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Daily Fantasy Sports and the Perils of Outlier Marketing

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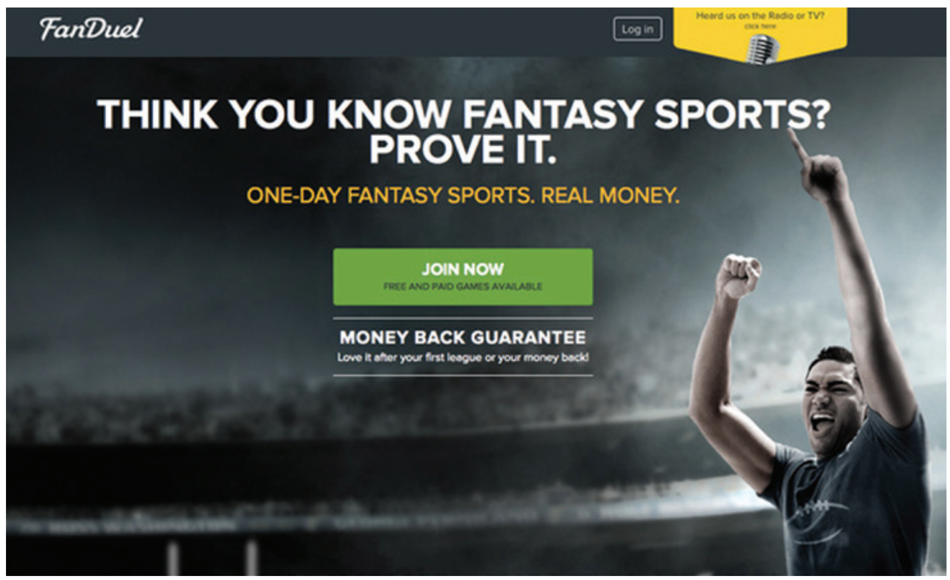

FanDuel website.

The daily fantasy sports (DFS) industry has been teetering on the blurry line that divides legality and illegality for some time. Regulators are certainly no strangers to the industry. Last month, the two leaders in the DFS industry, DraftKings and FanDuel, settled with New York Attorney General Eric Schneiderman's office for $12 million for repeated false advertising violations.

With games lasting just one day, one week or one match, DFS contests appeal to the need for instant gratification driven by today's digital and social media. An increasing number of states allow their residents to play DFS legally, but the legal challenges facing the industry continue to loom like a dark cloud over its prospects. Just 18 months ago, the forecast for growth in the DFS industry anticipated entry fees alone generating nearly $15 billion in revenue by 2020. Earlier this year, those forecasts were cut by more than half.

Most of the legal challenges to the DFS industry have focused on its legality as a gambling enterprise. But, legislation signed by New York Gov. Andrew Cuomo in August 2016 legalized DFS contests in the state, so the Attorney General's Office narrowed its investigation.

After a year-long inquiry, Schneiderman's office found both DraftKings and FanDuel had consistently engaged in fraudulent and misleading advertising, among other things:

- Giving false and misleading statistics in their marketing on the likelihood of gamers winning cash prices. They promised big jackpots and a positive return on entry fees, when in fact, most gamers lost money.
- Misleading novice gamers about the substantial advantage professional players had over them, and allowing the

professional gamers to use computer algorithms and various other strategies to repeatedly take advantage of novice gamers and win disproportionate shares of the jackpots.

• Promising to match a gamer's initial deposit in marketing promotions, failing to disclose the substantial investment required to fully earn those deposit bonuses.

• Marketing its contests as harmless fun and easy opportunities to get rich, failing to disclose the dangers of gaming and gambling addiction.

As a result of these findings, each company is expected to pay $6 million each for false advertising and have agreed to marketing reforms, including reforms to the disclosure methods and transparency.

