

Attorneys General issue negative opinions on daily fantasy sports



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David M. Kall | Thursday, April 28, 2016

One of the most important features of Daily Fantasy Sports (DFS) contests is their characterization as games of skill, not chance. If they were games of chance, they would be considered to be illegal gambling activities in many jurisdictions. The [Fantasy Sports Trade Association](#) justifies this definition on the grounds that players must analyze statistics and game theory, and account for voluminous facts, like injuries, coaching styles, weather patterns, prospects, home and away statistics, and the like, in order to be successful.

As we recently explained, Virginia and Indiana have legalized DFS, recognizing it as a game of skill, and Massachusetts will likely soon follow. Now, [LegalSportsReport](#) notes that Tennessee and Mississippi have bills awaiting their governors' signatures, even though the attorneys general in those states have recently issued negative opinions on the legality of DFS.

In Mississippi, at the end of January, Attorney General Jim Hood issued his [opinion](#) in response to requests for guidance from various licensed gambling establishments, the general public, and the Mississippi Gaming Commission. Attorney General Hood declared that “[f]antasy sports wagering is illegal in the state of Mississippi” primarily on these bases:

1. A fantasy sports wager is controlled by matters that are determined during an athletic event, and by an event that does not take place on the premises. Thus, DFS violates the provision that “[n]o wagering shall be allowed on the outcome of any athletic event . . . which does not take place on the premises.”

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2. A fantasy sports game involves a wager, which is illegal under the statutory and case law in Mississippi.
3. DFS requires an entry fee, and the operator takes a percentage of the total price, which also renders them illegal under statutory and case law.

Even the “possible existence of an element of skill in picking players” is not relevant, in the Attorney General’s opinion, because the crux of DFS is the “wager upon the performance of others.”

In Tennessee, [Opinion No. 16-13](#) dated April 5, 2016, declared that DFS are illegal gambling because, although “participants may use skill to select players for their teams, winning a fantasy sports contest is contingent to some degree on chance. Namely, the participants do not control how selected athletes perform in actuality on a given day. Athletes’ performances are affected by many fortuitous factors – weather, facilities, referees, injuries, etc. ” The Attorney General pointed out that lawmakers could pass legislation specifically exempting fantasy sports contests from the definition of gambling, but until that happens, “these contests constitute illegal gambling under Tennessee law.”

On April 18, 2016, Connecticut Attorney General George Jepson joined the others in issuing a negative [opinion](#) on the legality of DFS. This one was a bit different though, because it addressed the impact of DFS on the state’s revenue sharing agreements with the Mashantucket Pequot Tribal Nation and the Mohegan Tribe of Indians of Connecticut, both of which operate casinos in the Constitution State.

Current proposals in the Connecticut legislature define DFS as “a contest in which the offer or award of a prize is connected to the statistical performance or finishing position of one or more individual competitors...but does not include the offer or award of a prize to a winner...in the underlying competition itself.” These proposals also specify how much operators would have to

pay in registration fees, subject them to a surcharge on the total amount of entry fees, and establish that the Commissioner of Consumer Protection would adopt governing regulations, and specify that “daily fantasy sports contests are not contests of chance.”

However, there are existing agreements between Connecticut and the abovementioned Tribes that require the Tribes to share 25 percent of the gross operating revenues generated from video facsimile games with Connecticut, as long as no law is enacted to permit the operation of video facsimiles or other commercial casino games, and no other person lawfully operates video facsimile games or other commercial casino games.

Not only would DFS legislation jeopardize these payments, the agreements are governed by federal law, and any amendments must be reviewed by the Secretary of the Interior Department. What is more, in light of the “high degree of uncertainty” as to whether DFS constitutes a game of skill or chance for purposes of the agreements, along with how DFS fits in with other provisions therein, the Connecticut Attorney General asserted that the outcome would be difficult to anticipate, because “courts have been sympathetic to tribal efforts to protect their rights granted by various federal statutes.” In the end, “no one can predict with any level of certainty how a court, if faced with these issues, would rule.”



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