

Fantasy sports face tough odds - A Tampa investigation puts the future of the industry in doubt

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TAMPA — A Tampa-based federal investigation into daily fantasy sports games has put the future of the multibillion-dollar industry at risk.

One sign of the growing concern: Marc Dunbar, a lawyer who teaches gambling at Florida State University's law school, tells his students who play not to leave any money in their fantasy sports accounts.

That's because the government could seize the contents of player accounts, along with other assets of the game operators.

"At some point," Dunbar said he tells them, "the music will stop and your money will be frozen."

Fans pay money to compete in virtual games that pit their selected professional athletes against teams chosen by other fans. The outcomes of the fantasy games are determined by the performances of the athletes in real games.

The online competitions are wildly popular, with an estimated 3 to 4 million fans spending \$3 billion to \$4 billion each year, according to analyst Chris Grove, an editor for legalsportsreport.com. In Florida, Grove estimated the number of paying competitors is in the tens of thousands to low hundred thousands.

Florida is an important state to the game companies, Grove said, as the third most-populous state and its concentration of professional and college sports.

Grove said Florida may also serve as something of a bellwether.

"It's about the door that it opens in other states where the legal climate might be similarly questionable," he said. "The legality of daily fantasy sports is not a settled question in the vast majority of states. Only two states, Kansas and Maryland, have definitively authorized these games. The rest of the country is an open question."

The amount of money involved is staggering for a relatively young industry that only began growing to its current form in the past three or four years. Grove estimated that in addition to money paid by fans to play, the industry has raised more than \$1 billion in investment funds, primarily in the past six to 12 months.

The games also are a boon to professional and college sports, which benefit directly and indirectly. Nearly every professional team and league draws some sponsorship money from the game operators, sometimes worth millions of dollars.

The Tampa Bay Rays, for example, have a sponsorship deal with DraftKings, and the Buccaneers have one with FanDuel.

In addition, sports television ratings are boosted by fans who watch games they ordinarily wouldn't so they can monitor the performances of the players on their fantasy teams.

As the pots have grown larger, lawmakers and regulators are grappling with whether daily fantasy sports already amount to illegal gambling and whether to enact legislation that allows, bans or regulates the games. Lawmakers in Florida have signaled that fantasy sports games may become the focus of action in the next legislative session.

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The two leading daily fantasy sports companies, DraftKings and FanDuel — estimated by Grove to control 85 percent of the industry — have pulled out of several states, including Nevada, after concluding laws there are unfavorable to their business.

Attorney Marc Edelman, who teaches sports law in New York, said he thinks it's dicey for fantasy sports companies to operate in Florida, partially because he sees "a whole level of vigilance against gambling activities in Florida beyond what you see in other states."

Edelman said he would rank Florida "on the bottom quarter of my list" of places for fantasy sports. "It's not the riskiest place," he said. "It's also not the best place."

Still, the companies continue to cater to players in the state.

"I think there are 20 million reasons why they choose to stay in Florida," said Dunbar, who practices law in Tallahassee. "We're the third largest state. ... Every weekend, they have multimillion-dollar jackpots. In order to do that, you have to have millions of players paying in."

But the companies are taking a huge chance in Florida, said Dunbar and Fort Lauderdale gaming lawyer and blogger Daniel Wallach.

"I'm not saying it's plainly illegal," said Wallach, who broke the news of the Tampa federal investigation in a tweet last month. "It operates in a very unsettled legal terrain, which is shaky at best."

That terrain involves different federal and state laws and a 1991 legal opinion from Florida's then-Attorney General Robert A. Butterworth, who concluded a particular fantasy sports league constituted illegal gambling.

That league, as described in Butterworth's opinion, required contestants to pay \$100 to participate in the fantasy games by managing one of eight teams. The \$800 from the entry fees was used to make up the prizes.

Butterworth concluded this money qualified as "stakes, bets or wagers," which are illegal in Florida.

Representatives for FanDuel and DraftKings declined to comment.

But a FanDuel spokesman referred a reporter to attorney Richard Doran, whom the company hired to review the 1991 Butterworth opinion to determine whether FanDuel should operate in Florida.

Doran said he worked in the Florida Attorney General's Office when the opinion was drafted and reviewed it before it went to Butterworth for his signature. The opinion, he said, is not legally binding and is only a response to a specific set of facts.

Doran said FanDuel games involve entry fees, not wagers, and therefore do not constitute illegal gambling as described in the opinion.

But Wallach and Dunbar said calling the money paid by fans something other than bets or wagers doesn't necessarily mean the competitions don't constitute gambling.

"Labels are not controlling," Wallach said.

The question, he said is whether the prizes are tied to the entry fees.

"The courts will ultimately look to the entry fees and the prizes," Wallach said. "They don't exist in a vacuum. They are not unlinked. A business would not exist if they were paying out more than they were taking in."