The settlements with the New York Attorney General's Office highlight the challenges of businesses whose marketing message is based on consumers' ability to achieve extraordinary results. When companies like DraftKings and FanDuel have an enormous war chest, recruiting more gamers and increasing profits is often prioritized over accuracy of information. It can be extremely difficult for consumers to distinguish false advertising from credible ones, particularly when they feature seemly credible advocates. FanDuel, for example, ran commercials with statements like, "I'm just a regular guy who goes to work every day" and that "anybody can win". DFS is "simple [...] even a novice can […] spend $1 or $2 and win 10 or 20 thousand dollars." Chris Prince was featured in a commercial saying "a little bit of time, and a little bit of knowledge" is all it takes to win. The ad indicated he won more than $760,000. It was never disclosed that Prince is a professional DFS gamer or that professionals like him often engage in "bumhunting" (seeking out an inexperienced gamer and pillaging him for all he's worth). While DraftKings reported that the average user's winnings over a 12-month period was $1,263, 89.3 percent of players lost money during that period.

While the DFS industry has been a frequent target of regulators across the country, the focus and findings of the New York settlements should come as no surprise. They echo earlier regulatory actions against the weight-loss industry, which for years focused on similar results-based marketing schemes in an attempt to attract consumers: "get a gym body without going to the gym" by sprinkling an natural powder on your food, or "significantly slim your thighs and buttocks" using an almond scented cream. The Federal Trade Commission called these ads extortion and, along with states such as New York, waged war on the weight-loss industry for making fantastical, exaggerated claims of extraordinary results (often without scientific or statistical backing). In 2014, four companies (Sensa Products, L'Occitane, HCG Diet Direct and LeanSpa) collectively paid $34 million to refund consumers for false advertising. Once a generation, it seems, regulators engage in these stings to crack down on the industry's advertising antics. In 2004, the FTC charged six companies with false marketing in its Operation Big Fat Lie. Before that, in 1997, it was Operation Waistline that took down seven companies for bogus weight-loss marketing claims.

Additionally, weight-loss companies have also been penalized for failure to make necessary disclosures in their ads. Often, "typical consumers" would tout the amazing results of a weight-loss product, much like the Prince FanDuel commercials cited by Schneiderman. The weight-loss industry attached "results not typical" disclaimers to their ads until it was struck down by the FTC, which believed that advertisers should not include the outlier success story unless it discloses the results that an average consumer would achieve. The FTC has since put out guides like the Guides Concerning the Use Endorsements and Testimonials in Advertising (16 CFR Part 255), which contain key considerations like the bona fide use of the product or service, disclosures of the relationship between the endorser and the marketer and the endorser's experience being typical or nontypical of the average consumer.

Further, both the weight-loss and DFS industries used hidden or deceptive tactics to finagle extra cash in various forms from its consumers. Weight-loss product companies often makes promises of free-trials or "money back guaranteed" for dissatisfaction of a product. But the FTC found that consumers were being ripped off by paying nonrefundable shipping and handling charges as high as $79.99. Similarly, DraftKings and FanDuel promised in a marketing promotion that new gamers would receive a "100% first-time deposit bonus" if an initial deposit of a certain amount was made. The hundreds of dollars in bonuses required thousands of dollars of expenditures on DFS contests, according to Schneiderman. In an industry where nearly 90 percent of participants lost money, these expenditures had little chance of being recouped.

There are so many similarities between the marketing practices of the weight-loss industry and DFS industry that it should have been no surprise that the regulators would take notice. What would be surprising is if New York is the only regulator to make these claims.

Results-based marketing plays a key role in many industries beyond weight loss and fantasy sports. The investment, health and fitness, education and many other markets rely on success stories as a key element of their marketing strategies. These settlements, no matter in what industry, offers valuable lessons to those seeking to use results-based marketing programs and the risks of using outlier results to promote a brand. When promoting success stories, marketers must keep in mind these four principles:

1. Ensure that the success story representative of the typical consumer (e.g., casual investor vs. professional day trader).

2. Ensure you have verifiable and statistically significant data on consumer results.

3. Understand the full range of results that actual consumers have achieved (Is there a long tail? Is there a narrow or wide bell curve?).

4. Clearly and concisely communicate the full range of results in marketing materials ("results not typical" will not be sufficient).

While the prospect of continued regulatory action looms over the DFS industry like a dark cloud, there does appear to be something of a silver lining: the DFS industry has fought against arguments that it was gambling since its inception. The New York settlements provide a roadmap for defending the industry. While it may have been promoted like a lottery, New York found that the skill, data, analysis and experience of players was a primary driver of success. If DFS is a game of skill, then surely it's legal.

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