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Early Innings: Initial Issues Being Litigated in Legalized Sports Gambling

With the expansion of legalized sports gambling (and the surge of money being wagered), an increase in sports gambling litigation will ensue. Here is a summary of legal issues that have arisen recently in such cases around the country.

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In May 2018, the United States Supreme Court struck down the federal ban on state-authorized sports gambling, permitting any state to legalize sports betting at its discretion. See *Murphy v. NCAA*, 138 S.Ct. 1461 (2018). Since then, 25 states, along with Washington, D.C., have legalized some form of sports gambling. And business is booming.

As of Dec. 1, 2020, the public has legally wagered more than \$31 billion on sports, generating just under \$300 million in tax revenue.

(See <https://www.legalsportsreport.com/sports-betting/revenue>). In New Jersey alone, \$10 billion has been legally wagered on sports, including \$803 million in October 2020, a national record for the amount wagered on sports in a single state in a single month.

(See <https://www.legalsportsreport.com/45718/new-jersey-sportsbooks-october-handle>).

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litigation will ensue. Below is a summary of recent legal issues that have arisen in courts across the country in just such cases.

Want to Recover Losses from Cheating Athletes and Teams? Don't Bet on It.

In January 2020, Major League Baseball (MLB) announced that the Houston Astros and Boston Red Sox violated MLB rules and regulations by using electronic devices to steal opposing teams' signs in games played in 2017 and 2018.

Following this announcement, gambling plaintiffs across the country filed lawsuits to recover alleged losses stemming from the sign-stealing scandal. To date, no plaintiffs have been able to get on base, as courts across the country have found no causal link between plaintiffs' losses and defendants' alleged misconduct.

For example, in *Oliver v. Astros*, 2020 U.S. Dist. LEXIS 51808 (D. Nev. March 23, 2020), the District Court of Nevada dismissed plaintiff's complaint filed against the Astros and Red Sox in its entirety, finding that plaintiff was not the "direct victim" of the sign-stealing scandal.

Specifically, the court rejected plaintiff's RICO claim because defendants' actions and alleged RICO violations (sign stealing and defrauding the Dodgers of their World Series titles) were not the proximate cause of plaintiff's harm (placing losing bets). Plaintiff's unjust enrichment claim was also dismissed because the two MLB teams did not benefit from plaintiff's gambling losses—a Las Vegas casino and a sports betting app did.

Similarly, in *Olson v. Major League Baseball*, 447 F. Supp. 3d 159 (S.D.N.Y. April 3, 2020), the Southern District of New York dismissed a purported class action suit brought by participants in DraftKings daily fantasy sports contests. Like in *Oliver*, the Southern District found plaintiffs' alleged harm and defendants' conduct were "simply too attenuated to support any of plaintiffs' claims for relief." *Id.* at 173. In dismissing the complaint, the court rejected the notion that professional sports organizations owe daily fantasy sports participants any duty of care absent a transaction or other relationship between them. District Court Judge Jed S. Rakoff emphasized: "This absence of duty and reliance forecloses plaintiffs' fraud and negligence claims, and the lack of a transaction, relationship, or other nexus [between plaintiffs and defendants] forecloses plaintiffs' consumer protection claims."

Finally, plaintiffs' failure to demonstrate that defendants' enrichment came at [plaintiffs] expense forecloses their unjust enrichment claims." *Id.* Currently the matter is on appeal before the Second Circuit.

While the decisions in *Oliver* and *Olson* are disconcerting for aggrieved bettors, a recent settlement out of the District Court of New Jersey could provide some hope. *See Jeffrey Tretter v. Robert Bresnahan Jr.*, No. 2:18-cv-03245-MCA-ESK (D.N.J. 2020). In January 2016, Jeffrey Tretter bet on a harness race at Meadowlands Racetrack in New Jersey through an online betting site. The horses he bet on finished behind Tag Up and Go, a horse who tested positive for erythropoietin after the race. Tretter sued Tag Up and Go's trainer and owner for the losses he sustained. This first-of-its-kind lawsuit was financed by People for the Ethical Treatment of Animals (PETA) in the hopes more litigation by bettors would curtail illegal horse doping. After years of litigation, the lawsuit settled for \$20,000 in July 2020. While no official precedent was set, this settlement may open the door for similar lawsuits.

