May 2022

A newsletter brought to you by the Sports Law Group at Proskauer

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

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If Fantasy Sports Can Make It There, They'll Make It Anywhere! They're Constitutional According to You, New York, New York Court of Appeals

Game On, New York. Daily Fantasy Sports are here to stay.

After over five years of back-and-forth litigation on which both sides bet the house, New York's Court of Appeals ruled that Daily Fantasy Sports are not prohibited under the state constitution, and declined the plaintiffs' request for an injunction to stop implementation of a state law authorizing such contests. (*White v. Cuomo*, 2022 NY Slip Op 01954 (N.Y. Mar. 22, 2022)). In the case, the Court found that Interactive Fantasy Sports ("IFS") contests, including the subset of Daily Fantasy Sports ("DFS"), as authorized under Article 14 of the Racing, Pari-Mutuel Wagering and Breeding Law ("Article 14" or the "Law") are constitutional in New York because they are "predominately games of skill" and therefore are not prohibited gambling activities under the definition of "gambling" in Article I, §9 of the State Constitution.

The immediate upshot of the Court's ruling is two-fold: First, IFS and DFS contests are now conclusively legal in New York and may be regulated under Article 14, a 2016 law passed by the state legislature that authorized and regulated IFS. Second, the decision continues IFS proponents' winning streak, echoing the Illinois Supreme Court's decision in *Dew-Becker v. Wu*, 178 N.E.3d 1034 (Ill. 2020), which held that head-to-head DFS contests are predominantly skill-based. These state high court victories provide more evidence that the odds are increasingly in favor of continued IFS legalization across the U.S.

For those who are not familiar with fantasy sports, participants of IFS contests create virtual "teams" comprised of players from real-life teams to compete against other virtual teams compiled by other IFS contestants. While professional athletes strive to win games for their teams, an IFS player's roster is only concerned with the performance of the real-life athletes "drafted" for his or her roster because participants of IFS contests earn fantasy points based on their selected athletes' game stats (as opposed to the outcome of the games). Traditionally, fantasy sports participants would pit their roster against other players over the course of an entire season but, in recent years, IFS operators

began offering weekly and daily IFS contests; these contests became known as Daily Fantasy Sports.

The story of the Court of Appeals ruling in *White v. Cuomo* began in 2015, when large-scale daily fantasy sports websites and applications started operating in New York. In 2016, the state legislature passed Article 14, which legalized and regulated registered prize-based IFS contests. In this legislation, the New York state legislature declared that IFS contests were not "gambling" because: (1) the outcome of such contests are dependent on the "skill and knowledge of participants" rather than chance, and (ii) the contests were not wagers on future contingent events not under the contestants' control because the outcome of a contest is dependent on the skill of each IFS participant.

Both of these determinations by the state legislature were aimed as responses to language in Article I, §9 of New York's Constitution stating that, except as authorized therein, "no lottery or the sale of lottery tickets, pool-selling, book-making, ***or any other kind of gambling*** . . . shall . . . be authorized or allowed within this state." [emphasis added]. The definition of "gambling" is undefined in the Constitution and has evolved over time with various amendments. This definition has also been interpreted in subsequent case law (as agreed by both parties to this case), which generally defined gambling as "the risking of money or something of value on '***games of chance***,' as well as '***bets and wagers' by nonparticipants*** on competitions of skill." [emphasis added]. So, the state legislature's determination that IFS was both (i) a game of skill and (ii) not a bet or wager on a future event not under the participants' control was meant to directly counteract arguments that IFS was gambling and therefore unconstitutional.

After Article 14 was passed, a group of bettors with gambling addictions and their family members sued the Governor and the state gaming commission to block the law. They argued that Article 14 was unconstitutional because IFS contests should properly be considered gambling as they are "games of chance" or "bets or wagers" on events outside the participants' control. In response, the Government asserted that, although IFS contests may superficially resemble "gambling," the legislature reasonably concluded they are neither "games of chance" nor "bets or wagers by nonparticipants on competitions of skill" because IFS contests are themselves skill-based contests in which fixed prizes are awarded based upon the participants' own judgment and strategy.

In October 2018, plaintiffs, the opponents of IFS contests, were successful in the Supreme Court of New York (the state's trial court), which ruled that IFS contests are "gambling" under the state constitution because they "involve[ed], to a material degree, an element of chance." In February 2020, the New York Supreme Court, Appellate Division, Third Department, affirmed, holding, among other things, that IFS contests are "gambling" prohibited by the State Constitution.

