

New York's Authorization of Fantasy Sports Ruled Unconstitutional

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On October 26, 2018, Justice Gerald W. Connolly of the New York Supreme Court for Albany County ruled in *White v. Cuomo* (Index No. 5861-16) that New York's 2016 authorization of fantasy sports violated the state constitution. However, the court upheld those portions of the 2016 law that exempted fantasy sports from the definition of gambling under New York Penal Law.

By way of background, Article I, Section 9 of the New York Constitution broadly prohibits gambling (with certain exceptions) and authorizes the legislature to pass appropriate laws to prevent gambling offenses. Although the constitution does not define "gambling," Section 225.00[2] of New York's Penal Law defines the term as when a person "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."

In 2014, New York's attorney general brought a lawsuit against DraftKings and FanDuel alleging, among other things, that certain of their paid daily fantasy sports contests constituted illegal gambling in violation of New York law. Under the challenged contests, participants paid an entry fee, selected a "team" of multiple athletes in a particular sport and competed against other participants for cash prizes. Winning outcomes were determined by accumulated points based on the actual performances of the athletes. The New York Supreme Court for New York County held that fantasy sports contests with entry fees likely violated New York's prohibitions against gambling and preliminarily enjoined DraftKings and FanDuel from accepting entry fees for fantasy contests in the state. *Schneiderman v. FanDuel, Inc.*, 2015 N.Y. Misc. LEXIS 4521 (Sup. Ct. N.Y. Dec. 11, 2015). The parties later settled the case while it was on appeal, after the New York Legislature enacted Chapter 237 of the Laws of 2016 (the 2016 Fantasy Sports Law). That law contained a legislative finding that fantasy sports did not constitute gambling as prohibited by New York Penal Law and expressly authorized fantasy sports contests meeting certain conditions.

Shortly after the enactment of the 2016 Fantasy Sports Law, a group of citizens filed the case captioned *White v. Cuomo*, seeking a declaratory judgment that the statute violated the state constitution's prohibition against gambling. The state subsequently moved to dismiss the complaint, but that motion was denied in September 2017. On October 26, 2018, the court granted partial summary judgment in favor of the plaintiffs, holding that the authorization of fantasy sports violated the state constitution. Essential to this ruling was a determination that fantasy sports contests with entry fees constitute gambling. The court concluded that the legislative findings that fantasy sports are not games of chance and do not constitute wagers on future contingent events failed to "address[] the fact that points are scored (and cash prizes won or entry fees lost) based upon performances of selected athletes in events held after 'contests are closed.'" Even accepting the legislative finding that succeeding in fantasy sports contests is predominantly determined by skill (rather than chance), the court deemed that fantasy sports contests were contingent upon future events — and therefore are a form of gambling — because participants cannot control the performances of the athletes on their fantasy "team." Having determined that fantasy sports contests constitute gambling, the court held that, under New York law, "sports gambling cannot be authorized absent a constitutional amendment."

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The court, however, did not strike down the 2016 Fantasy Sports Law in its entirety. Notwithstanding its determination that a constitutional amendment was necessary to authorize fantasy sports in New York, the court upheld the portion of the statute that excluded fantasy sports from the definition of gambling under the New York Penal Law (denying this aspect of the plaintiffs' motion and granting the state's cross motion for summary judgment on the point). Because the state constitution provides the Legislature with the authority to pass laws to prevent gambling offenses, the court ruled that "the legislature has the full authority to define and limit such offenses in the context of an anti-gambling statute as in its discretion it deems appropriate."

In light of the exclusion of fantasy sports from New York's criminal gambling prohibitions, the two parties at the center of the previous litigation with the state — DraftKings and FanDuel — have publicly stated that they intend to continue operating in New York. Nevertheless, the regulatory scheme under which fantasy sports companies had been operating in New York for the past two years was nullified by the court's ruling. The state is expected to appeal the ruling.

The continued exclusion of fantasy sports from New York's prohibitions against gambling indicates that this ruling might not prevent fantasy sports from continuing to be offered in New York, but we will continue monitoring developments in this area.