

NEW YORK STATE LEGALIZES ONLINE SPORTS WAGERING

To Our Clients and Friends:

The New York State Legislature, as part of its annual revenue bill, has authorized mobile sports wagering in New York, and the Governor is expected to sign that bill momentarily. Through this landmark legislation, New Yorkers will soon be able to wager on sporting events online, just like millions of Americans who live in other states.

Although New York has long delayed legalizing various forms of sports wagering due to provisions of its State Constitution, the new mobile sports wagering law should pass constitutional muster. As Gibson Dunn attorneys argued in a *New York Law Journal* article last year,^[1] the Legislature has the authority to authorize mobile sports betting, consistent with the State Constitution, so long as the servers that effectively place the bets are physically housed “at” the casinos duly authorized under the State Constitution. Through the new sports wagering law, the Legislature adopted Gibson Dunn’s constitutional interpretation: The new law “deem[s]” “[a]ll mobile sports wagering initiated in this state” as “tak[ing] place at the licensed gaming facility where the server . . . is located.”^[2]

I. New York’s Online Sports Wagering Law Adopts Gibson Dunn’s Constitutional Interpretations and Will Likely Survive Constitutional Challenge

In 2013, New York State voters approved a constitutional amendment to allow the Legislature to authorize “casino gambling” “at” up to seven casinos in the State.^[3] Prior to this constitutional amendment, legal gambling in New York was limited to state-run lotteries and betting on horse races, as well as gambling allowed on Native American tribal lands under federal law. The same constitutional amendment also conferred on the Legislature broad authority to regulate wagering in the State.

Pursuant to this constitutional authority, in 2019, the Legislature legalized “sports wagering” in New York State.^[4] The law then enacted provided that sports wagers may only be accepted “from persons physically present” “in a sports wagering lounge located at a casino.”^[5] In effect, the law prohibited online sports betting, since sports bettors would only be permitted to make bets in person at an authorized casino.

But as Gibson Dunn attorneys argued in a 2020 *New York Law Journal* op-ed,^[6] the Legislature had the authority to go further under the 2013 constitutional amendment. As our attorneys explained, the Legislature could enact legislation legalizing online sports wagering for two reasons. *First*, sports betting fits within the Constitution’s language empowering the legislature to legalize “casino gambling.” Specifically, when the constitutional amendment was passed and adopted, “casino gambling” would have been understood to include sports betting. *Second*, online sports wagering can be conducted “at” an authorized casino. As our attorneys explained, a wager is nothing more than a

GIBSON DUNN

contract, and under well-established New York law, a contract is made where the contractual offer is accepted. When a mobile sports bettor in Manhattan, for instance, asks to place a wager by entering her bet into an app or website, that request constitutes a contractual offer. So long as the acceptance of the Manhattanite's bet and ultimate placement of the wager occurs at a server located at a duly authorized casino, online sports betting can be deemed to have occurred "at" a casino.

New York's new online sports wagering law adopts Gibson Dunn's constitutional reasoning. The Legislature amended the 2019 law to state that "all sports wagers through electronic communication . . . are considered placed or otherwise made when and where received by the mobile sports wagering licensee on such mobile sports wagering licensee's server . . . at a licensed gaming facility, regardless of the authorized sports bettor's physical location within the state at the time the sports wager is placed."^[7] The hypothetical sports bet requested by an app user in Manhattan, for example, therefore is deemed to occur "at" the casino that ultimately accepts and places the bet. Additionally, the new law is based on a legislative declaration that "a sports wager that is made through virtual or electronic means from a location within New York state and is transmitted to and accepted by electronic equipment located at a licensed gaming facility . . . is a sports wager made at such licensed gaming facility."^[8] Under well-established New York law, this legislative finding of fact will be considered presumptively valid, making it more likely that the law will survive a constitutional challenge.^[9]

With our attorneys' reasoning codified into law, New Yorkers across the State will be able to access online sports wagering websites and apps, and the State will begin to reap the economic benefits (including tax revenue) of these lucrative transactions.

II. New York's Detailed Regulatory Scheme for Mobile Sports Wagering

The new law includes a number of provisions regulating mobile sports wagering. It clarifies that online sports betting is legal as long as the bettor is "physically present" in New York at the time of the transaction.^[10] By requiring the casino, bettor, and servers all to be located in New York, the law limits mobile sports wagering to intrastate transactions. This allows the mobile sports betting industry to avoid problems that may arise from conducting interstate transactions, which are subject to federal regulations, including the federal Wire Act's prohibition on using wires to transmit "bets or wagers on any sporting event or contest" if the state where the bet initiates has banned sports betting.^[11]

The law's regulatory framework centers on the "platform providers" that will offer online sports betting services. The law authorizes the State Gaming Commission to select two platform providers to become mobile sports wagering operators based on a competitive bidding process.^[12] The Commission may permit more than two mobile sports wagering operators if the Commission determines that doing so is "in the best interests of the state" and if the additional operators pay the same tax rate as the initial two licensees.^[13] Applicants must provide a range of information about their operations and predicted earnings.^[14] Additionally, all licensees must pay a one-time \$25 million fee to the State, and the operator's license will need to be renewed after ten years.^[15]