The Government appealed the rulings to the Court of Appeals. Thus, the state's highest court was tasked with discerning whether the legislature erred in finding that Article 14 IFS contests fall outside the scope of the constitutional prohibition on gambling. In a close 4-3 vote, over a particularly lengthy and forceful dissent, a majority of the Court of Appeals agreed with the state legislature and IFS proponents that IFS contests are not gambling under the New York Constitution, granted summary judgment to the Government and declared that Article 14 does not violate Article I, §9 of New York's Constitution.

Before reaching its determination about whether or not IFS contests should be considered gambling, the Court of Appeals essentially weighed the odds in the state's favor from the beginning. This is because, according to the Court, when a legislative enactment is challenged, there is an "exceedingly strong presumption of constitutionality" and a "presumption that the [l]egislature has investigated for and found facts necessary to support the legislation." Therefore, at the outset of its analysis, the Court flatly stated that "courts may not 'substitute their judgment for that of the [l]egislature.'"

With this advantage to the state regarding standard of review in hand, the Court then dove into the substance of determining whether IFS contests fell under the New York Constitution's definition of gambling. Making things slightly easier, both sides agreed that "gambling" in the state constitution should be defined as either "games of chance" or "bets and wagers by nonparticipants on

competitions of skill." So, the Court decided to tackle whether IFS contests fit either of those two definitions separately.

The Court hit a roadblock pretty early on in its "game of chance" inquiry; namely, how does one define a "game of chance"? After all, every game has some element of chance. A gust of wind might blow a golf ball five yards further than expected; a wet spot of flooring might cause a basketball player to slip and miss their shot; an entire soccer team might wake up the day of their most important match of the season with food poisoning from a rogue lasagna. All true stories. Conversely, many games of chance have at least some element of skill – just ask any casino why certain players are no longer welcome at their craps or blackjack tables.

The Court solved this conundrum by applying what it called the "dominating element test." The test, taken by the Court from a 1904 case, *People ex rel. Ellison v. Lavin*, asks whether a game is one in which the "element of chance was the dominating element that determines the result of the game." Essentially, is skill or chance the controlling factor in deciding who wins? The Court decided to apply the dominating element test over an alternative "material degree test," which was employed by the Appellate Division, and which asks whether "the outcome depends in a material degree upon an element of chance."

Applying the dominant element test along with its earlier discussed deference to the state legislature, the Court found that the legislature's determination that IFS contests were games of skill and not gambling "has resounding support." For example, the Court referenced studies in the legislative record that skilled players achieve significantly more success in IFS contests. The Court further stated that participants in IFS contestants "draw from their knowledge of the relevant sport, player performance and histories, offensive and defensive strengths of players and teams, team schedules . . . statistics, strategy, and the fantasy scoring system in order to exercise considerable judgment in selecting virtual players for their rosters." While not discounting that chance plays some role in determining the victor of IFS contests, the Court concluded that "the legislature's determination of the skill issue . . . is supported by considerable evidence . . . demonstrating that IFS contests are not games of chance because the outcome is predominantly dependent upon the skill of the participants."

The Court used that same analysis to reject the plaintiffs' contention that IFS contests are "bets or wagers" of non-participants on future events outside the contestants' control. Because IFS contestants use skill in making their lineup selections in a contest featuring upfront entry fees and a pre-set prize pool, they are not non-participants in future events but rather active participants in determining their success or failure in getting the fixed premium or prize, similar to participants in "a spelling bee . . . golf tournaments . . . [or] televised game shows." The Court further concluded that "unlike bets or wagers on games of skill in which a bettor takes no part, participants in IFS contests engage in a distinct game of their own, separate from the real-life sporting events, in which they strive against other IFS participants." The combination of the skill involved in setting the lineups and the pre-set size of the prize pool (and the fact that outcomes are never based on score, point spread, or the performance of a single athlete, team or sporting event) appeared to be the key factors for the Court in determining that there was no betting on future events outside the contestants' control.

So, what's the impact of the Court of Appeals ruling on New York and other states? First, IFS and DFS as regulated under Article 14 are now in the clear moving forward in New York State. Second, other determinations made by the New York legislature in recent sports betting legislation, such as that mobile sports bets take place in the place "transmitted to and accepted" at a "licensed gaming facility," could be entitled to a similar level of deference regarding their constitutionality as given to Article 14 in this case. Third, it appears the number of states applying the dominating element test (as compared to the material degree test) is increasing, with New York following Illinois' lead in *Dew-Becker v. Wu* in deciding that dominating element was the correct (and likely more straightforward) test to apply when determining whether a game is a game of chance or skill. Finally, at least in New York, it appears that the pre-determination of the entry fees and size of the prize remain an important element of the constitutionality of IFS games, and that other states' future legislation may

want to consider this facet of the IFS contests when drafting legislation that may be challenged under similar state constitutional or other legal grounds.

