. Skill Predominates

- a. Players act like general managers of a team.
- b. Players evaluate an enormous amount of information
  - i. Look to past performance
  - ii. Strength of schedule
  - iii. Coaching philosophy
  - iv. Changes in (actual) league rules
  - v. Abundance of blogs, books, strategy websites
  - vi. Existence of fantasy sports boot camps to train.
- c. Empirical evidence
  - i. Data-driven approach significantly impacts outcome (testimony from MIT math professor).
  - ii. Data shows that after an initial learning curve, over time good players tend to remain good; mediocre players remain mediocre; and bad players remain bad.
  - iii. Data shows that practice makes perfect.
- d. Daily v. Season long
  - i. Daily requires *greater* skill
    - 1. Must draft new lineups each week.
    - 2. Draft selection dependent upon weather, game location, injuries, player motivations and specific matchups.
  - ii. Season-long
    - 1. More chance involved because a player's outcome is very dependent on where he/she is placed in the draft.
- e. Fundamentally unlike gambling
  - i. Players don't bet against the operator.
  - ii. Operator does not stand to win if players lose.
  - iii. Prizes are pre-announced and paid regardless.
  - iv. Outcome of actual games does not determine winner (not like someone betting on a sporting event).
  - v. Not like poker because a player does not start with a random set of cards.

B. DFS Leagues – Legal Arguments

1. “Fees” are not “wagers” under established NY law on gambling. A “wager” is where others have a chance to win another player’s money. For example, NY courts have held that fees to enter a horserace are not “wagers” under the gambling statute.
2. Skill is not the dominating element.
  - a. NY Attorney General argues that NY follows the more-restrictive “material element” test, operators argue that caselaw establishes that NY follows the less-restrictive “dominant element” test.
  - b. All games have some element of chance, even games that have been established as games of skill.
  - c. In DFS, skilled players outperform unskilled (as explained above).
3. DFS does not involve a “wager” on the outcome of future events.
  - a. It does not matter whether the player has any influence over the outcome of the real-life game.
  - b. The proper perspective is to look at the “game” itself, i.e., the fantasy game v. a real world game.
  - c. DFS does not involve betting on an actual sporting event.
4. If season-long fantasy sports are acceptable, then so are DFS, since both have similar elements of skill.
  - a. Salary cap used in both.
  - b. Money prizes in both.
  - c. More information (data) is available to players of DFS.
  - d. There is no evidence that DFS are more susceptible to creating problem gamblers.

### C. NYS Arguments

1. Players “risk something of value”
  - a. If you win, you get your money back; if you lose, you lose your money.
  - b. It’s not a traditional “fee” because of the prospect of losing money.
2. Outcome is contingent on events that are outside of players’ control.
  - a. Outcome isn’t dependent on a particular game.
  - b. There can be no winners or losers if not for actual sporting events.
3. Outcome depends on chance to a material degree.
  - a. Standard (citing caselaw): “Skill where the role of chance is *immaterial.*”
  - b. Chance elements:
    - i. Unknowable performance of athletes on a given day. For example, slumps.
    - ii. Decision of actual sports league. For example, canceled games, suspended players.
    - iii. Acts of nature. For example, weather or freak injuries.
    - iv. Bad referee calls.
    - v. Margin of victory in DFS is usually measured in *fractions* of points.

### **THE FUTURE OF ONLINE FANTASY SPORTS**

The landscape for online fantasy sports leagues is changing and its future is unpredictable. Possible outcomes include:

1. Increased legislation at the federal and state level, likely concentrating on specifying the “skill” necessary to compete, which may include season-long contests rather than daily games.
2. Requiring licensure of online fantasy game operators.

