If You Can't Beat 'Em…

By Reg P. Wydeven
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Last fall I wrote numerous articles about DraftKings and FanDuel, two competing daily fantasy sports websites. The two companies seemingly advertised during every commercial break of each NFL game, boasting million dollar jackpots to prospective players. The duo was able to pay out these jackpots.

In addition to vying with one another for players, the two leaders in daily fantasy sports also had to contend with tremendous political heat. Countless investigations and hearings were held to determine whether daily fantasy sports constituted gambling. Several states felt it did and outlawed it. Matters got worse after a FanDuel employee won big using insider information.

Needless to say, as an attorney, DraftKings and FanDuel would be ideal clients seeing as they constantly need legal help.

Their latest legal entanglements involve antitrust allegations.

According to The Boston Globe, DraftKings and FanDuel brought in nearly $3 billion in entry fees last year, more than tripling 2014's numbers. The industry estimates, provided by the research firm Eilers & Krejcik Gaming LLC, reflect that New York-based FanDuel Inc. collected almost $1.8 billion in fees from players, while Boston's DraftKings Inc. brought in nearly $1.2 billion.

Despite these gargantuan numbers, Eilers & Krejcik estimated that the companies actually *lost* money last year. Like many fast-growing consumer Internet companies, DraftKings and FanDuel relying heavily on money from investors to pay for their growth. So after paying back loans, spending millions on advertising and paying attorney fees for fighting the anti-gambling war, DraftKings lost an estimated $280 million in 2015, while FanDuel lost an estimated $137 million.

Due to these losses, DraftKings may be under financial pressure after failing to raise additional funding, according to Legal Sports Report, a daily fantasy sports monitoring website. As a result, the company is considering a merger with FanDuel. Apparently, DraftKings feels the enemy of my enemy is my friend, so teaming up with their biggest competitor to take on government regulators makes sense.

While it's early in the negotiating stages, even if the two companies can come to an agreement, it's unlikely the government will allow the union. Last year, the Federal Trade Commission opposed a $6.3 billion merger deal between Staples and Office Depot citing antitrust concerns.

The FTC was created in 1914 under the Federal Trade Commission Act to prevent "unfair methods of competition" and "unfair or deceptive acts or practices." The Sherman Act, the country's first antitrust law, was passed in 1890 to prevent monopolies. The Clayton Act, also passed in 1914, addressed specific practices that the Sherman Act did not clearly prohibit, such as mergers and interlocking directorates, which is where the same person makes business decisions for competing companies.

According to the FTC, these three antitrust laws have had the same basic objective for over 100 years: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.

So even though the companies may be losing money, it is unlikely the government would allow the two biggest market-share holders in the country to combine, especially given the legality concerns DraftKings and FanDuel already face.

Last week, the New York legislature passed a bill legalizing daily fantasy sports. We'll have to see If Governor Cuomo approves it and if so, if it will change the companies' fortunes or if they'll still try to combine. I guess it's anybody's bet.