Golf Club of Georgia Gets Breakfast Ball in Libel Suit Against Tee'd Off Former Member

At the Golf Club of Georgia in Alpharetta, GA, clubhouse chatter around birdies and eagles is par for the course. But not everyone is feeling peachy. The club itself has been paired with a disgruntled former member in a lawsuit over a string of allegedly libelous tweets sent under an anonymous Twitter handle that disparaged the club's new management practices (to the former member, it's protected opinion; to the club, it's an unlawful Twitter Tantrum). Recently, the Georgia Court of Appeals overturned a trial court summary judgement decision that had dismissed the case and found that the North Atlanta Golf Operations (which does business as the Golf Club of Georgia, LLC (the "Club")), Eugene "Ben" Kenny (the Club's owner) ("Kenny") and Jacqueline and Samuel Welch (the Club's former general manager and groundskeeper, respectively) (collectively, the "Plaintiffs") may have a claim for libel against former Club member Peter Ward ("Ward" or "Defendant") for certain disparaging tweets lobbed against the plaintiffs. (*North Atlantic Golf Operations, LLC v. Ward*, No. A21A1525 (Ga. App. Fifth Div. Mar. 11, 2022)).

Following Kenny's acquisition of the Club in 2014, Ward became displeased with the new management and maintenance of the Club and opened a Twitter account under the name "Secret GCOG Member." Thereafter, he embarked on his escapade of cyber-criticisms aimed at the Club, its owner, its management, and specifically Kenny and the Welches. (Notably, in a testament to the world we live in, Ward testified that he never actually attempted to offer feedback to the Club's management in the real world.) Following an unrelated dispute over his residency and membership status, Ward's membership at the Club was terminated in 2017. Ward subsequently changed his Twitter account to "Former GCOG Member," and over the next few years, he continued taking shots at management and the Club on Twitter.

After learning of Ward's Twitter account, the Plaintiffs filed suit in December 2018 against Ward in Georgia state court, asserting claims for libel, tortious interference with business relations, injunctive relief, punitive damages and attorney's fees and costs. In January 2021 a trial court granted summary judgement in favor of Ward with respect to all claims, and the Plaintiffs subsequently appealed. In March 2022, the Court of Appeals of Georgia reversed and sent the litigants back to the starter for a new round. The appellate court affirmed the trial court's summary judgement in favor of Ward on the Plaintiffs' claim of tortious interference on the grounds that the Plaintiffs could not demonstrate that Ward's posts caused a third party not to enter into or continue a business relationship with the Club or any other specific financial injury. With respect to the libel claim, however, the Court took a different approach.

Under Georgia law, libel is a form of defamation, specifically the "false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule." (OCGA Section 51-5-1(a)). As outlined by the Court, a claim for libel in Georgia has four elements: (1) a false and defamatory statement concerning the plaintiff; (2) an unprivileged communication to a third party; (3) fault by the defendant amounting to at least negligence; and (4) special harm or the actionability of the statement, irrespective of special harm. In their appellate brief, Plaintiffs argued that their libel claim is supported by a select group of tweets from the hundreds published by Ward between 2016 and 2019.

In the first instance, the Court had to examine whether Ward's tweets were false and defamatory statements – according to the court, a statement that "[m]ak[es] charges against another in reference to his trade, office, or profession, calculated to injure him therein[,]" is defamation per se under Georgia law. As stated by the Court, a defamation action may stand only for a statement of fact (with truth being a complete defense), as a statement of opinion of subjective assessment cannot be proven false. The trial court had found that each of Ward's tweets were opinions incapable of being proven false and therefore failed the first prong. The

Court of Appeals, however, said this legal conclusion was no gimme and reversed. The Court agreed that while many of Ward's tweets were indeed opinions incapable of being proven false, others were on the fringe, and in context could reasonably be interpreted to imply defamatory facts about the Plaintiffs capable of being proven false. For example:

- On April 5, 2018, Ward tweeted "Jaquline [sic] and Ben sitting around Golf Club of Georgia brainstorming. Hmm we have very little play, we ruined the club, and revenue is down 50% what should we do? Let's open up an extra day this week and understaff the place again, yeah that will piss off those stupid members!"
- On April 10, 2018, Ward doubled down, posting: "Pretty sad that members pay $750 a month but dislike atmosphere Ben and Jacqueline created that they drive down the street to local tavern to drink and eat! Ownership and management still clueless and that's why revenue and membership down 50%. #dobetter".
- An April 22 post by Ward blamed the groundskeeper for "dead grass" around the greens.