3. Limiting the age of participants; eliminating college sports; and/or limiting the amount and number of bets allowed.
4. Implementing consumer protection initiatives, such as available ways to file complaints and obtain information.
5. Requiring the operators to distribute all fees in the form of winnings, and only profit from advertising and related fees.
6. Outright prohibiting monetary fees to play, or requiring a “free” method of participation. In December 2015 a new DFS league -- Quick Draft -- opened which tries to separate itself from DraftKings and FanDuel by eliminating entry fees.

## **TAKE-AWAYS**

There are myriad of commercial games of skill and chance happening every day. The vast majority are conducted legally. So why so much scrutiny over DFS?

1. Scandal leads to increased regulatory scrutiny. If something goes wrong (especially in a popular game), regulators pay attention and, in part, feel public pressure to investigate. In DFS, the scandal involving alleged insider trading seemed to be the precipitating factor for increased regulatory action.
2. Consumer complaints may spark regulatory scrutiny. Of course, operators of games must take care of winners and if prizes aren't awarded properly, winners may cause a stir. But keep an eye on the non-winners. It is not uncommon for the non-winners to call foul and seek out regulators.
3. Competitors take notice. Examples such as the Subway and Quiznos feud over a Quiznos contest asking consumers to create a commercial explaining why Quiznos subs were better than Subways.
4. The bigger the promotion, the more potential for scrutiny. Telling consumers they can “Win a Million Dollars” and prolific advertising of the promotion may likely get not only consumers' attention but regulators as well.

5. Does the issue of skill v. chance really matter? Often times, no. The issue comes down to whether “consideration” is present.
  - a. What are forms of “consideration”?
    1. Paying a sum of money to enter is typically “consideration”, but consider:
      - a. Postage: Postage has been specifically excluded from the definition of consideration. Some states (most notably WA and VT) have held that a return stamp for an entry via an SASE was consideration, but these states have more recently amended their statutes.
      - b. Internet access: At one time (during the early days of the Internet), Internet access was deemed to constitute consideration (because of the need to have a computer, pay for access, etc.) But now, through mostly the passage of time, the ubiquity of access to the Internet, and a 1998 ruling from the state of Florida stating that Internet access was not consideration, Internet access is considered a free form of entry.
      - c. Message and Data Charges: There are no definitive rulings on whether the use of mobile devices for entry would be deemed to constitute consideration because of the need (and cost involved) of having mobile access. In practice, standard message and data charges are still considered as requiring a payment to enter, but it’s likely that this practice may go the way of the Internet. However, premium text messages are almost universally deemed consideration.
    2. Non-monetary forms of consideration. Other non-payment entry requirements could also be deemed consideration.
      - a. This is perhaps more of a theoretical risk, since regulators seldom attack games involving non-monetary efforts to participate. In addition, many state laws only include monetary entry requirements as constituting consideration.

- b. Non-monetary consideration takes into account the degree of effort required to participate and is considered on a case-by-case basis. The greater the effort, the more likely it could be deemed consideration.
- c. Some examples of “efforts” that have been deemed *not* to constitute consideration are as follows:
  - i. Watching a half-hour television show.
  - ii. Calling a toll-free number.
  - iii. Complete a (reasonable) survey.
  - iv. Reading a product brochure and answering questions.
  - v. Listening to a sales presentation. But note, many states have specific laws on disclosure requirements.
  - vi. Becoming a member of a social media site, such as Facebook, Pinterest, Twitter, etc.
  - vii. Posting a picture or video.
- d. Some examples of “efforts” that could more likely be deemed to constitute consideration are as follows:
  - i. Traveling to a location.
  - ii. Disclosing personal information.
  - iii. Waiving legal rights. For example, the NY Attorney General has deemed waiver of do not call rights as constituting consideration.

b. Practical considerations

1. Florida and New York require registration and bonding for games of chance where the prizes exceed \$5000.
2. CA, CT, ND, NM and OR have specific disclosure requirements for contests.
3. AZ has a registration requirement for intellectual contests where a fee is required.

4. It just sounds bad if you call a sweepstakes (or other game of chance) a “contest.”

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