Are Daily Fantasy Sports Contests Gambling? Courts Are Split.

Daily fantasy sports (DFS) contests have been around for decades and continue to grow in popularity. A quick refresher: DFS contests require contestants to select a lineup of players, each assigned a different "salary" value. Participants accrue fantasy points based on the real-life performance of the players they have "drafted" on the particular day or week covered by the contest. The participants' total points at the end of the contest determine who wins a cash prize.

Recently, courts have explored whether DFS contests—games that involve both skill and chance—are gambling or skill-based. Courts are split.

In determining whether a game that involves both skill and chance constitutes gambling, courts generally apply one of three tests: the "material element test," the "predominant purpose test," or the "any chance test." *See* Marc Edelman, "Regulating Fantasy Sports: A Practical Guide to State Gambling Laws, and a Proposed Framework for Future State Legislation," 92 Ind. L.J. 653, 663-665 (2017). Under the material

element test, a contest is considered gambling if chance is a material element in the contest. Under the "predominant purpose test," a contest is not considered gambling if the dominant factor in the contest is skill. Finally, the "any chance test" provides a contest is considered gambling if it involves any chance whatsoever.

In the past year, the New York Appellate Division and the Illinois Supreme Court, adopting different tests, issued conflicting opinions on whether DFS contests are gambling. The decisions highlight the inconsistencies in how sports gambling is treated across the country and reflect the uncertain legal landscape of the DFS space.

In February 2020, the New York Appellate Division, Third Department, adopted the material element test and ruled that DFS contests constituted illegal gambling in violation of New York's ban on gambling. *See White v. Cuomo*, 181 A.D.3d 76 (3rd Dep't 2020). The Third Department concluded that because DFS participants could not control how the athletes on their teams would perform in the real-world sporting events, DFS contests were gambling because they "involve[d] a material degree of chance." *Id.* at 84. Shortly after this decision was entered, New York State appealed the decision to the Court of Appeals. Doing so imposed an automatic stay of enforcement of the Third Department's order, permitting DFS contests to continue in New York until the Court of Appeals decides the issue once and for all.

Thereafter, in April 2020, the Illinois Supreme Court took an alternative approach and adopted the predominant purpose test. *See Dew-Becker v. Wu*, 2020 IL 124472 (Il. April 16, 2020). In doing so, the court ruled that DFS contests do not constitute gambling because the outcome is predominantly skill-based. Citing to several prominent peer-reviewed studies, the court held that head-to-head DFS contests are not determined by luck, but are "predominately determined by the skill of the participants using their knowledge of statistics and the relevant sport to select a fantasy team that will outperform the opponent." *Id.* at *P26. (citations omitted).

In adopting the predominant factor test, the Illinois Supreme Court found that it "provides a workable rule that allows for

greater consistency and reliability in determining what constitutes a contest of skill." *Id.* at *P25. Comparably, the court rejected the material element test because it "depends too greatly on a subjective determination of what constitutes 'materiality.'" *Id.*

What's Next?

Although courts have historically "refused to allow judges to become replay officials for disappointed fans" (*see Oliver*, 2020 U.S. Dist. LEXIS 51808, at *6), lawsuits involving sports gambling will continue to grow as legal sports betting becomes more prolific with each passing year.

What type of issues might be litigated? First, courts will likely continue to entertain lawsuits from aggrieved bettors seeking to recover losses from athletes, teams, sports wagering sites and/or casinos. If you are the type of person to bet on sports, you may be the type of person to roll the dice with a lawsuit to recover losses. In addition, courts, like the Third Department in *White v. Cuomo* and the Illinois Supreme Court in *Dew-Becker v. Wu*, may continue to examine whether DFS contests, or other games involving both skill and chance, are gambling. Finally, with the growth of online gambling, the interplay between technology and sports gambling may come to a head, bringing up various issues, including messenger betting (when an out-of-state bettor transmits information through a proxy, instructing the proxy to place a wager in another jurisdiction where gambling is legal). While the exact issues to be litigated in the future are unclear, one thing is certain: sports gambling is not going anywhere. And the House—and the states that legalize sports gambling—will continue to win. Gamble responsibly. ●