



Payment Systems ADVISORY ■

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New York Appeals Court Rules Daily Fantasy Sports Is Unconstitutional Gambling

Gambling has historically presented challenges to courts called upon to interpret the scope and intent of federal and state gambling laws. Last week's decision by the New York Appellate Division in *White, et al. v. Andrew Cuomo* highlights how the advent of new forms of gaming, coupled with the use of the Internet as a delivery channel, are forcing state legislatures to reexamine their traditional anti-gambling laws. The current environment of legal uncertainty is creating compliance concerns for online gaming merchants, as well as the financial institutions that provide payment services to them.

Daily Fantasy Sports Held Unconstitutional in New York

On February 6, 2020, in the *White* decision, the New York Appellate Division ruled that daily fantasy sports (DFS) contests constitute illegal gambling under New York Law. In reaching this conclusion, the court addressed the constitutionality of Article 14 of the state's Racing, Pari-Mutuel Wagering and Breeding Law (the "DFS authorization law"), passed in 2016, which "authorizes" interactive fantasy sports by declaring they are not "gambling" under New York law and provides for the registration and regulation of DFS providers. The court ruled that the DFS authorization law is unconstitutional because DFS fits the definition of "gambling" under New York State law.

The New York State constitution provides that, with certain exceptions for horse racing and casinos, "bookmaking, or any other kind of gambling, except lotteries operated by the state and the sale of lottery tickets in connection therewith as may be authorized and prescribed by the legislature" is not "authorized or allowed" and directs the state legislature to "pass appropriate laws to prevent offenses against any of the provisions of this section." In 1965, the legislature defined "gambling" to mean "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, upon an agreement or understanding that he will receive something of value in the event of a certain outcome."

In addressing the question of how fantasy sports fit the definition of "gambling," the court found "that the current Penal Law definition comports with the common understanding of the meaning of the constitutional prohibition and of the particular words 'book-making' and 'gambling' – at both the time of the prohibition's enactment and now." In its analysis, the court emphasized that, even when a contest involves some level of skill, the dispositive element is whether chance plays a material role in the outcome of the contest. Accordingly, the court reasoned, because "the skill level of [a DFS] contestant cannot eliminate or outweigh the material role of chance in [DFS] contests," such contests must meet the definition of gambling under the New York Penal Law.

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Thus, the court rejected the legislature's decriminalization of DFS in New York as unconstitutional; however, an appeal to the New York Court of Appeals is expected, which means it is likely that the lower court's decision will be stayed and DFS will be allowed to continue – for now.

The Dynamic Nature of Federal and State Gaming Laws

The *White* decision reflects continued uncertainty in the DFS space and erects yet another hurdle in New York for the DFS authorization law (which was challenged by anti-gambling advocates almost immediately after its passing). More broadly, however, the decision illustrates the ongoing legal challenges for merchants (as well as their third-party service providers) seeking to provide online gaming services nationwide. Following the U.S. Supreme Court's 2018 ruling in *Murphy v. NCAA* that the Professional and Amateur Sports Protection Act (which outlawed sports wagering in all but four states) was unconstitutional, sports wagering companies rushed into new markets, creating challenges for state legislatures, courts, and agencies.

Many states quickly passed legislation legalizing sports wagering, but their approach to *regulating* the activity, and its participants, has been very different. Some states are more hands-off, while others have imposed numerous and detailed licensing, registration, and reporting requirements on both gaming merchants themselves and a broad range of third-party servicers that play a role in facilitating online wagers. Furthermore, while the recent focus of state legislatures has been *sports* wagering, other forms of online gaming are quickly proliferating (such as DFS, lotteries, sweepstakes, and even forms of gambling that are being offered through video games), which may result in additional legislative action. Finally, it must be noted that the issue of the proper scope of the Federal Wire Act, which the U.S. Department of Justice contends outlaws *all* forms of interstate online wagering, is currently before the First Circuit Court of Appeals; an adverse decision in this litigation could have immediate consequences for the online gaming industry, regardless of permissive state laws.

The current patchwork of state gaming laws, differing approaches to state gaming regulation, and the unresolved question of the legality of online gaming under the Federal Wire Act all highlight the compliance and reputation risk for online gaming merchants and those entities that facilitate online wagers. The Alston & Bird Payments Team actively tracks the development of federal and state gaming laws and routinely advises on how such laws apply to online gaming merchants and service providers.

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