One primary factor in assessing licensing applications will likely be the amount of tax on revenues that mobile sports wagering operators are willing to pay. The law sets the *minimum* revenue tax on mobile

GIBSON DUNN

sports wagering operators at 12%—with casinos to pay a 10% revenue tax only on in-person sports wagering.[16] But the bidding process appears designed to reach a higher rate of taxation, explicitly stating that the ultimate tax percentage platform providers will pay “shall be determined pursuant to a competitive bidding process.”[17] This revenue tax will be paid at least “monthly.”[18]

The new law requires any casino that offers mobile sports wagering, and each mobile sports wagering platform provider, to submit a detailed annual report to the Commission. The report must include, among other information, the total amount of wagers placed and prizes awarded and the number of accounts established by sports bettors.[19] New York law will also now empower the Commission to conduct financial audits of casinos and mobile sports wagering licensees and mandate that the Commission publish an annual report sharing the aggregate information that the Commission receives across all sports betting entities.[20]

Mobile sports wagering operators must satisfy a number of compliance requirements as “condition[s] of licensure.”[21] For instance, they must limit sports bettors to a single account, take steps to ensure “to a reasonable degree of certainty” that individuals are only placing bets from within New York State, prevent minors from participating in any sports wagering, and avoid running advertisements that mislead players about the odds of winning on a bet.[22]

Conclusion

New York’s mobile sports wagering law stands on solid constitutional ground. By deeming online bets to take place at the location of the servers housed on casinos’ premises, the new law follows the proposal made by Gibson Dunn attorneys last year and is consistent with the New York State Constitution.

[1] Mylan Denerstein, Akiva Shapiro & Lee R. Crain, *The Constitutionality of Mobile Sports Betting in New York State*, N.Y. L.J. (Jan. 31, 2020), <https://www.law.com/newyorklawjournal/2020/01/31/the-constitutionality-of-mobile-sports-wagering-in-new-york-state/>.

[2] N.Y. Rac. Pari-Mut. Wag. & Breed. Law (PML) § 1367–a(4)(i) (post-2021 amend.).

[3] N.Y. Const. art. I, § 9. These casinos authorized by the State Constitution do not include those that Native American tribes may operate pursuant to the Indian Gaming Regulatory Act, 18 U.S.C. §§ 1166–1168 and 25 U.S.C. §§ 2701 *et seq.*

[4] *See* PML § 1367 (pre-2021 amend.).

[5] *Id.* § 1367(3)(b), (d).

[6] Denerstein, Shapiro & Crain, *supra* note 1.

[7] PML § 1367–a(2)(d) (post-2021 amend.) (emphasis added).

GIBSON DUNN

[8] S.B. S2509, 2021 Leg., 2021–2022 Sess., Part Y, § 2 (N.Y. 2021) (emphasis added).

[9] *See, e.g., All Am. Crane Serv. Inc. v. Omran*, 58 A.D.3d 467, 467 (1st Dep’t 2009) (noting that laws are “presumed to be supported by facts known to the legislative body”).

[10] PML § 1367(1)(b) (post-2021 amend.).

[11] 18 U.S.C. § 1084(a)–(b); *cf. Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1483 (2018) (emphasizing that “federal policy” is to “respect the policy choices of the people of each State on the controversial issue of gambling”).

[12] PML § 1367–a(7) (post-2021 amend.).

[13] *Id.* § 1367–a(7)(d).

[14] *Id.* § 1367–a(7)(b).

[15] PML § 1367–a(2)(b), (3).

[16] *Id.* § 1367(7).

[17] *Id.*

[18] *Id.* § 1367(7)–(8).

[19] *Id.* § 1367(6).

[20] *Id.* § 1367(6), (9).

[21] *Id.* § 1367–a(4).

[22] *Id.*



The following Gibson Dunn lawyers prepared this client alert: Mylan Denerstein, Akiva Shapiro, Lee Crain, Michael Klurfeld, Grace Assaye and Lavi Ben Dor*.*

Gibson, Dunn & Crutcher’s lawyers are available to assist with any questions you may have regarding these issues. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, or the following authors in New York:

Mylan L. Denerstein – Co-Chair, Public Policy Practice (+1 212-351-3850, mdenerstein@gibsondunn.com)

Akiva Shapiro (+1 212-351-3830, ashapiro@gibsondunn.com)

GIBSON DUNN

Lee R. Crain (+1 212-351-2454, lcrain@gibsondunn.com)
Michael Klurfeld (+1 212-351-6370, mklurfeld@gibsondunn.com)

**Ms. Assaye and Mr. Ben Dor are not yet admitted to practice law in New York and currently are practicing under the supervision of members of the New York Bar.*

© 2021 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.

© 2021 Gibson, Dunn & Crutcher LLP

Attorney Advertising: The enclosed materials have been prepared for general informational purposes only and are not intended as legal advice.