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New York Appellate Court Strikes Down Law Authorizing Interactive Fantasy Sports Wagering

On February 6, 2020, in *White v. Cuomo*, the New York Supreme Court Appellate Division, Third Department, struck down a New York state law that legalized interactive fantasy sports contests, typically known as fantasy sports leagues. The court based its decision – which could eradicate the lucrative fantasy industry in New York – on the fact that the legislation authorizing the leagues violated the New York State Constitution’s prohibition on gambling. While this decision sent shock waves through the industry, it likely is not the last word on the issue since the State of New York is expected to seek review by the New York Court of Appeals.

Background

Most everyone is familiar with the world of interactive fantasy sports contests (“IFS”), and “leagues” have popped up in sports ranging from football and basketball to golf and gymnastics. While the sports may differ, the concept is the same. Participants build fantasy team rosters comprising real-world athletes. Participants’ teams then “compete” against each other based on the performances of their selected group of athletes. Participants typically pay an entry fee and receive a reward if their team’s athletes perform best.

Until 2016, these fantasy leagues bumped up against New York State’s prohibition against gambling. In particular, the New York Constitution prohibits the authorization of “the sale of lottery tickets, pool-selling, book-making, *or any other kind of gambling*” within the state.¹ In 2015, then-New York State Attorney General Eric Schneiderman utilized this provision in ordering IFS firms to cease operations in the state.

In response to the then-Attorney General’s action, the New York State Legislature amended the Racing, Pari-Mutuel Wagering and Breeding Law (“Wagering Law”) to authorize IFS contests. The Legislature did so by clarifying that IFS contests do not constitute “gambling” under the state constitution or penal law. It simultaneously established regulations to govern the industry.² In declaring that IFS contests are not “gambling,” the Legislature reasoned that such contests are not “games of chance” but instead are “based upon the skill and knowledge of the participants.”³ The Legislature further concluded that fantasy leagues are not “wagers on future contingent events not under the contestants’ control or influence” because of a contestant’s control in shaping his/her roster.⁴

Challenge to IFS Authorization

Later in 2016, a group of New York taxpayers filed a lawsuit seeking a declaratory judgment that the newly enacted law was unconstitutional. The New York State Supreme Court granted the plaintiffs’ request, concluding that the law authorizing IFS contests violated the state’s constitutional ban on gambling.⁵

On appeal, the Appellate Division, Third Department, upheld the lower court ruling, holding that IFS contests are prohibited gambling contests under the state constitution. By invalidating the portion of the 2016 law that excluded IFS contests from the constitutional meaning of “gambling,” the Third Department made clear that such contests are not excluded from the gambling prohibition “merely because the Legislature now says that it is so.”⁶ The Appellate Division

¹ N.Y. Const. Art. I, § 9 (emphasis added).

² N.Y. Racing, Pari-Mutuel Wagering and Breeding Law (“Wagering Law”) § 1400 *et. seq.*, as added by L. 2016, ch. 237, § 1.

³ Wagering Law § 1400 (1)(a).

⁴ *Id.* § 1400 (1)(b).

⁵ *White v. Cuomo*, 87 N.Y.S.3d 805, 821 (Sup. Ct. Albany Cty. 2018).

⁶ *White v. Cuomo*, No. 528026, 2020 WL 572843, *3 (3d Dep’t Feb. 6, 2020).

explained that although the constitutional provision does not define “gambling,” the Legislature has for decades defined the term through its Penal Code and that those definitions should be read to include IFS contests. The relevant portions of the Penal Code relied upon by the court include the following:

- “A person engages in gambling when he stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome.”⁷
- A “contest of chance” is defined as “any contest, game, gaming scheme or gaming device in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein.”⁸

The court stated that a fantasy league meets both of these definitions. First, it concluded that it is “undisputed” that IFS contestants “pay an entry fee (something of value) in hopes of receiving a prize (also something of value) for performing well” in the contests.⁹ Second, it found that IFS games constitute a “contest of chance.” In considering this second question, the Third Department said the proper test is to evaluate whether such contests “involve a material degree of chance.”¹⁰ While the court acknowledged that there may be an element of skill involved in choosing one’s team, it noted that “skill and chance are not mutually exclusive; they often coexist.”¹¹ The Third Department reasoned that despite the skill IFS contestants use in selecting teams, “the skill level of an IFS contestant cannot eliminate or outweigh the material role of chance in IFS contests.”¹² In reaching this conclusion, the court noted the numerous aspects of chance that factor into the results of IFS contests – *e.g.*, player injury or illness, unexpected weather conditions, poor officiating, etc.

Observations

Although the *White* decision temporarily makes illegal fantasy sports gambling in New York, this decision is unlikely to be the last word on the matter. Attorneys for FanDuel expect an appeal to the New York Court of Appeals to move forward. Even if the Court of Appeals does not address this issue, this decision may signal to the Legislature that in order to enact fantasy sports gambling, as it did in 2016, it will need to amend the state constitution to legalize the industry once and for all.

Ropes & Gray attorneys work closely with clients in the sports and entertainment sector. For further information, please contact one of our [Sports Industry](#) attorneys or your usual Ropes & Gray contact.

⁷ N.Y. Penal Law § 225.00 (2).

⁸ N.Y. Penal Law § 225.00 (1).

⁹ *White*, 2020 WL 572843, *4.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*