

April 21, 2020

## **ILLINOIS SUPREME COURT RULES THAT DAILY FANTASY SPORTS DO NOT CONSTITUTE GAMBLING UNDER STATE CRIMINAL CODE**

To Our Clients and Friends:

In a decision that directly addresses an issue of critical importance for the daily fantasy sports industry, on April 16, 2020, the Illinois Supreme Court held that head-to-head daily fantasy sports matches do not constitute “gambling” as contemplated by the state’s criminal statutes. *Dew-Becker v. Wu*, 2020 IL 124472. In this alert, we summarize (1) the current landscape of sports betting regulation in the United States, as well as treatment of daily fantasy sports vis-à-vis sports betting, (2) the analysis of the Illinois Supreme Court in the *Dew-Becker* case, and (3) the potential impact of the *Dew-Becker* ruling, and rulings by other state courts on the issue decided in the *Dew-Becker* case, on the daily fantasy sports industry.

### **Current Landscape – Sports Betting and Daily Fantasy Sports**

Following the historic reversal of the federal ban on sports betting in 2018 by the U.S. Supreme Court in *Murphy v. National Collegiate Athletic Association, et al.*, 138 S.Ct. 1461 (2018)[1], the regulation of sports betting was placed in the hands of each state, which has caused a patchwork of state legislation and case law governing sports betting to emerge in the last two years. The federal Interstate Wire Act of 1961 further complicates this state-by-state legal landscape, as it prohibits the transmission of sports bets or wagers through interstate commerce. As a result, online sports betting operations (where legalized) currently require the bettor to be geographically located in the same state as the sportsbook operator accepting bets.

While daily fantasy sports have not been generally viewed as sports betting, the question remains an important one for daily fantasy sports operators and their customers. At the federal level, daily fantasy sports are specifically excluded from the definition of “bet” or “wager” under the Uniform Internet Gambling Enforcement Act of 2006, the federal statute regulating online gambling. See 31 USC 5362(1)(E)(ix).

For the states that have adopted legislation regarding sports betting, those that have chosen to explicitly address the treatment of daily fantasy sports are in the minority, although more than twenty states have passed laws declaring that daily fantasy sports are not gambling or otherwise regulating the contests as a lawful activity. Currently, the industry’s largest platforms offer paid contests in 43 states and the District of Columbia, but do not offer paid contests in seven states (Arizona, Hawaii, Idaho, Louisiana, Montana, Nevada, and Washington). In the case of Nevada, the state Gaming Control Board has classified daily fantasy sports as a form of gambling (which is legal in the state) that is subject to

Nevada’s existing regulatory scheme requiring a state license, thus practically preventing operators from entering the market.

One state appellate court has concluded that daily fantasy sports are a form of gambling. Earlier this year a New York state appellate court, in a split decision, affirmed a lower court’s finding that interactive fantasy sports constitute gambling after applying the “material degree of chance” test applied by a minority of courts. *White v. Cuomo*, 62 Misc. 3d 877 (N.Y. Sup. Ct. 2018), *reargument denied*, (N.Y. Sup. Ct. 2019), and *aff’d as modified*, 181 A.D.3d 76 (N.Y. App. Div. 2020). The New York State Attorney General has filed a notice of appeal to challenge this ruling.

## ***Dew-Becker Ruling***

In making its determination in the *Dew-Becker* case, the Illinois Supreme Court, in an opinion penned by Chief Justice Burke, applied the “predominant factor test” used by most courts and concluded that daily fantasy sports do not constitute gambling. The “predominant factor test” is used to determine whether a game is a “game of chance”, and therefore constitutes gambling, by evaluating whether the element of chance or the element of skill *predominantly* controls the game’s result. Relying heavily upon recent statistical studies demonstrating the importance of player skill in head-to-head daily fantasy sports games, the majority concluded that the outcomes of such games are predominantly skill-based, and therefore, not gambling.

The court discussed, but ultimately did not use, two other tests that other states have employed to determine whether a contest is one of skill or chance. First, the court rejected the “material element test” (employed by the New York court in *White v. Cuomo* discussed above), which analyzes whether the game involves the element of chance to a material degree, reasoning that the test “depends too greatly on a subjective determination of what constitutes ‘materiality.’” Second, the court rejected the “any chance test”, which analyzes whether the game involves any element of chance whatsoever, reasoning that the test “is essentially no test at all” because “every contest involves some degree of chance.”

Furthermore, the court underscored the ability of the state legislature to change the laws and regulations applicable to daily fantasy sports in Illinois, noting that the determination of whether “regulation of DFS is unnecessary or inappropriate...is for the legislature. We determine here only that the DFS contest at issue in this case does not fall under the current definition of gambling.” *Dew-Becker v. Wu*, 2020 IL 124472 at \*6.

The decision was not unanimous, however - in a dissent, Justice Karmeier sharply questioned the majority’s application of the predominant factor test, stating in his dissent that because the element of chance (*e.g.*, the participant cannot influence the athletes’ performance) might ultimately thwart the participant’s efforts or skill in daily fantasy sports, the character of such game is one of chance. The dissenting opinion also foreshadowed the plaintiff’s intent, as stated by his counsel in press reports following the decision, to file a motion for rehearing on the grounds that the issue of head-to-head daily fantasy sports as a game of skill v. chance was not directly litigated by the parties.

## Potential Impact

As the legal and regulatory treatment of both sports gambling and daily fantasy sports continues to unfold on the state level, the outcomes could have significant consequences for the development of the daily fantasy sports industry and for the business of daily fantasy sports operators. Whether state courts classify daily fantasy sports as a form of sports gambling may determine whether the industry is subject to the evolving and complex (and costly) regulatory laws governing sports gambling in the particular state.

State regulatory schemes governing sports betting have varied widely. Emerging issues facing gaming operators include: market access based on a limited number of state licenses, distinctions between brick and mortar, mobile, and online platforms, the use of official sports league data, integrity fees, and player protections. If courts in other states follow the reasoning applied by the Illinois Supreme Court in *Dew-Becker*, using the “predominant factor test” or otherwise, in likewise reaching the conclusion that daily fantasy sports do not constitute gambling, daily fantasy sports operators conducting business in those states will have greater certainty that their operations are not subject to the legal and regulatory hurdles and costs imposed by evolving, and at times ambiguous, laws and regulations applicable to sports betting in those states.

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[1] Gibson, Dunn & Crutcher LLP represented the State of New Jersey in this victory.



*Gibson Dunn’s lawyers are available to assist with any questions you may have regarding these developments. For further information, please contact the Gibson Dunn lawyer with whom you usually work, or the following authors in Gibson Dunn’s Betting and Gaming and Sports Law practices.*

**Authors:** *Kevin Masuda, Maurice Suh, Sarah Graham and Maya Hoard*

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