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Alert | New York Government Law & Policy/Gaming

November 2018

NY Daily Fantasy Sports Law Ruled Unconstitutional, But Still Permissible?

On Oct. 26, 2018, after two years of litigation, Albany County Supreme Court Justice Gerald Connolly issued a Decision, Order and Judgment in the case *Jennifer White et al. v. Andrew Cuomo and the New York State Gaming Commission*. In a somewhat contradictory opinion, the court concluded that New York's interactive fantasy sports law was unconstitutional, but upheld the statutory provision making it clear that the activity is not illegal pursuant to the state's Penal Law. Although this decision is clearly important, what matters more is what happens next.

The Interactive Fantasy Sports Law

In late 2015, the then-Attorney General issued cease and desist orders to the prominent interactive fantasy sports (IFS) operators that were offering gaming services in New York. To ensure that New York consumers could continue accessing this type of entertainment, the Legislature responded by enacting the Interactive Fantasy Sports Law. This statute legalized IFS and established a regulatory scheme. As a result: (i) the Attorney General settled the case with the IFS operators; (ii) the Gaming Commission was granted express authority to license IFS operators and regulate IFS games; (iii) a new tax scheme was established on IFS revenues; and (iv) certain requirements were placed on operators, such as excluding minors and interested parties, as well as providing resources to contestants regarding compulsive play.

Most notably, however, was that the new IFS law included the legislative declaration that IFS does not constitute gambling. The statute codified in Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law a statement that IFS games "are not games of chance because they consist of fantasy or simulation sports games or contests in which the fantasy or simulation sports teams are selected based upon the skill

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and knowledge of the participants and not based on the current membership of an actual team that is a member of an amateur or professional sports organization." Moreover, IFS "contests are not wagers on future contingent events not under the contestants' control or influence because contestants have control over which players they choose and the outcome of each contest is not dependent upon the performance of any one player or any one actual team." As such, the Legislature summarily declared that IFS "do not constitute gambling in New York state as defined in . . . the penal law."

Constitutionality of IFS and *White v. Cuomo*

Article 1, Section 9 of the New York State Constitution generally proscribes any kind of gambling, subject to certain exceptions, as follows:

> [N]o lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature, the net proceeds of which shall be applied exclusively to or in aid or support of education in this state as the legislature may prescribe, except pari-mutuel betting on horse races as may be prescribed by the legislature and from which the state shall derive a reasonable revenue for the support of government, and except casino gambling at no more than seven facilities as authorized and prescribed by the legislature shall hereafter be authorized or allowed within this state; and the legislature shall pass appropriate laws to prevent offenses against any of the provisions of this section.

The anti-gambling plaintiffs in *White et al. v. Cuomo* argued that the 2016 legislative enactment regarding IFS is in contravention with this constitutional prohibition against gambling and directive that "the legislature . . . pass appropriate laws to prevent offenses against" the gambling prohibition.

In contrast, the state argued that the Legislature's authorization of IFS was consistent with its constitutional mandate to enact appropriate gambling laws. The defendants highlighted that the Constitution does not define gambling and requires that the Legislature determine what is not gambling. The court was not swayed by this argument and thus rejected the state's position that IFS is a game of skill, not pure chance, and excluded from the Constitution's proscription. Justice Connolly agreed with the plaintiffs, holding that the term "gambling" in the Constitution must be interpreted broadly and by its plain meaning. In fact, the court stressed that the Constitution "does not simply bar the authorization of gambling, it bars the authorization of '. . . lottery or sale of lottery tickets, pool-selling, book-making, or <u>any other kind of gambling'.</u>" (*Emphasis included*.) "[T]he 'any other kind' proscription calls for an expansive, not a limited, interpretation of the term 'gambling'." Notably, the court referenced a 1984 Attorney General Opinion to reach the conclusion that "sports gambling" is not permitted under the Constitution because that activity falls within "pool-selling, bookmaking and any other kind of gambling." The court determined that, notwithstanding the statutory language, IFS is a "contest on a future contingent event," and must be considered gambling.

But, the court did partially approve of the legislative action. Although Justice Connolly struck down the statutory language authorizing IFS in New York state, the court upheld the Legislature's exemption of IFS from the definition of "gambling" under the Penal Law as constitutional. The Legislature's exemption of IFS from the Penal Law definition of "gambling" was within their discretion and authority.

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The Future of Gambling in NYS: IFS and Sports Wagering

The result of this seemingly split decision is sure to play out over the next several months. The prominent IFS operators have expressed their intent to remain operational in New York, while the plaintiffs have called on the state to shut them down. This dichotomy in the reading of the decision emanates from what appears to be a ruling that New York is not allowed to have a regulatory scheme for permissible IFS, but at the same time the Legislature has the authority to conclude that engaging in IFS is not a criminal action. Regardless, it is likely that the state will appeal the Albany County Supreme Court's Decision. If an appeal is pursued, the state is entitled to an automatic stay, which will maintain the status quo statutory framework until the litigation is resolved.

Although all IFS companies and consumers will be anxious to see how this issue plays out, those interested in the future of sports wagering and mobile platform wagering in New York are likely equally anxious. New York's casinos are awaiting the Gaming Commission's release of regulations to implement the statutorily approved sports wagering. In addition, there was a strong push for a statutory change during the 2018 legislative session to expand the opportunity to access sports wagering though mobile applications. It is unclear what repercussions Justice Connolly's decision will have on these gaming policies. However, as the 2019 legislative session approaches, and the implementation of sports wagering is well underway in neighboring states, it is certain that commercial casinos and legacy gaming operators alike will pay close attention to *White et al. v. Cuomo*.

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