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Gambling and New York Law: Skill v. Chance

New York's first gambling ban was a ban on lotteries included in the State's second Constitution in 1821. In 1894, when New York adopted its fourth Constitution, the lottery ban was expanded to include all forms of gambling. The relaxation of New York's gambling laws has been a deliberate process. For example, the state lottery itself is only 50 years old and bingo was illegal until 1957.

Section 225.00(2) of the Penal Law defines "gambling" as follows: "A person engages in gambling when he stakes or risks something of value upon the outcome of a *contest of chance* or a future contingent event not under his control or influence, upon an agreement or understanding that he will receive something of value in the event of a certain outcome" (emphasis added).

Penal Law Section 225.00(1) defines a "contest of chance" as "any contest, game, gaming scheme or gaming devise in which the outcome depends in a material degree upon an element of chance, notwithstanding that skill of the contestants may also be a factor therein." Thus, contests of chance may involve some skill on the part of the player to prevail, but they are distinguishable from contests of skill in that chance (and not skill), is considered a material influence on the outcome of the contest.

A seminal case on this issue is *People ex rel. Ellison v. Lavin* (71 N.E. 753, 756 (1904)) an early twentieth century case decided by the New York State Court of Appeals involving a newspaper that held a contest asking readers to guess how many cigars would the federal government collect taxes on during the month of November, 1903. Cigars at the time were taxed \$3.00 per thousand sold. The newspaper publisher was arrested for holding an illegal lottery.

A main part of the court's decision involved the discussion of whether the newspaper's contest was a game of skill or of chance. In holding that the cigar contest was a game of chance and therefore illegal, it elaborated on the issue, stating, in part:

"Throwing dice is purely a game of chance, and chess is purely a game of skill. But games of cards do not cease to be games of chance because they call for the exercise of skill by the players, nor do games of billiards cease to be games of skill because at times...their result is determined by some unforeseen accident, usually called luck. The test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game."

Most recently, in late 2015, New York Attorney General Eric Schneiderman declared that daily fantasy sports constituted illegal gambling, shining new light on the issue. However, a judicial determination of whether daily fantasy sports are games of skill or chance was avoided as the New York State Legislature voted to legalize it in August 2016. Currently, nine companies are operating under temporary permits while the state Gaming Commission develops permanent regulations.

If you have any questions about this Legal Briefing, please contact any attorney of our Firm at 585-730-4773.

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