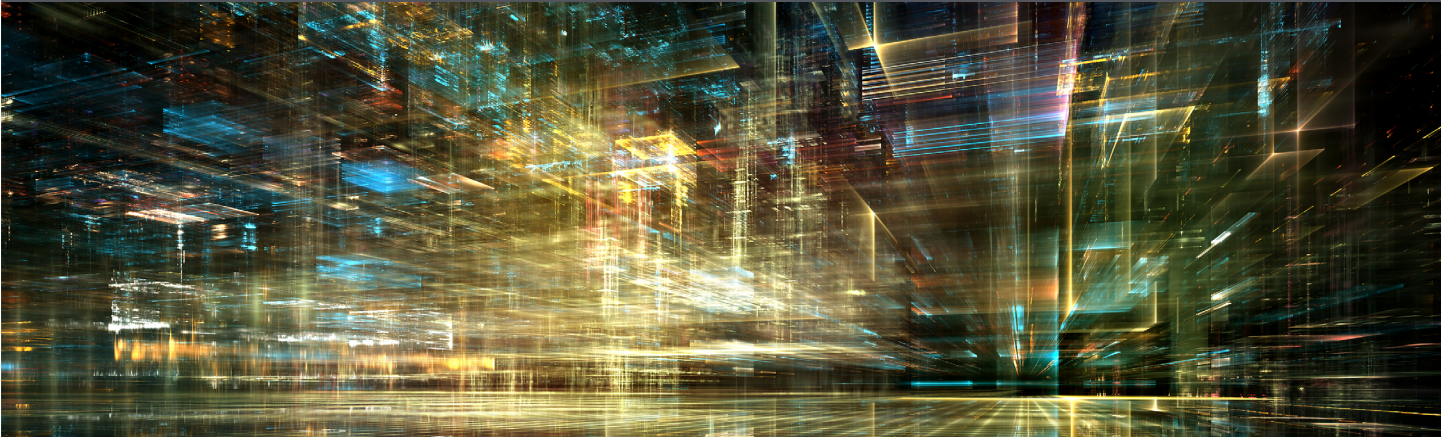


## Gaming



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## New York Court of Appeals Implements Constitutional Standard for Judging Games of Chance; Confirms Constitutionality of Interactive Fantasy Sports Law

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In a widely anticipated decision for fantasy sports operators and their customers, the New York Court of Appeals has ruled that Article 14 of the Racing, Pari-Mutual Wagering and Breeding Law (“Article 14”), which authorized and regulated interactive fantasy sports (“IFS”) contests in New York, is constitutional. In a 4-3 decision, the court ruled in *White v. Cuomo, et al.* that the “dominant factor test” is the constitutional standard for judging games of chance under the State’s Constitution, regardless of the more stringent “material element” standard adopted in the existing New York Penal Law. The court also ruled that paying an entry fee for an opportunity to compete for a pre-determined prize, not determined by the amount of entry fees, is not an illegal bet or wager in the fantasy sports context. The ruling confirms the legality of the IFS law, enacted by the New York legislature in 2016, and should finally close the long-debated dispute over the law’s constitutionality.

In reaching its decision, the court adopted the “dominant factor” or “dominant element test” which has been adopted by courts in several other states as the proper constitutional standard to consider whether the activity constituted “gambling.” In so doing, the court held that games in which skill predominates over chance and skill-based competitions for prizes in which the players have influence over the outcome do not constitute gambling under the State Constitution.

In the context of IFS, the court focused on “whether the participant has skillfully composed and managed a virtual roster so as to garner more fantasy points than rosters composed by other participants.” The court’s examination of cases involving games of skill and games of chance found that New York courts “historically applied the dominating element standard to determine whether a particular activity constituted a ‘game of chance’—reflecting a shared understanding that ‘gambling’ encompasses those games dominated by chance, not skill.” The dominant element, or dominant factor test, considers whether chance or skill is the dominant or controlling factor in determining the outcome of the game. New York Penal Code § 225.00(1) specifies that gambling involving a “game of chance” occurs when “the outcome [of the game] depends in a material degree upon an element of chance, notwithstanding that the skill of the contestants may also be a factor therein.” Based on an analysis of the historical understanding of “gambling” at the time that the New York Constitution’s prohibition was first adopted in 1894, however, the court nonetheless determined that the “material element” standard was not constitutionally required and that the “dominant element” standard more accurately complied with that historical understanding. Ultimately, the court determined that skill dominated the ability to compose the best roster for IFS purposes.

In addition, the court clarified that IFS contests that charge entry fees and award fixed prizes do not constitute gambling prohibited by New York's Constitution. Article 14 as enacted by New York's legislature permits only contests that have prizes that are predetermined, announced prior to the start of the contest, awarded by a neutral operator, and which do not change based upon the number of participants or the amount of entry fees collected. In upholding the constitutionality of Article 14, the court noted that other courts have looked at this issue and determined that illegal gaming implies gain and loss between the parties by betting. This element is notably lacking when entrance fees are fixed and predetermined prizes are awarded by a neutral party whose monetary stake is limited to the payment of the prize. Thus, in the eyes of the Court of Appeals, fantasy sports participants are not "wagering" in the hopes of scoring a pool of funds "wagered" by other players; rather, contestants know the set fee to enter the competition, the sum total of prizes that may be awarded, and that such a sum must be awarded even if entry fees are insufficient to cover the cost of the prize. In this regard, the legislature was appropriately careful to authorize only a contest for a prize, not legalize a scheme of constitutionally prohibited bets and wagers.

This decision is surely a positive for the fantasy sports industry in the large New York market and should finally put to rest the question of whether such activities constitute "gambling" in the State.

**For additional information or assistance, contact [Dennis M.P. Ehling](#), [Stephen D. Schrier](#), [Michael P. Trainor](#), [Gregory A. Bailey](#), or a member of Blank Rome's [Gaming](#) group.**

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