While some content in the posts could reasonably be interpreted as rhetorical hyperbole or statements of Ward's personal belief (e.g., that Kenny and the Welches were not adequately managing or maintaining the Club), the Court pointed to specific facts in Ward's tweets that can be proved false, including the claim about dead grass and that the Club's membership and revenue had fallen by 50%. The Court found that a genuine issue of material fact therefore existed, because, contrary to Ward's tweets, evidence in the record showed that revenue and membership over this period of time remained consistent and the grounds were in excellent condition. (If true, this would leave Ward with an uphill lie going into the re-trial).

The Court then went on to analyze the remaining three prongs for libel, holding that (1) whether the tweets, which were undeniably communications to third parties, were privileged or "statements made with a good faith intent to protect Ward's interest in a matter" was a question for a jury to decide; (2) because the case involved defamation *per se*, a jury question existed as to whether the Plaintiffs could show necessary fault; and (3) because the posts concerning the Plaintiffs' trade, office or occupation were defamation *per se*, the Court stated that damages are inferred and the Plaintiffs were not required to show special damages. As such, the Court held that a jury may find a libel claim exists, and overturned the trial court's order granting summary judgment to Ward.

The Court then went on to consider which tweets out of the hundreds Ward posted were in play and which ones could be deemed published outside the one-year statute of limitations for defamation claims. The Plaintiffs argued that, under the theory of "continuing publication" Ward should be liable for defamation for posts from the inception of his account and not just for posts published less than a year before Plaintiffs filed their suit. The Court, however, disagreed and held that tweets are consistent with the single publication rule, which states that one publication is only one libel, regardless of the times it was exposed to the view of different people. As such, the Court found any tweets posted outside of the one year statute of limitations were out-of-bounds.

At this point, the parties are likely considering whether it is worth teeing off for another round. Ward (as of the date of this article, and likely against the advice of counsel) appears to, after a year-long hiatus in March 2019, have started tweeting again on the "Former GCOG Member" account (currently holding strong at 459 followers), so unless the Club is especially forgiving, we may see this group headed back to trial.

Happy Hour for K.C. Area Sports Bars as Software Used to Send Promotional Texts Deemed to Fall Outside TCPA

Plaintiffs Colby Beal ("Beal") and Zachary Smith ("Smith") were back for a rematch to challenge the call from a Missouri district court that the marketing software used by various Kansas City area bars to send promotional text messages to their customers did not violate the Telephone Consumer Protection Act ("TCPA"). Upon further review by the Eighth Circuit, Beal and Smith's challenge was unsuccessful and the call

from the court stands. (*Beal v. Outfield Brew House, LLC*, No. 20-1961 (8th Cir. Mar. 24, 2022)).

As background, Smith alleged that for a period of time after visiting No Other Pub, the establishment continued to send him promotional texts and calls in violation of the TCPA. Beal brought similar claims over allegedly unsolicited promotional text messages sent in violation of the TCPA from defendant Outfield Brew House, LLC. The TCPA prohibits using an automated telephone dialing system (ATDS) or "autodialer" to make non-emergency, unsolicited calls advertising "property, goods, or services" without the prior express consent of the recipient. 47 U.S.C. §§ 227(a)(5), (b)(1). Although the TCPA does not define a "call," the Federal Communications Commission (FCC) has interpreted the TCPA to "encompass[ ] both voice calls and text calls to wireless numbers" including text messages. According to both No Other Pub and Outfield Brew House, LLC (collectively, the "Establishments"), these messages were sent to patrons who visited the bar and voluntarily provided their contact information to hear about happy hours or other promotional events. As noted by the appeals court, the Establishments use marketing software called "Txt Live," which allows them to send text messages to former and potential customers, like the Plaintiffs. Plaintiffs argue these messages violated the TCPA because they were sent using an autodialer without their consent. The sole dispute before the Eighth Circuit was whether Txt Live falls within the TCPA's definition of an autodialer.