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A promotional video on the FanDuel website seems to say the entry fees are linked to the prizes. "How much can you win?" the narrator asks. "Up to you. Just depends on the entry fee and the league you choose."

When asked about Wallach's assertion and the statement on the video, attorney Doran said, "Number one, when you look at the statute, the words are important. ... The criminal law is such that the burden is on the state when they draft these laws to be very specific.

"Number two, I don't have a deep grasp of the nuance of every one of these different videos," he added. "I think the idea is that all the attorney general's opinion said was, if you are putting a bunch of money in, that constitutes the whole thing, then you've got an issue. I don't believe that is the way the (FanDuel) model is set up. I think that's the difference."

Some of the games offer guaranteed prizes, which Wallach said could support an argument that the winnings are not completely tied to the entry fees.

But Wallach said there is other evidence the game operators know they are in the gambling business.

Some of the most damning is described in a memorandum issued Oct. 16 by the Nevada Attorney General's Office, which concluded the daily fantasy sports games are gambling and advised the operators if they want to stay in Nevada, they had to be licensed.

For example, DraftKings uses something called alt text — words in its Internet coding — that is designed to draw people who search online using phrases such as, "weekly fantasy football betting" or "Fantasy college betting."

The memo also details statements made by DraftKings owner and co-founder Jason Robins on Reddit.com, where he described his site as "almost identical to a casino." He says the concept is "a mashup between poker and fantasy sports. Basically, you pick a team, deposit your wager. and if your team wins you get the pot."

Dunbar, of Florida State University, said the fact the game operators reserve the right to cancel some big jackpots for any reason is also evidence the prizes are tied to entry fees.

That's because the reason games are usually canceled is because there's not enough money in the pot, Dunbar said.

FanDuel has a section on its website asserting that its game is legal partly because of a provision in a 2006 federal law, the Unlawful Internet Gambling Enforcement Act, which exempts from its sanctions fantasy sports leagues that meet certain requirements. But that law, which made it illegal for financial institutions to process payments for illegal gaming, is irrelevant, Wallach said. The law specifically "does not interfere with the ability of states determining whether fantasy sports are legal or illegal under their statutes," he said. "Just because it's carved out under UIGEA is wholly immaterial to the state law analysis. States remain free to determine the legality of daily fantasy sports under their own laws, and UIGEA explicitly does not trump that."

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Another federal law is more likely to come into play in the Tampa investigation, Wallach said. That is the Illegal Gambling Business Act, which was enacted in 1970 as part of legislation aimed at organized crime.

That act made it a federal crime for an organization of five or more people to continuously operate a business that conducted gambling that's illegal under state law.

And that's where the 1991 Butterworth opinion and Florida's anti-gambling laws come into play in the federal investigation in Tampa.

Another common defense of the legality of fantasy sports leagues is they involve games of skill and not chance. But although that makes a difference in many states, Florida law makes no distinction; it's illegal to wager on either.

Still, experts said it's unlikely that fans who play the games will face any criminal charges.

"As a matter of public policy, I very much doubt that any state will go after individual players," Edelman said. "Furthermore, the language of certain federal laws, such as the wire act, preclude going after players because, arguably, they are not in the business of gambling."

But if federal prosecutors do bring a case against the companies under the Illegal Gambling Business Act, that could "devastate the industry," Wallach said. "The government could take away all of their assets."

Federal forfeiture provisions could force the companies to surrender not only billions of dollars, but also assets such as their Internet domain names, Wallach said.

"IGBA could become the death knell for the industry in Florida," Wallach said.

The federal grand jury investigation in Tampa already is having an impact, Wallach said.

In federal court, over 99 percent of grand juries result in indictments, Wallach noted.

"The fact that it's on a grand jury stage means it's highly likely an indictment will result," he said. "The news of the grand jury alone has caused five of the top ten companies to leave the state. An indictment will cause the rest to leave."

DraftKings and FanDuel are "taking a calculated, but significant business risk in view of both the Florida statute and the news of the grand jury," Wallach said.

Dunbar said he has no knowledge about a Tampa federal investigation into fantasy sports. But he has dealt with federal prosecutors in Tampa on a gambling-related case before. In May, the Justice Department announced that prosecutors in Tampa had reached an agreement with Ironman World Championship triathlon to forfeit more than \$2.7 million it received in entrance lotteries since 2013.

The triathlon company, a much smaller business than fantasy sports, had violated state and federal gambling laws by charging athletes for a chance to win the opportunity to compete in the championship.

"They take their forfeiture very seriously," Dunbar said, speaking of Tampa federal prosecutors. If they go after fantasy sports, "it's going to be a huge number — a huge number — and these guys are going to have to forfeit out their business."

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