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NEW YORK COURT OF APPEALS RULES THAT INTERACTIVE FANTASY SPORTS CONTESTS DO NOT CONSTITUTE GAMBLING UNDER STATE CONSTITUTION

To Our Clients and Friends:

In a closely followed decision that directly addresses an issue of critical importance for the interactive fantasy sports ("IFS") industry, in which daily fantasy sports are a subset, the New York Court of Appeals held on March 22, 2022 that IFS contests do not constitute "gambling" within the meaning of New York's constitutional prohibition on gambling. *White v. Cuomo*, No. 12, 2022 WL 837573 (N.Y. Mar. 22, 2022).[1] In doing so, New York's highest court followed the reasoning set forth by the Attorney General and further developed in an amicus brief Gibson Dunn filed on behalf of DraftKings and FanDuel (available **here**), and joined other state courts holding that "it is now 'widely recognized' that IFS contests are predominately skill-based competitions" distinguishable from games of chance. *Id.* at *7 (quoting *Dew-Becker v. Wu*, 178 N.E.3d 1034, 1041 (Ill. 2020)). The *White v. Cuomo* case confirms the legality of daily fantasy sports in New York. And it has important implications for the sports betting industry writ large, as it underscores the degree of deference courts must give the New York legislature's interpretation of the State's constitutional gambling provisions.

In this alert, we summarize and discuss: (1) the decision of the New York Court of Appeals in *White v. Cuomo*; and (2) the potential impact of *White v. Cuomo* on the constitutionality of mobile sports betting and other gambling-related legislation in New York.

White v. Cuomo **Ruling**

In *White v. Cuomo*, the New York Court of Appeals was called on to decide whether the legislature had violated the New York Constitution's general prohibition on lotteries and "other forms of gambling" by enacting a law expressly authorizing and regulating IFS contests. That legislation, known as article 14, also states that IFS contests do not constitute "gambling" because their outcomes depend on "the skill and knowledge of the participants," rather than chance, and the "contests are not wagers on future contingent events not under the contestants' control or influence." *White*, 2022 WL 837573, at *2 (quotation marks omitted).

In a lengthy decision penned by Chief Judge DiFiore, the New York Court of Appeals held that "[b]ecause ample support exists for the legislature's determination that the IFS contests authorized in article 14 are properly characterized as lawful skill-based competitions for prizes under our precedent, plaintiffs have not met their burden to demonstrate beyond a reasonable doubt that article 14 is unconstitutional." *White*, 2022 WL 837573, at *1. The Court's decision has two particularly notable features.

First, the Court underscored the degree of deference due legislative judgments generally and those involving the constitutional prohibition on gambling specifically. The Court stated that "[i]t is well settled that legislative enactments are entitled to a strong presumption of constitutionality," and that "courts strike them down only as a last unavoidable result after every reasonable mode of reconciliation of the statute with the Constitution has been resorted to, and reconciliation has been found impossible." *White*, 2022 WL 837573, at *3 (cleaned up). So great is this level of deference that, "[w]hile courts may look to the record relied on by the legislature, even in the absence of such a record, factual support for the legislation would be assumed by the courts to exist." *Id.* (quotation marks omitted). Notably, the Court emphasized that this deference extends to legislative judgments regarding whether a particular activity falls within the constitutional prohibition on gambling.

Second, the Court applied the "dominating element" test used by many courts to confirm the legislature's finding that IFS contests do not constitute gambling. The "dominating element" is used to determine whether a game is one of "chance," and therefore constitutes gambling, by evaluating whether the element of chance or skill *predominantly* controls the game's result. Relying heavily upon recent statistical studies demonstrating the importance of player skill in head-to-head fantasy sports games, the Court concluded that the outcomes of such games are predominantly skill-based, and therefore, not gambling.

The *White v. Cuomo* decision discussed, but ultimately rejected, another test that some courts have employed to determine whether a contest is one of skill or chance—the "material degree" test. That test analyzes whether the game involves the element of chance to a *material* degree. But as the Court of Appeals explained, the "material degree" test does not comport with the standard New York courts have historically applied in determining whether a particular activity constitutes a game of chance. By adopting the "dominating element" test and rejecting the "material degree" test, the New York Court of Appeals joined a recent, high-profile decision by the Illinois Supreme Court holding that IFS contests are not gambling.

The *White v. Cuomo* decision was not unanimous, however. In a dissent joined by two other judges, Judge Wilson sharply questioned the majority's deference to the legislature. In addition, the dissenting judges criticized the majority's decision to use the "dominating element" test to determine whether a game is one of "chance." But as the majority noted, the dissent "provid[ed] no discernable definition for the term 'gambling'" or any "logical framework for assessing the constitutionality of any particular activity alleged to be 'gambling.'" *White*, 2022 WL 837573, at *10.

