

Reproduced with permission from Electronic Commerce & Law Report, 21 ECLR, 5/11/16. Copyright © 2016 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

Gambling

DraftKings Takes Gamble in Texas, Asks Court to Determine If Business Model Legal

BY NUSHIN HUQ

Texas Attorney General Ken Paxton (R) wants a lawsuit by online fantasy sports company DraftKings Inc. moved away from Dallas County, according to a May 2 court filing (*DraftKings vs. Paxton*, Tex. Dist. Ct., DC-16-02593, *motion filed 5/2/16*).

DraftKings filed suit March 4 seeking a declaration that online daily fantasy sports is legal in Texas. Travis County is the appropriate venue instead of where the suit was filed, in Dallas County, because that is where Paxton resides, Paxton said.

The suit seeks to clarify the ambiguous legal stance of the daily fantasy sports industry in Texas, following a nonbinding opinion by Paxton that the activity violates state gambling law. The venue battle could determine which side gets a more favorable jury, if the case goes to trial.

Paxton asked the district court to either dismiss the case for lack of jurisdiction or move it to Travis County because “no substantial part of the events or omissions giving rise to this suit occurred in Dallas County.”

DraftKings contended that Dallas County, home of the Dallas Cowboys, is the correct venue because the website has a large number of customers in the Dallas area and has joint ventures with the local football team, the Dallas Cowboys, the company said in its petition.

In January, Paxton issued an opinion stating that “odds are favorable that a court would conclude that participation in paid daily fantasy sports leagues constitutes illegal gambling” (21 ECLR 120, 1/27/16). The other leading daily fantasy sports site, FanDuel Inc., agreed to stop allowing Texans to participate in paid contests as of May 2, the attorney general’s office said.

Venue Considerations. DraftKings gave serious thought to which venue would be more favorable to it, Chad Ruback, a Dallas appellate attorney, told Bloomberg BNA.

“Dallas County judges and jurors tend to be more business friendly,” Ruback said. “Dallas County is very business friendly, Travis County is more government friendly. The jury pool in Travis County is comprised of

a lot of government workers and a lot of folks that work in higher education.”

Paxton makes a compelling argument that it would be more convenient for him to have the trial in Travis County, where the state capitol is located, Ruback said. While Delaware-based DraftKings might have customers in Dallas as well as some ventures with the Dallas Cowboys, it isn’t based in Dallas. It would be just as convenient for them to come to Travis County as Dallas County. On the other hand, traveling to Dallas County would be burdensome for Paxton, who has a number of responsibilities around Austin, Ruback said.

“No one from the Dallas Cowboys is going to be on the witness stand for this case,” Ruback said.

Nonetheless, the Dallas County judge may still decide that he would like to hear this case, Ruback said.

Calculated Risk? The DraftKings lawsuit seeks to test the legality of paid fantasy sports in Texas, which may be a bit of a gamble on the company’s part. Texas is one of its three largest state markets, and a ruling against the company could do it irrevocable damage nationwide, Ruback said.

“While it is a risk, its not an irrational decision,” Ruback said. “If ultimately the court rules against DraftKings, at least they have certainty, but right now, there is no certainty. Do they keep pouring money into a business model that very well might be determined illegal in Texas sometime in the future?”

With 254 counties in Texas, at some point a state prosecutor will decide to file criminal charges against the company, Ruback said.

DraftKings decided not to wait to be prosecuted criminally and is asking the Dallas district court, a civil court, to interpret Texas penal code, making this an unusual case. In his motion, Paxton said the suit wasn’t appropriate, but he didn’t address how a business can find out under state law if its business activities violate state penal code.

“This is not something that would come up often,” Ruback said. “You know armed robbery is a crime, murder is a crime, but DraftKings wants the court to rule on its business model. The attorney general gave his opinion, but that’s just one man’s opinion.”

To contact the reporter on this story: Nushin Huq in Houston at nhuq@bna.com

To contact the editor responsible for this story: Joseph Wright at jwright@bna.com

Full text at <http://src.bna.com/eD0>.