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State of DFS In New York Just Got Even Murkier

The great New York State debate continues over the constitutional meaning of "gambling"



by **John Brennan** — February 6, 2020 in **Fantasy** 3 min read



Oct 17, 2019; Bronx, NY, USA; (Brad Penner-USA TODAY Sports)



If a legislature declares that a certain activity does not qualify as gambling, is that enough to ensure its legality?

A [New York State appeals court on Thursday declared](#) that no, it is not enough in that state – and thus the state’s rollercoaster ride with daily fantasy sports continues.

Rob Rosborough, a New York State attorney who has followed the the saga in *White v Cuomo*, quickly answered a core, short-term question on Twitter:

Much to unpack here, but most immediately, the State will undoubtedly appeal as of right to the NY Court of Appeals based on the substantial constitutional question, and will get an automatic stay of the order. So #DFS can continue in NY, for now. The future is much less certain.

— Rob Rosborough (@NYSAppeals) [February 6, 2020](#)

This debate was supposed to be solved in August 2016, when passage of an amendment to the Racing, Parimutuel Wagering and Breeding Law found that “interactive fantasy sports” – the odd alternate description of DFS by state lawmakers – do not constitute gambling. Taxation, consumer safeguards, and other details also were added to this now-legal form of entertainment.

Well, legal until [the state Supreme Court in October 2018](#) held that the amendment runs afoul of the state Constitution’s limitations on gambling.

Thursday’s ruling by the New York Supreme Court’s Appellate Division affirms the lower court’s ruling, even while stressing that “We do no rule on the wisdom of the Legislature’s enactment of laws, but on whether the NY Constitution prohibited the Legislature from enacting such laws.”

When court intervention is necessary

Both courts leaped a high hurdle in knocking down a Legislature's passage of a law – with each saying it had no choice.

“Allowing the Legislature unfettered discretion to determine what is not gambling would render meaningless the constitutional prohibition on ‘lottery or the sale of lottery tickets, pool-selling, bookmaking, or any other kinds of gambling,’” according to the appeals court's majority. **“[DFS] contests are not excluded from the constitutional meaning of ‘gambling’ merely because the Legislature now says that it is so.”**

It does not help that, as the judges noted, “The NY Constitution does not define the word ‘gambling.’” That is true in many states, and is a reason why the DFS has had to fight for years – mostly successfully – to convince states that DFS is a game of skill, not chance.

Of course, the reality is that it is both. But which is dominant in DFS? The judges concede that “a very small percentage of [DFS] contestants receive a very large percentage of the prize money, suggesting that the skills exercised by this small percentage of winners actually affects the outcome of these contests.”

But, the judges concluded, there also is a “material degree of chance” based on such variables as injuries, unexpected weather, inaccurate calls by officials, and “a selected player having a particularly bad day or an unselected player having a particularly good day.”

Judge Stan L. Pritzker dissented. While agreeing with the concept that the Legislature's power to declare what is or isn't gambling is not unlimited, he said the Court should stay out of this issue because “the record demonstrates with vigor that the lawmakers, without caprice, acted rationally, carefully and with measured consideration.”

Pritzker added that the plaintiffs – taxpayers who say their personal lives have been upended by the effects of gambling – “assert their own opinions as facts, but at the same time brand opposing opinions as fiction. The opinions.... are both interesting and heartfelt, but they are nothing more than that – opinions.”

In a footnote, Pritzker added that “Plaintiffs' argument would have teeth if, for example, the Legislature found that roulette is not gambling – which is a patently unsupportable opinion.”

Both FanDuel and DraftKings had agreed to suspend operations in early 2016 in reaching a settlement with then-Attorney General Eric Schneiderman – prompting the Legislature to try to end the debate by passing a law taking DFS out of the gambling realm.

But once again, the Courts have not yielded the issue to the Legislators.

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