

# DraftKings, FanDuel Handed Empire State Reprieve

14TH DEC 2015 | WRITTEN BY: SARA FRIEDMAN

In a rapid reversal of fortunes Friday, a New York appellate court allowed DraftKings and FanDuel to continue to operate while the case brought against the two daily fantasy sports (DFS) operators by the Empire State's attorney general remains in question.

New York Supreme Court Judge Manuel Mendez had ordered DraftKings and FanDuel to cease operations in the Empire State Friday morning, but a few hours later a state appellate court ruled that both companies could resume operations until the higher court reviews the case in January.

"This immediate stay was granted, so we will remain fully operational in New York," said DraftKings counsel David Boies, who serves as chairman of law firm Boies, Schiller & Flexner.

"We look forward to a full and fair hearing and are confident we will demonstrate clearly to the court why we should be able to continue to offer our DFS games in New York permanently."

Rival FanDuel had decided to halt operations in New York **last month** after Attorney General Eric Schneiderman's action seeking a preliminary injunction against the two DFS operators was filed.

But following Friday's developments, the company said New York players may start using the site again, even though FanDuel will not be accepting new deposits from New Yorkers while the legal case remains pending.

"Based on the appellate court's ruling, New Yorkers can continue to enjoy FanDuel contests while legal process moves forward," said the company in a note to players.

The Fantasy Sports Trade Association (FSTA) also applauded the move by the New York appellate court to stay Judge Mendez's order.

"The FSTA was gratified to see that the appellate court acted so quickly and decisively to stay what we believe was an erroneous lower court decision that failed to address important issues affecting both the

companies involved and the legion of New Yorkers who enjoy playing daily fantasy sports," said the trade association in a statement.

In agreeing to issue **preliminary injunctions on the fantasy operators**, Mendez had initially handed a victory to Schneiderman in the first round of what is expected to be a lengthy legal battle over the status of daily fantasy sports in New York.

In an **11-page order**, Mendez said that New York's Penal Code is sufficiently "broadly worded" for Schneiderman to reach the conclusion that DFS involves "illegal gambling."

The judge also said that a **2007 New Jersey federal case**, *Humphrey v Viacom Inc*, which found that entry fees to season-long fantasy sports leagues should not be considered bets or wagers, "has no application" to DFS in New York, despite it being extensively cited by both FanDuel and DraftKings in their legal arguments.

"Contrary to *Humphrey v Viacom, Inc*, the facts in this action involve DFS, the participants pay a fee every time they play, potentially multiple times daily instead of one seasonal entry fee, with a percentage of every entry fee being paid to FanDuel, Inc. and Draftkings, Inc.," Mendez wrote in his decision.

He noted that New York's gambling definitions are different from New Jersey's, in that they do not refer to the act of wagering or betting, but rather they speak of a person "risking something of value" on a contest.

"The payment of an 'entry fee' as high as \$10,600.00 on one or more contests daily could certainly be deemed as risking 'something of value,'" he said.

Elsewhere, Mendez noted that DFS operators use the **2006 exemption** in the federal Unlawful Internet Gambling Enforcement Act (UIGEA) for fantasy sports to support the legality of their operations.

But the judge said that the exemption does not protect the company from New York's laws and is "not a basis" to contest the legal actions brought by Schneiderman.

UIGEA specifically relates to the processing of deposits for unlawful online gambling, but does not preclude states from making their own determinations about fantasy sports under their own gaming laws, according to Robert McLaughlin, head of the gaming practice at law firm Hodgson Russ in Albany.

"In my mind, UIGEA is nothing more than a financial transaction statute," McLaughlin told GamblingCompliance.

"Those in the DFS industry have said the law gives them the ability to do fantasy sports on a federal level and with financial transactions, but you are still subject to the particular rules of the states."

Mendez had also rejected arguments from FanDuel and DraftKings that their years of operations in New York without prosecution should preclude Schneiderman from now taking action.

The judge also said arguments that Schneiderman exceeded his authority in calling on the fantasy companies to cease and desist were not strong enough to prevent an injunction.

In a statement that preceded Friday's appellate decision, Schneiderman expressed his appreciation for Mendez's ruling.

"We are pleased with the decision, consistent with our view that DraftKings and FanDuel are operating illegal gambling operations in clear violation of New York," he said.

Friday's legal developments affected not just FanDuel and DraftKings, but also their payment processors.

PayPal initially said it would be halting payments for DFS in New York in the aftermath of Mendez's ruling. However, only hours later the payments provider told the Boston Globe that it would resume its payments services following the appellate court's move to stay the injunction.

McLaughlin said Mendez's decision was not entirely surprising as the New York Supreme Court frequently sides with the state's attorney general over injunctions.

"All that the judge had to do in this case was decide the likelihood of success ... based on the merits," said McLaughlin.

The court found Schneiderman had standing to seeking injunctions against the fantasy companies, McLaughlin said, "so he had to defer to the attorney general on the interpretation of the statute."

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