

What's Next for Online Sports Betting in New York?

The Bottom Line

- *The New York Supreme Court Appellate Division's decision places one of the most lucrative betting markets temporarily out of reach of DFS operators. The decision, if upheld by the New York Court of Appeals, will also cast doubt on the New York Legislature's efforts to authorize online sports betting. These developments demonstrate the hurdles that remain to enabling nationwide online sports betting. Participants in this industry, including sponsors, will likely continue a state-by-state focused strategy until these hurdles are overcome.*

Last month, a New York appeals court found that the New York legislature cannot legalize daily fantasy sports without an amendment to the New York Constitution, and that, as a result, daily fantasy sports services like FanDuel and DraftKings cannot legally operate in New York.

The ruling spells trouble for the broader legalization of online sports betting in New York, and may prevent New York from joining the growing list of states that have entered this lucrative market.

Legal Challenges to Daily Fantasy Sports

In daily fantasy sports (DFS), players compete by building a team of professional athletes, earning points based on those players' real-world performance over a short period of time. Players pay an entry fee, and winners receive prizes funded by those entry fees, with the provider keeping a portion of the entry fees as its profits.

In 2015, then-New York Attorney General Eric Schneiderman ordered DraftKings and FanDuel to cease accepting entries from New York, finding that the practice of accepting wagers for DFS games amounted to illegal gambling under New York law. In response, the New York Legislature passed a law the following year specifically authorizing DFS operations, effectively nullifying Attorney General Schneiderman's order and permitting DraftKings and FanDuel to continue operating in New York. A group of New York taxpayers, backed by anti-gambling group Stop Predatory Gambling, filed suit, seeking a declaratory ruling that the law was unconstitutional under the New York Constitution. The trial court agreed and the Attorney General's office appealed the decision.

Last month, the New York Supreme Court Appellate Division for the Third Judicial Department affirmed the trial court's ruling, finding that the New York Legislature could not legalize DFS absent a constitutional amendment. Although the Attorney General's office argued that it is not "gambling" because it largely relies on skill, the Court found that DFS still "depends in a material degree upon an element of chance" and therefore still constitutes gambling under the New York Constitution.

The decision is currently on appeal with the New York Court of Appeals, New York's highest appellate court.

Implications for Online Sports Betting

The Appellate Division's decision may spell trouble for efforts to legalize online sports betting in New York.

Until 2018, the federal Professional and Amateur Sports Protection Act of 1992 prohibited the majority of states from legalizing sports betting. Since 2018, when the United States Supreme Court found that prohibition unconstitutional, New York joined 18 states that has legalized sports betting in some form, but notably does not allow online sports betting. As New York finalizes its 2021 budget, some lawmakers — encouraged by New Jersey's \$40 million in tax revenue from sports betting in 2019 — are eyeing the potential for added revenue to help close New York's projected \$6 billion budget deficit. However, they are facing stiff opposition, including from Governor Andrew Cuomo, who has asserted that New York's Constitution would not allow the New York Legislature to legalize online sports betting.

Legalized gambling in New York relies on an exception to the New York Constitution's generalized ban on gambling that permits the New York Legislature to authorize "casino gambling at no more than seven facilities." Opponents of legalized online sports betting have asserted that this language would not permit the New York Legislature to legalize online sports betting, given that it very narrowly permits "casino gambling" that is conducted "at ... seven facilities."

In contrast, proponents of the legislation argue that so long as the servers used to accept the bets are present on the premises of authorized casinos, the gambling is occurring "at" the designated facilities, and is, therefore, allowable under the New York Constitution. The New Jersey Legislature relied on the same rationale in finding that its Constitution — which limits sports betting to "casinos within the boundaries...of Atlantic City" — would permit online sports betting so long as the servers are located physically in Atlantic City.

Although the Appellate Division's decision on DFS did not address this question, it demonstrates the hurdles that legalization of sports betting would have to overcome. The Appellate Division relied on prior decisions indicating that "public policy continues to disfavor gambling" and that, therefore, "exceptions to the constitutional prohibition on gambling must be strictly construed to ensure that they do not consume the rule itself." This same rationale, when applied to the question of online sports betting, may mean that:

1. Courts will interpret the New York Constitution narrowly, finding that online sports betting does not occur "at" a designated casino, regardless of where the server is.
2. Governor Cuomo and his allies may be empowered to keep online sports betting out of the 2021 budget, avoiding the question until the New York Court of Appeals renders a final decision in this matter.

And, if the New York Court of Appeals agrees with the Appellate Division, the legalization of both DFS and online sports betting may ultimately require a Constitutional amendment, to be decided by New York voters via a ballot referendum.

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