

The Odds Are Getting Better for Sports Betting and Fantasy Sports in New York

The Bottom Line

- *As New York lurches toward the legalization of sports betting and interactive fantasy sports, true national sports betting and fantasy sports gaming is still a long way from becoming a reality.*
- *Businesses in the sports gaming industry, including sports books, media companies, sponsors and marketers must continue to take a local-first approach in monetizing and taking advantage of the growth of sports gaming.*

Despite mixed signals from the state courts, New York is moving to establish a framework to enable sports betting and interactive fantasy sports gaming within the state. Early this year, the New York State Gaming Commission (Gaming Commission) approved a set of proposed rules to enable sports wagers in upstate casinos. While these rules will not allow betting anywhere near New York City or any online or mobile betting, they offer a first step in the state's plan to generate significant revenue and upstate economic activity through gaming.

These rules come on the heels of an earlier decision by the Gaming Commission to cease regulating interactive fantasy sports (IFS) in response to the Supreme Court of New York's decision in *White v. Cuomo* (*White*). The Supreme Court of New York in the *White* decision declared simultaneously that the authorization of IFS leagues in New York is an unconstitutional use of power by the legislature, and that creating or taking part in an IFS league does not constitute illegal gambling. The multifaceted ruling hinges on differing treatment of the term "gambling" in the New York Constitution and in the New York Penal Law.

Case History

The ruling is the latest in the ongoing IFS saga (which includes the May, 2018 U.S. Supreme Court decision in *Murphy v. NCAA* striking down of the federal ban on sports betting) and grows out of the already complex history of IFS in New York. The state had briefly enjoined major IFS providers such as DraftKings and FanDuel in 2015, until the adoption of Chapter 237 of the Laws of 2016 of the State of New York. Chapter 237 authorized the creation – and importantly the regulation – of IFS by finding that IFS is not gambling because IFS "are not games of chance" and are "not wagers on future contingent events not under the contestant's control or influence because contestants have control over which players they choose."

With Chapter 237's determination that IFS is not gambling, New Yorkers with gambling addictions (or having family members with gambling addictions) filed *White v. Cuomo* seeking a determination that the adoption of Chapter 237 violated the state's constitution.

The Constitutional Element

Article 1, Section 9 of New York's constitution, prohibits "lottery or the sale of lottery tickets, pool-selling, book-making, or any other kind of gambling" except for certain enumerated exceptions. Essentially, the

plaintiffs asked the court to conclude that Chapter 237 was a legislative end-around past the broad constitutional prohibition of “other kinds of gambling.”

The court agreed. Citing to previous legislative history and New York Attorney General opinions, the court held that “sports gambling cannot be authorized absent a constitutional amendment” and that “IFS [is] a game determined by a dominant degree of skill and a material degree of chance.” The “material degree of chance” is significant enough to bring IFS within the constitutional “other kinds of gambling” catch-all. Therefore, New York’s attempt to authorize and regulate IFS by statute is unconstitutional.

Opposite Result Under The Penal Law

The court came to the opposite conclusion with regards to IFS and the New York Penal Law. Article 225, which makes gambling illegal, defines “gambling” as “stak[ing] or risk[ing] something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence” and a contest of chance as a contest or game “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.” But because this definition of gambling is a product of the legislature’s creation of Article 225, the court held that the legislature acted properly when it specifically excluded IFS from the definition of gambling with the enactment of Chapter 237. “In light of the specific discretion afforded the Legislature...the Court cannot find that the provision ostensibly excluding IFS from the ambit of the Penal Law definition of gambling is unconstitutional,” the court determined.

The court summed up this apparent discrepancy succinctly: “The Legislature has the authority to address and exclude certain acts, including IFS, from the ambit of the Penal Law. Such discretionary exclusion, however, does not have the effect of changing the meaning of the constitutional terms each time the statute is revised; the constitution is not so fungible.”

Immediate Impact

The situation in New York is emblematic of conflicting state priorities across the United States. There is significant momentum to legalize sports betting and IFS gaming, and the potential revenue these activities represent. Yet, state constitutions, existing legislation and embedded stakeholders continue to create barriers to the rapid expansion of sports betting and fantasy sports gaming on a national basis. This challenge has led to odd results, with states such as New York (and earlier New Jersey) simply throwing up their hands and refusing to regulate this activity, creating both opportunity and great uncertainty.

Yet, while there is no clear path to resolve these conflicting interests, this uncertainty undoubtedly will not be able to hold, as this lack of oversight will foster an environment of fraud, abuse and consumer deception and states will need find a way to move towards a robust and regulated marketplace.

Related People

James Johnston

Partner

212 468 4867

jjohnston@dglaw.com