Potential Impact

The *White v. Cuomo* ruling has important implications for the IFS industry and, more broadly, the sports betting industry. With respect to IFS contests, and most immediately, the ruling closes the chapter on five years of litigation contesting the legality of IFS contests in the largest market in the United States. New York has decided, once and for all, that IFS contests do not constitute gambling. The *White v. Cuomo* decision may also impact the IFS industry beyond the Empire State. If other state courts follow the reasoning applied by the New York Court of Appeals in *White v. Cuomo*, IFS 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 in those states.

More broadly, the decision has important implications for the constitutionality of New York's mobile sports betting legislation.

In 2013, New York voters approved a constitutional amendment to allow the legislature to authorize "casino gambling" "at" up to seven casinos in the State, and expressly delegated to the legislature the task of implementing relevant laws relating to wagering. N.Y. Const. art I, § 9. In particular, the constitutional amendment authorizes the legislature to permit gambling as long as (1) the gambling constitutes "casino gambling" and (2) it occurs "at" one of the facilities authorized and prescribed by the legislature.

In April 2021, acting upon this constitutionally delegated authority, the New York legislature enacted legislation authorizing mobile sports wagering, provided the wagers are transmitted to and accepted by servers located at a licensed gaming facility. *See* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 1367-a. Specifically, the legislation provides that "[a]ll 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." *Id.* § 1367-a(2)(d). So, for example, a bet requested by an app user in Manhattan would be deemed to occur "at" the casino housing the server that accepts and places the bet. The legislature further declared 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." S.B. S2509, 2021 Leg., 2021–2022 Sess., Part Y, § 2 (N.Y. 2021).[2] This statute went into effect on January 8, 2022, and generated nearly $70 million in tax revenue for New York in its first 30 days. *See* Press Release, Governor Hochul Announces Nearly $2 Billion in Wagers Over the First 30 Days of Mobile Sports Wagering (Feb. 14, 2022), https://www.governor.ny.gov/news/governor-hochul-announces-nearly-2-billion-wagers-over-first-30-days-mobile-sports-wagering.

The *White v. Cuomo* decision greatly bolsters the constitutionality of New York's mobile sports wagering legislation, and the likelihood that the legislature's finding that mobile sports wagers are placed at the location of the servers would be found valid. As discussed above, the *White v. Cuomo* decision underscored the strong deference deference afforded to legislative findings, including the legislature's interpretation of the New York Constitution's gambling provisions. The Court reiterated that "when a legislative enactment is challenged on constitutional grounds, there is both an 'exceedingly strong presumption of constitutionality' and a 'presumption that the [l]legislature has investigated for and found facts necessary to support the legislations.'" *White*, 2022 WL 837573, at *3 (citation omitted). This "exceedingly strong presumption of constitutionality" should apply to the legislature's exercise of its constitutionally delegated authority to define the contours of legal gambling in the mobile sports wagering legislation and any future legislation enacted under such authority.

[1] Interactive fantasy sports involves the creation of a "virtual 'team[]' . . . composed of athletes who play for different real-life teams" and that is pitted against another "virtual team[] compiled by [an]other IFS contestant[]." *White*, 2022 WL 837573, at *2. "The performance of simulated players on an IFS roster corresponds to the performance of the real-life athletes," but "the outcome of an IFS contest does not mirror the success or failure of any real-life athlete or sports team." *Id.* That is because "IFS rosters do not replicate real-life teams, IFS scoring systems are premised on an aggregation of statistics concerning each individual athlete's performance on specific tasks, and IFS contests pit the rosters of participants against one another rather than tying success to the outcome of sporting events." *Id.*

[2] New York's mobile sports wagering legislation adopted Gibson Dunn's constitutional reasoning. As Gibson Dunn attorneys argued in a 2020 *New York Law Journal* op-ed, the legislature had the authority to enact legislation legalizing online sports wagering for two reasons. *First*, sports betting fits within the New York Constitution's term "casino gambling," because "casino gambling" would have been understood to include sports betting at the time the constitutional amendment was passed and adopted. *Second*, based on general contract law principles, online sports wagering can be conducted "at" an authorized casino so long as the acceptance and ultimate placement of the wager occurs at a server located at one of the licensed casinos. *See* Gibson Dunn, New York State Legalizes Online Sports Wagering (April 13, 2021), https://www.gibsondunn.com/new-york-state-legalizes-online-sports-wagering/.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. Please feel free to contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Litigation or Appellate and Constitutional Law practice groups, or the following authors:

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