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Expert Analysis

Further Ticket Sale (and Resale) Reforms Come to New York State

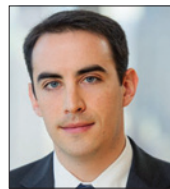
New York has long regulated the sale of tickets to places of entertainment in the state through Article 25 of the New York Arts and Cultural Affairs Law (ACAL). This past July, Gov. Andrew Cuomo signed Senate Bill 8501-B, which amends and extends the current provisions of ACAL Article 25 until June 30, 2021. This article discusses the recent amendments, the majority of which become effective on Dec. 28, 2018. As discussed below, many of these reforms appear to be in direct response to concerns expressed in 2016 by the New York Attorney General (NYAG), yet the changes do not appear to be as sweeping as the NYAG had sought. Nor do they address any of ACAL's anti-resale restrictions that make New York one of the most ticket-broker friendly states in the United States.

ACAL Background

For years, ACAL restricted the resale market, going so far as to



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cap the price of resold tickets at \$2 above face value. In 2007, with the Internet popularizing ticket resale and bringing it out of the shadows, so to speak, New York substantially amended ACAL in order to facilitate a more expansive resale market—including the removal of the \$2 resale price cap. 2007 N.Y. Laws 2738.

In the ensuing years, the state legislature continued to revise New York's ticketing laws in response to developing concerns. Notably, in 2010, the legislature added provisions restricting service fees, paperless tickets, and the use of ticket purchasing software ("bots"). 2010 N.Y. Laws 781, 785; see also Anthony J. Dreyer, "Hold All Tickets: New York Adopts (Yet Another) Ticket Resale Law," N.Y.L.J., July 28, 2010.

Yet the open resale market has led to numerous complaints that consumers are unable to purchase tickets at face value on the primary market, as resellers hoard increasingly valuable ticket inventory. This prompted the NYAG to survey the ticketing landscape in the State and issue recommendations for improvements to ACAL. Among the NYAG's findings were that resellers often were obtaining tickets through illegal bots, and some ticket sellers were adding "unclear and unreasonable 'service fees'" to the ticket price. The report concluded with a recommendation that the state legislature (1) mandate certain reforms and disclosures within the ticketing industry to increase transparency regarding ticket availability and service fees, (2) end a prohibition against non-transferable paperless tickets, (3) impose criminal penalties for bot use, and (4) reinstate caps on resale markups to ensure reasonable pricing. Eric T. Schneiderman, N.Y. State Attorney General, "Obstructed View: What's Blocking New Yorkers From Getting Tickets" (2016)

(Obstructed View) at 4-6, 36-37. Although the bot recommendation was addressed in a 2016 law (as well as a federal law), many items in the NYAG's "checklist" remained. The 2018 ACAL amendments address some, but not all, of those remaining concerns.

Significant Changes For Primary Market Sales

The state has sought on multiple occasions to curb the addition of allegedly excessive and opaque service charges to a ticket's price, such as processing fees. The 2007 amendments required that fees added to a ticket's face value must be tied to "special services." N.Y. Arts & Cult. Aff. Law §25.29 (as amended May 31, 2007). Three years later, the legislature imposed a requirement that any service charge imposed by ticket sellers be "reasonable." N.Y. Arts & Cult. Aff. Law §25.29 (as amended July 2, 2010). The NYAG has since taken the position that "charges added to a ticket's face value violate State law if they are either (1) mandatory, general fees, unconnected to the provision of 'special services,' or alternatively, when (2) such fees reach levels that are no longer 'reasonable.'" Obstructed View, at 28.

The recent amendments should help in determining whether surcharges are compliant with ACAL. The amendments add a requirement—in a new subsection 25.07(4)—that both primary and secondary ticket sellers "disclose in a clear and conspicuous manner the total price of the ticket and the

portion of the ticket price stated in dollars that represents a service charge, or any other fee or surcharge prior to accepting payment therefor." Notably, the new provision is silent with respect to where such disclosures must be made.

The new law also takes aim at paperless ticket restrictions. ACAL §25.30(1)(c) restricts a venue operator's ability to offer nontransferable paperless tickets by requiring that

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purchasers be offered an independently transferable option at the time of purchase, such as a paper ticket or PDF. The prohibition against nontransferable paperless tickets serves to support the State's efforts to facilitate a free market for ticket resales, as such tickets generally require the presentation of photo identification, a credit card, or a personalized app barcode at a venue's entrance. However, as the NYAG observed in recommending full repeal of the provision, no other state has such restrictions on paperless ticketing. Obstructed View, at 36. Moreover, paperless tickets serve to protect secondary market purchasers from fraudulent tickets and may result in the greater availability of tickets at face value to consumers on the primary market.