As we detailed in a prior edition of *Three Point Shot*, Smith's first attempt with the Missouri district court was soundly rejected by an April 2020 ruling in favor of the Defendants on the parties' summary judgment motions (*Smith v. Truman Rd. Development, LLC*, No. 18-00670 (W.D. Mo. Apr. 28, 2020)). One of the key questions before the district court was whether the Txt Live software used by No Other Pub could properly be categorized as an ATDS. The TCPA defines an ATDS as "equipment which has the capacity—(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. §227(a)(1). No Other Pub scored big when the district court applied a narrow interpretation to the meaning of ATDS, finding that "the best reading of the plain text of the ATDS definition indicates that a system must include a random or sequential number generator."

Beal suffered a similar defeat in another Missouri district court. There, the district court granted summary judgment in favor of the defendant-brew pub and ruled Beal did not craft an adequate TCPA claim. The court found that because the Txt Live platform used by the brew pub did not have the ability to generate, or create numbers, and could only call specific stored numbers entered by pub employees and send a specific promotional message chosen by an employee, the Txt Live system was not an autodialer under the TCPA.

Following these adverse rulings, Smith and Beal threw the red challenge flag and the question was sent to the Eighth Circuit to address whether the Txt Live software should be considered an ATDS.

In a consolidated appeal that included both Beal's and Smith's cases, the Eighth Circuit spent time reviewing how the Txt Live software actually operated. The appeals court noted that employees of the Establishments had to manually enter phone numbers into the software, and if they wanted to send promotional text messages to a specific group of customers from the database using the software, the Establishments would first apply certain filters to narrow down which customers would receive a message, then the software would shuffle the numbers that met the criteria and the message would be sent to only those selected numbers. In particular, the Eighth Circuit noted that the Txt Live software was not "capable of randomly or sequentially generating phone numbers." The court also noted that the system required manual effort at many stages of the process, as the employees would select the number of potential customers to whom the text message would be sent, draft or select the content of the message, and then hit "send." The court, however, did concede that the Txt Live software performed certain automated processes. For example, once employees decided to send a message, the software could perform automated tasks, such as the ability to create a sub-set of contacts from the pub's database if the pub wanted to send a targeted message to only selected customers who fit a chosen demographic.. Also, if the number of people who met the filtered criteria for a particular promotional

message exceeded the desired number of recipients, Txt Live would select those recipients at the top of the shuffled sub-set of contacts. It is these automated capabilities that Plaintiffs pointed to in arguing that the Txt Live system was an autodialer.

In affirming summary judgment in favor of the Establishments, however, the Eighth Circuit noted that, at its core, the Txt Live software "merely stores and dials phone numbers", which courts have found outside the scope of the TCPA. The parties argued over certain undefined terms in the TCPA, including the word "produce" in the definition of an ATDS (The TCPA defines an Autodialer as: equipment which has the capacity— (A) to store or **produce** telephone numbers to be called, using a random or sequential number generator…). [emphasis added]. Looking at the statute, the appeals court stated that under the TCPA, 47 U.S.C. § 227(a)(1), it is a "random or sequential number generator" that does the producing. Because Txt Live does not generate phone numbers to be texted, the court concluded that it does not "produce telephone numbers to be called" for purposes of § 227(a)(1). The appeals court noted that its ruling was supported by a Supreme Court decision from last year that had narrowly construed the statute's prohibition on automatic telephone dialing systems and held that "a necessary feature of an autodialer under §227(a)(1)(A) is the capacity to use a random or sequential number generator to either store or produce phone numbers to be called." The Eighth Circuit ultimately rejected the Plaintiffs' argument that certain automated randomizing features of Txt Live that shuffled and selected phone numbers based on filters (what the court called, "randomly selecting from a database of non-randomly collected phone numbers") turned the software into an autodialer. Here, the court stated that such functions that merely involved storage and organization of numbers did not turn Txt Live – a system used in this case to text potential customers who have voluntarily given a business their phone numbers – into an autodialer as defined under the TCPA, thus dooming Plaintiffs' claims.

Armed with the Supreme Court's clarification about the scope of the prohibition on autodialers under the TCPA, the Eighth Circuit broke little sweat in affirming summary judgment in favor of the Establishments. Advances in technology since the TCPA was enacted 30 years ago may prompt Congress to reconsider what should be considered an ATDS under the TCPA. Until that time, it appears that it is last call for claims like the Plaintiffs' based on comparable marketing software systems used to text numbers submitted voluntarily by patrons of businesses. Still, future litigants will undoubtedly continue to search for situations that might still fall under the TCPA's prohibitions.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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