

DraftKings & FanDuel: Are they legal in New Mexico?

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Odds are good you've seen or heard them. Or you might even have won, or lost, some money playing.

Multimillion-dollar ad campaigns for daily fantasy sports websites DraftKings and FanDuel have bombarded our television and radio air waves in the past two months, and millions of dollars are being spent.

The intense marketing uses tales of average sports fans becoming instant millionaires by simply picking the right combination of players during football, baseball, basketball or other major sporting events.

But is it gambling? And if so, is it legal to be doing it here in New Mexico?

"Of course, it's gambling," said Guy Clark, president of the New Mexico chapter of Stop Predatory Gambling. "The (AG's Office) should take them to court and sue them. What they're doing – these fantasy games are radically different than what that exemption in (a 2006 federal law making fantasy sports legal) was intending."

But don't expect an answer anytime soon from the officials who actually have a role in enforcing gambling laws in New Mexico.

The unregulated world of daily fantasy sports has fallen under widespread scrutiny and some states, such as Nevada, have banned operation of the sites, saying it is illegal gambling. Others have launched investigations and federal lawmakers are calling for congressional hearings.

New Mexico is not doing any of the above.

"At this time, the Office of the Attorney General is monitoring the development of the issue across the country," said James Hallinan, communications director for Attorney General Hector Balderas' office.

And as for the New Mexico Gaming Control Board?

"My stance, and my message to people in New Mexico is that all gaming is prohibited unless specifically (spelled out as being allowed) by the New Mexico Gaming Control Act," said Donovan Lieurance, acting executive director of the New Mexico Gaming Control Board.

Based on that quote, since fantasy sports games aren't specifically allowed by state law, you'd think New Mexicans playing on DraftKings or FanDuel are committing a crime, right?

Not exactly.

"Again, I would say that all gaming is prohibited unless specifically covered by the New Mexico Gaming Control Act," Lieurance said instead of giving a definitive yes or no to the question, as well as making it a point not to specifically mention either DraftKings or FanDuel in any answers on the subject.

But the issue clearly has the gaming board's attention.

"We're continuing to research the matter," said Stefen Sloane, a senior staff attorney with the New Mexico Gaming Control Board.

An employee in the software development department of DraftKings, a daily fantasy sports company, walks past screens displaying the company's online system stats in Boston. (AP Photo/Stephan Savoia)

University ban

Both of the state's Division I universities – University of New Mexico and New Mexico State University – have already prohibited their student athletes from participating in daily fantasy sports games like DraftKings and FanDuel, and the NCAA, the governing body of college athletics, has ruled the sites meet their definition of sports gambling.

The NCAA has also decided that it will not allow advertising from either DraftKings or FanDuel at NCAA championship events.

Sloane noted that a recent decision in Nevada to prohibit the sites from operating without a license in that state – the Nevada Gaming Control Board issued a cease and desist order on Oct. 15 after determining their games constituted gambling – was only possible after specific laws were passed in the Nevada legislature in the past year.

But in many states, including New Mexico, ambiguity remains as to whether fantasy sports meet the legal definition of gambling. On a federal level, fantasy sports were specifically exempt in the Unlawful Internet Gambling Enforcement Act of 2006, because they were viewed as a game of skill, making them legal, rather than one of chance, which is gambling.

But it is hard to argue there is any difference in the skill vs. chance ratio between traditional sports wagering (which is illegal in New Mexico), and fantasy sports games, both of which involve decision-making processes that can range from a coin flip to detailed research on trends, past performances and other predictive indicators.

There is no gray area if you ask people like Clark.

Stop Predatory Gambling recently sent to lawmakers in Massachusetts, where DraftKings is based, a letter that says the 2006 federal exemption considered fantasy sports as season-long, social-based games where "the trophy mattered more than the money."

But, the organization maintains, the evolution of fantasy sports, and in particular the recent explosion in recent months of advertising and money changing hands, has morphed from a social activity for bragging rights into an activity that very much incorporates the basic elements of gambling.

For their part, DraftKings and FanDuel are less interested in who wins these events as they are in getting people to play them. Their profit, after all, comes from a 10 percent cut they take off the top of every entry fee before the games even begin.

Define gambling

The three universally accepted elements of gambling are consideration (the wager), chance and prize. According to New Mexico's Gaming Control Act, the definition of what constitutes a "game" covered by

the law is “an activity in which, upon payment of consideration, a player receives a prize or other thing of value, the award of which is determined by chance even though accompanied by some skill.”

The state criminal code and the NMGCA, both of which were drafted long before the notion existed of people using their smartphones from their couch to spend money to enter fantasy sports contests, don't specifically address fantasy sports.

It is unclear if any state lawmaker is considering introducing legislation in next year's session that would clear up some of the murkiness of the existing statutes as they apply to daily fantasy sports.

And both the Attorney General's Office and the NMGCB say there is no timetable for action on the matter from their offices.