

What The Growth Of Daily Fantasy Sports Means For Tribes

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Daily fantasy sports (DFS) has rapidly become a \$26 billion industry with nearly 60 million players annually. The rise of the industry has been rapid and presents several, still unanswered, questions on what it will mean to Indian Country. To the nonsports fan, traditional fantasy sports may seem like an absurd idea. It involves pretending to be the general manager of an imaginary team in an imaginary league but competing based on the actual production of real players. To most participants, it is a fun way to follow sports, compete, perhaps wager, and endlessly trash talk your friend's teams on league message boards. Typically, traditional fantasy sports are played over the course of an entire season with winners earning some type of predetermined prize, usually collected from entry fees. The primary difference with DFS is the rapidly accelerated period of competition, which is often a single day or week.



Charles W.
Galbraith

The Legal Uncertainty of DFS

DFS essentially did not exist as a significant industry three years ago and this rampant growth has greatly outpaced the legal and regulatory systems that would govern it. Indeed, it remains unclear if DFS even constitutes gambling. There are at least four federal statutes which potentially impact the legality of DFS — the most recent being the Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006. However, all of these federal laws predate DFS and clearly did not contemplate DFS in their intended coverage.

State law is equally underdeveloped, but states are certain to move faster than the federal government in developing a regulatory system. Generally, at the state level, whether a contest is considered illegal gambling depends on whether a court would deem that contest to be a game of skill or a game of chance.[1] But the permissible degree of chance as compared to the amount of skill required to win a given contest varies substantially from state to state.[2] Also variable is the degree of chance involved in many different DFS contests due to their particular rules and structure.[3]

Based as they are, on sports results, DFS contests necessarily contain a clear degree of chance.[4] The short period of competition in DFS makes these games appear to involve significantly more chance and look a lot more like gambling than traditional fantasy sports contests.[5] For example, over the course of a full season in traditional fantasy baseball, a manager has to make hundreds of player moves to build the strongest lineup based on player production, injuries, player matchups, etc. In DFS, the shortened period of competition reduces the decisions of the manager and accordingly raises the “chance” involved in the outcome.

Indeed, it is for this reason that even though some statutes specifically contain carve outs for fantasy sports, such as UIGEA, DFS does not necessarily fall within those carve outs. To date, there has been little litigation on the legality of DFS, and thus far, only a New York state court has conducted an analysis on the legality of DFS, finding that there was a reasonable likelihood that DFS constituted illegal gambling under New York law.[6]

DFS and Tribal Gaming

If DFS is indeed gambling — and that is a big “if” — a significant question that remains to be answered is how DFS is to coexist with tribal-state compacts. Under the Indian Gaming and Regulatory Act (IGRA), to conduct “Class III” gaming, a tribe must enter into a tribal-state compact, which generally requires the tribe submit to state regulation of certain gaming activities in exchange for the right to conduct those activities.[7] In such compacts it has also become a common practice for tribes to agree to share revenues with the state in exchange for “exclusivity” in their ability to conduct Class III gaming within a designated area.

The National Indian Gaming Commission has yet to opine on whether DFS constitutes “Class II” or “Class III” gaming. Yet, under IGRA, Class III gaming is defined as “all forms of gaming that are not Class I or Class II gaming,” and Class I and Class II are both limited categories, with Class II expressly excluding “electronic or electromechanical facsimiles of any game of chance.”[8] It would seem more likely than not that if DFS is considered gaming, it would be Class III gaming. Accordingly, DFS operators in states with tribal-state compacts potentially threaten the exclusivity of tribal gaming interests in those states.

Clearly, this is a concern for tribal gaming operations. It is also a potentially greater concern for states, who stand to potentially risk forfeiting significant compact revenue by allowing DFS in their states. Indeed, the attorney general of Connecticut, George Jepsen, recently released an advisory opinion that found the high degree of uncertainty surrounding DFS held the potential to derail tribal-state compact agreements in Connecticut.[9] It is no surprise then that the states where legislators have already acted to pass legislation legalizing and regulating DFS — Massachusetts, Indiana, Tennessee and Virginia — there has not been a strong tribal gaming presence.

The Future Outlook

It is unlikely that the current situation will persist for long given the strength of the current push to broadly legalize and regulate DFS. Attempts to ban DFS would likely do little more than create a black market for the industry, shut the door to a large market, and cut off a significant source of state tax revenue. Indeed, at a May 12, 2016 hearing of the House Commerce, Manufacturing and Trade Subcommittee of the House Energy and Commerce Committee, Rep. Frank Pallone, D-N.J., made clear that the federal government has no intention of banning DFS.[10] It is hard to imagine that an industry of this size and potential profitability will exist in a legal grey area forever.

If, or when, DFS is broadly legalized, tribes could consider starting their own DFS operations within the framework of IGRA and tribal-state compacts. Tribes should continue to educate themselves on this industry and keep an eye on state legislative efforts that have the potential to impact their operations. Also, tribes should appreciate the real potential that DFS has to undermine the exclusivity in their revenue sharing agreements. Both states and tribes alike stand to gain from finding an efficient legal and regulatory system, and tribes will need to remain involved and vigilant as Congress and state legislatures consider legislative proposals to ensure tribal interests are reflected in the policymaking process.

—By Charles W. Galbraith and Julian SpearChief-Morris, Kilpatrick Townsend & Stockton LLP

Charlie Galbraith is counsel in Kilpatrick Townsend's Washington, D.C., office and a member of the firm's Native American affairs practice. Galbraith is a citizen of the Navajo Nation.

Julian SpearChief-Morris is a summer associate with Kilpatrick Townsend's Native American affairs practice.

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[1] Marc Edelman, A Short Treatise on Fantasy Sports and the Law: How America Regulates its New National Pastime, 3 Harv. J. Sports & Entertainment Law 1, 26-27 (2012)

[2] Marc Edelman, Navigating the Legal Risks of Daily Fantasy Sports: A Detailed Primer in Federal and State Gambling Law, 2016 U. Ill. L. Review 117, 130 (2016)

[3] See id. at 131–32

[4] See id.

[5] James L. Johnson & Josh J. Gordon, Rise of Daily Fantasy Sports Presents Opportunities and Risks to Companies, 27 Intell. Prop. & Tech. L.J. 19, 19-20 (2015)

[6] See People ex rel. Schneiderman v. DraftKings, Inc., No. 453054/2015 (N.Y. Sup. Ct, December 11, 2015), appeal pending; People ex. Rel. Schneiderman v. DraftKings, Inc., No. 453056/2015 (N.Y. Sup. Ct, December 11, 2015), appeal pending.

[7] 25 U.S.C.A. § 2710 (d)(1)(C)

[8] 25. U.S.C.A. § 2703

[9] 2016 WL 1610641, at *1 (Conn. A.G. Apr. 18, 2016)

[10] Daily Fantasy Sports: Issues and Perspectives Before the H. Commerce, Mfg., and Trade Subcomm. of the H. Energy and Commerce Comm., 114th Cong. (2016) (statement of Rep. Frank Pallone)