The recent amendment does not adopt the NYAG's recommendation, but rather creates a narrow exception to that paperless ticketing prohibition—in a new §25.12 that, unlike the other amendments, became effective immediately—allowing professional sports organizations to offer paperless tickets that are not independently transferable for no more than 5 percent of all available seats, "provided that such tickets are included in a membership pass at a discounted price offered by a professional sports organization for seating in venues or stadiums with a fixed capacity of over thirty thousand seats that guarantees entry to a specified number of events in a specified time period . . ." The impact of this new section is likely to be limited, however, because only four professional sports teams in New York currently play in venues large enough to fit within the exception: the New York Yankees, New York Mets, Buffalo Bills, and New York City FC.

Significant Changes and Disclosures for Secondary Market Sales

The other ACAL amendments primarily focus on activities by ticket resellers. For example, online resellers will be required to post a "clear and conspicuous" notice indicating (1) that the tickets are being offered on the secondary market, (2) that the price may exceed the ticket's face value, and (3) procedures for receiving a refund in the instance that the ticketed event is cancelled or postponed. N.Y. Arts & Cult. Aff.

Law §25.23(2) (as amended July 1, 2018). Relatedly, venue operators (and their agents) that link or otherwise transfer prospective purchasers seeking tickets on the primary market to a ticket reseller will be required to clearly and conspicuously disclose that the tickets are not being offered by the operator or its agent, but rather by resellers in the secondary market. *Id.* §25.30(5).

A new §25.10 prohibits reselling (or contracting to resell) tickets that the reseller neither possesses, nor has a contractual right to possess, unless (1) the reseller notifies the purchaser of such fact in writing, *and* (2) the purchaser expressly confirms that he/she has read such notice prior to the completion of any transaction. This addresses scenarios in which a reseller would offer for resale a ticket it did not have, and only make efforts to obtain the ticket after completion of a sale. The NYAG had contended that such “speculative” tickets sales defraud consumers that do not actually receive the specific seats they purchased, and also contribute to raising ticket prices. *Obstructed View*, at 26. Although §25.10 does not flatly prohibit speculative ticket sales, it aims to ensure that consumers purchasing such tickets will have a full understanding of the risks involved. (Speculative sales as used herein should not be confused with the misdemeanor of “ticket speculation”—set forth in ACAL §25.09)—which prohibits engaging in a ticket resale business without a license.)

The amendments also increase the penalties for using bots to obtain tickets for resale. In November 2016, the legislature adopted the NYAG’s recommendation of criminalizing (as a Class A misdemeanor) the use of bots in connection with obtaining and selling event tickets (2016 N.Y. Laws 969, 970); just a few months later, the NYAG procured over \$4 million in settlements with six companies engaged in illegally

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purchasing and reselling tickets, five of which did so with the help of ticket bots.

In addition to the existing penalties of fines or imprisonment, the new subsection 25.24(10) provides that a knowing violation of the bot prohibitions may cause a licensed ticket reseller to lose its license and be barred from licensure for up to three years.

Finally, the new amendments target cybersquatting by ticket resellers. A new §25.34 prohibits operating a ticket resale website with a URL or domain name that includes the name (or any substantially similar name) of the event for which tickets are being sold, or of the venue (with the exception of “the use of general terms to depict a geographical location or venue category”), team(s), or performer(s)

associated with such event. This prohibition does not apply to resellers acting on behalf of, or with the consent of, the event, venue, team, or performer “for which the website is being created.” The penalty for a violation of this provision is a fine of up to \$1,500 (or \$5,000 for repeat offenders within the last three years).

Conclusion

The recent amendments reflect continued attempts to strike a balance between an open marketplace, affordable tickets, and consumer protections. At the very least, the recent disclosure requirements should make the ticket purchasing process more transparent on both the primary and secondary markets. Although the 2018 amendments ensure that the general ticketing landscape ushered in by the State in 2007 will remain in place for another three years, the legislature remains unwilling to make the changes permanent. Notably, the bot prohibitions are not subject to the sunset provision.