



Portfolio Media, Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Arbitration Clauses Not 'Magic,' Draft Kings Users Say

By **Rick Archer**

Law360, New York (January 10, 2017, 2:17 PM EST) -- "Arbitration" is not a magic word for making multidistrict fraud claims vanish, a group of customers of daily fantasy sports platforms DraftKings Inc. and FanDuel Inc. argued to a Massachusetts federal court Monday.

Responding to the companies' November motions to compel arbitration, the consumers argued that the existence of an arbitration clause in DraftKings' and FanDuel's website terms of use cannot be used to duck the issues of whether the terms as a whole are a valid contract and if the arbitration clause itself is enforceable.

"Arbitration clauses in online user agreements are not magic. These clauses do not supersede black-letter contract formation law or cut short the court's legal analysis of whether a contract exists in the first place merely through invocation by DraftKings," said the opposition to DraftKings' request.

There are about 50 named plaintiffs in the **master complaint**, which alleges more than 20 consumer protection claims against the two companies as well as other defendants. The disgruntled players have organized their claims in three areas: bonus fraud, "insider" claims alleging company employees used inside information to win big at other daily fantasy sports sites, and illegal gambling and false advertising claims.

While the companies advertised the games as "100 percent legal," that was untrue, the consolidated complaint alleges. The companies are in fact operating illegal internet gambling operations.

The case was sent to Massachusetts by the U.S. Judicial Panel on Multidistrict Litigation in February 2016.

In **separate motions** in November, DraftKings and FanDuel urged U.S. District Judge George A. O'Toole Jr. to send the claims of all but a small handful of named plaintiffs to arbitration. DraftKings argued that its terms of use are clear and precise in requiring customers to not only arbitrate any disputes, but also allow an arbitrator to decide whether any objections to arbitration are valid.

FanDuel, meanwhile, argued that "the very first line" of its terms of use informs potential players that they are agreeing to arbitrate any disputes they have from using the service.

In their response to DraftKings, the consumers said that the terms of use as a whole and the arbitration clause in particular are unenforceable, and that the company cannot establish its customers gave fully informed consent.

"They had to check a box indicating they agreed to the terms of use, but were not required to actually read or even see them before indicating this agreement, and the check box appears before the link to the terms of use," the opposition to DraftKings' request said. "The arbitration clause was buried halfway through a 6,000-word, single-spaced webpage where it is neither conspicuous nor understandable."

The customers also said the arbitration clause is contradicted by another clause in the terms that require all claims against DraftKings to be brought in a Massachusetts court.

"There could be no unambiguous assent to such an ambiguous, confusing and self-conflicting document," they said.

The response to FanDuel argued that the link to the terms of use on FanDuel's sign-up page was easy to miss because it was not highlighted or underlined, as is the usual practice for webpage links, and was located below the sign-up link.

"As discussed below, the way FanDuel presented its terms of use to users is fatal to FanDuel's contract formation argument under clear Second Circuit precedent," the opposition to FanDuel's request said.

Both opposition briefs also claimed that the companies are attempting to enforce the arbitration clauses against plaintiffs that were the family members of customers and would not have agreed to the terms of use even if they were valid contracts.

Counsel for the plaintiffs and for defendants did not immediately respond to requests for comment Monday.

The plaintiffs' lead counsel include Napoli Shkolnik PLLC, Jones Ward PLC, Stull Stull & Brody and Todd & Weld LLP, among others.

FanDuel is represented by Morrison & Foerster LLP, Prince Lobel Tye LLP, Rouse Hendricks German May PC, Pietragallo Gordon Alfano Bosick & Raspanti LLP, Baker Donelson Bearman Caldwell & Berkowitz, Taylor English Duma LLP, Trujillo Rodriguez & Richards LLC, Napier Gault Schupach & Stevens PLC and Armstrong Teasdale LLP.

DraftKings is represented by Boies Schiller & Flexner LLP, Berry and Silberberg LLC, Wyatt Tarrant & Combs, Young Wells Williams PA, HeplerBroom LLC, Lightfoot Franklin & White LLC and Gunster.

The case is In re: Daily Fantasy Sports Litigation, case number 1:16-md-02677, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Daniel Siegal, Brian Amaral and Zachary Zagger. Editing by Edrienne Su.

All Content © 2003-2017, Portfolio Media, Inc.