

## NY Lawmakers Keep Daily Fantasy Alive To Fight Another Day

By **Zachary Zagger**

Law360, New York (June 20, 2016, 11:20 PM ET) -- Facing a deadline in an agreement to halt litigation with New York Attorney General Eric Schneiderman, daily fantasy sports giants DraftKings and FanDuel sweated out a New York legislative session late last week as lawmakers came through in the eleventh hour to pass legislation that experts say gives the beleaguered companies a major boost to their legal battles.

Schneider had hit daily fantasy sports industry leaders DraftKings Inc. and FanDuel Inc. with enforcement actions alleging their contests violate state anti-gambling laws and obtained a state court decision ordering the companies to shut down immediately. The lawsuits not only raised doubts about whether they could continue in the lucrative New York market, which is home to FanDuel, but also threatened severe penalties including the disgorgement of revenue.

Placed in a dire situation, DraftKings and FanDuel **reached a deal** with Schneiderman to pull out of the state in exchange for a halt to the litigation to give it time to go to the state Legislature for salvation. With the legislative session going on past its scheduled end on Thursday and running up against a deadline to the attorney general deal, state lawmakers came through, **passing legislation to legalize and regulate daily fantasy sports**, sending it to the governor's desk for the final approval.

Though the legislation forces daily fantasy sports companies to follow some stiff regulation, attorneys said it is a lifesaver for the industry that could shine a path forward for legal fights in other states.

"It is a home run for them," said David O. Klein, managing partner at Klein Moynihan Turco LLP. "They live to fight another day, to say the least."

DraftKings and FanDuel have faced several legal challenges since last fall, with dozens of civil lawsuits containing consumer protection claims that allege false advertising and accuse the contests, which allow participants to select imaginary rosters of athletes from leagues like the NFL to compete based on the real-life performances of those athletes, of violating various state anti-gambling laws.

But New York had always been of particular concern for the industry, experts said, in part because of its size as a market. DraftKings had said that New York contained at least 7 percent of its overall user base across the country before it temporarily pulled out of the state.

Further, while a growing number of state attorneys general, at least 12 at this point, have issued opinions saying daily fantasy sports is likely illegal in their respective states, Schneiderman filed enforcement actions to kick the companies out of the state and demanded the disgorgement of revenue. He was even able to obtain a **court order** demanding DraftKings and FanDuel stop paid contests in the state, a ruling that was stayed by the appellate court. The companies had reached **their deal with the attorney general in March** to halt the litigation until the end of this month to give them time to get legislation through Albany.

The situation had pushed the industry to the brink, with even rumblings of a potential DraftKings-

FanDuel merger, as the rest of the country watched.

"I think a lot of jurisdictions and people who are in the industry or perhaps had designs on entering it had a wait-and-see approach with respect to how things played out in New York," Klein said. "Now that they look like they are moving in the direction where it is going to be legalized, highly regulated, but legalized ... I think the dominoes should fall in a lot of other jurisdictions relatively quickly."

The legislation, which still must be signed by Gov. Andrew Cuomo, would define "interactive fantasy sports" as games of skill, specifically exempting them from the definition of illegal gambling under New York Penal Law Section 225. It seeks to impose several consumer protection-oriented restrictions, such as limiting contests to those 18 years old or older, banning third-party scripts that are believed to give more sophisticated users an advantage, and limiting entries by a particular user in particular contests. The legislation also requires operators to be registered and pay a hefty tax.

Such restrictions, while significant, are an acceptable trade-off for DraftKings, FanDuel and most other big players in the industry, as opposed to risking a court battle that could end up in a judicial opinion finding the contests are illegal gambling, experts said.

"They have had the sword of the judiciary hanging over them as to whether or not they would be viewed as gambling or an illegal form of gambling, and now you want to talk about hedging your bet and obtaining certainty — this was clearly the best outcome they could hope for in New York as to not have taken one's chances on how a judge or group of judges will rule on any given day," said Herrick Feinstein LLP attorney Dan Etna.

The companies were faced with a deadline to pass legislation by the end of June under the agreement with Schneiderman, and efforts went down to the very end of the last legislative session, which was supposed to end Thursday, to get bills through both houses. The Assembly passed its version on Friday afternoon, but the Senate version did not go to a floor vote until after 2:00 a.m. on Saturday after not even having been voted out of committee until late Friday.

"I think that they obviously have a tremendous infrastructure and a dynamic team and have a brilliant strategy to be able to pull off legislation in the middle of this current environment," gaming litigator A. Jeff Ifrah of Ifrah Law said. "It is really a remarkable achievement, and it is an achievement that hasn't really been witnessed by other comparable industries that have been under pressure."

The quick action by New York lawmakers is also in stark contrast to the many other states where the industry has been pushing legalization bills since coming under scrutiny last fall. Only six states have passed such legislation so far this year — Colorado, Indiana, Tennessee, Mississippi, Virginia and Missouri — with Massachusetts Attorney General Maura Healey further publishing final regulations for the contests, ostensibly finding them legal in that state.

"New York was the tipping point of either the efforts being a success in year one or an abject failure," said gaming and appellate attorney Daniel Wallach of Becker Poliakoff. "Had the industry not won the battle of New York, they could not characterize their efforts over the past six to nine months as a success. New York makes it a success because New York could be the catalyst for the rest of the country."

But Wallach warned that companies are not yet out of the woods in New York, saying that there is a strong possibility that consumer groups, competitors or other taxpayers could bring a challenge to the legislation on New York constitutional grounds.

He pointed to Article I, Section 9 of the New York State Constitution, which prohibits the state from authorizing any lottery, pool-selling, bookmaking or "any other kind of gambling, except lotteries operated by the state ... except pari-mutuel betting on horse races ... and except casino gambling at no more than seven facilities," as potentially providing an avenue for challengers to upend the legislation. Such a constitutional conflict was pointed out by two Assembly members during the floor debate.

Further, Schneiderman has said he will continue to pursue the false advertising claims he brought last year. And the legislation does nothing to stop the wave of civil class actions against the industry, most of which **have been consolidated** in a Massachusetts federal court by the U.S. Judicial Panel on Multidistrict Litigation.

But for now, experts said the New York legislation can be seen as the industry clearing a major hurdle that could legitimize its efforts in other states.

"The question will be whether the industry pick up the pieces before the start of the NFL season and be able to assemble enough states to really be profitable," Ifrah said.

--Editing by Christine Chun and Kat Laskowski.

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