



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

150 South Main Street • Providence, RI 02903

(401) 274-4400 - TDD (401) 453-0410

Peter F. Kilmartin, Attorney General

February 4, 2016

Hon. Gina Raimondo
Office of the Governor
The State House
Providence, Rhode Island 02903

Hon. M. Teresa Paiva Weed
President of the Senate
The State House
Providence, Rhode Island 02903

Hon. Nicholas A. Mattiello
Speaker of the House of Representatives
The State House
Providence, Rhode Island 02903

Re: Daily Fantasy Sports

Dear Governor Raimondo:

The issue of Daily Fantasy Sports (DFS) leagues, such as DraftKings and FanDuel, has generated a great deal of inquiry as to whether or not they constitute legal or illegal gambling. Each state has its unique constitutional structure, statutory structure, and case law thereby rendering different conclusions.

Recently, this office, through both its civil and criminal divisions, has undertaken a review of the operation of "Daily Fantasy Sports" sites in order to determine whether the operation of those sites violates current Rhode Island law. Although there is no statute or case that deals on point with this issue, there is enough precedent to analyze and draw a conclusion.

"Fantasy Sports" allow participants to assume the role of the general manager of a sports team by allowing the participant to select a hypothetical team, generally limited by a fictional "salary cap," which competes against similarly constituted "teams." Because members of the fictional "team" come from a variety of real teams, it is impossible to utilize the outcome of actual games in order to award points. Rather, success is derived by individual performances, which are then combined and compared with other "teams." Performances are generally evaluated over the course of a season.

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Daily Fantasy Sports (“DFS”) started in 2007 as a variant of fantasy sports, offering a condensed version of the season long fantasy experience by allowing players to draft a team to compete on a weekly or daily basis. With the start of the 2015 National Football League season, increased advertising at NFL venues, combined with a widely distributed story of a DraftKings insider making big money on a competitor’s site brought unprecedented attention to the operation of Daily Fantasy Sports.

Inevitably, individual states have examined the operation of DFS sites, generally through the offices of the state attorney general. Although the conclusions reached by various state attorneys general have not been uniform, each has been decided based upon the law of the individual state. Some states, such as New York and Illinois, have initiated proceedings to stop the operation of DFS in their states. Other states have issued opinions that DFS are not illegal.

The operation of Daily Fantasy Sports is not specifically addressed in the Rhode Island General Laws. Rhode Island’s statutes related to gambling are found in a variety of titles. Statutes related to gambling are found in Title 11, outlining criminal offenses; Title 41, regarding “Sports, Racing and Athletics;” and Title 42, regarding the State Lottery. There is no comprehensive definition of “gambling” applicable to all of these titles. In addition, gambling, and the expansion of gambling is addressed in the Rhode Island Constitution. As a result, the Rhode Island Supreme Court has opined regarding a number of gambling related issues. See, for example, In re: Advisory Opinion to the Governor (Casino), 856 A.2d 320 (R.I., 2004).

Although we believe that DFS does implicate certain provisions of existing civil and criminal statutes, it is the opinion of this office that Daily Fantasy Sports may currently operate legally in the State of Rhode Island. Our laws specifically prohibit “games of chance” as well as lotteries, except those operated by the state.¹ Lotteries comprise three elements, consideration, prize, and chance. Clearly, DFS have the elements of consideration and prize. Whether DFS constitutes a “lottery” under Rhode Island law relies upon an analysis of the element of chance.

Recognizing that although the outcome of some games are purely based upon chance, and others entirely upon skill, it is clear that DFS, like most games, is a mixture of these factors. The Supreme Court of Rhode Island has adopted the “dominant factor” test to determine if chance exists in a lottery scheme. Under this doctrine, a scheme is a lottery “when an element of chance dominates the distribution of prizes, even though such a distribution is affected to some degree by the exercise of skill or judgment.” 856 A.2d at 328. This is an especially high burden, more than the “substantial” chance that the New York Supreme Court found in December, 2015, when analyzing the New York Attorney General’s challenge to DFS. Applying the “dominant factor” standard, I do not believe that daily fantasy sports constitute a “game of chance” and therefore, daily fantasy sports games do not constitute a lottery under Rhode Island law.

Nevertheless, it is my very strong suggestion that the legislature, this year, enact a statute which governs the operation of DFS in this state. At a minimum, a high level of regulation should be established

¹ See, for example, Section 11-19-1 of the Rhode Island General Laws.

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to ensure criminal elements do not infiltrate the game, youth participation is barred, addiction issues addressed and all attendant issues we have experienced with gambling in Rhode Island are vetted. It is also critical that any regulatory scheme reduce or eliminate the risk of economic harm to vulnerable players, promote the games' transparency, and potentially generate revenue for the State. Should you wish to allow Daily Fantasy Sports to continue to operate legally in Rhode Island, my office remains available to the legislature to assist in vetting this issue with you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter F. Kilmartin". The signature is written in a cursive style with a large initial "P".

Peter F. Kilmartin
Attorney General