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State's top court sets broad rule for establishing skill game legality

On April 16, the Illinois Supreme Court issued a surprising decision in the case *Dew-Becker v. Wu*, 2020 IL 124472 (April 16, 2020) (“*Dew-Becker*”), holding that head-to-head daily fantasy sports (“DFS”) contests do not involve “gambling” under Illinois law. The decision is surprising because Illinois law has one of the strictest definitions of “gambling” in the country. The court’s analysis in *Dew-Becker* has potentially far ranging implications for the legality of not just head-to-head DFS contests, but all forms of DFS operations and the operations of other entertainment games where participants can win a prize.

The question of whether DFS contests involve gambling generally turns on whether those contests are “games of chance” – which are generally considered gambling if the participants pay a fee for the opportunity to win a prize determined by chance, or “games of skill” – which are often considered legal contests (similar to a chess match or golf tournament) where, although participants pay a fee to play, their skill, not chance, determines whether they win the prize. Regulation of “skill gaming” is typically much lighter than true “gambling.” Courts in a number of states have, in the context of DFS and otherwise, typically used three approaches to determine whether a game is a “game of skill,” asking: (1) Is skill or chance the dominant factor in the outcome (i.e. the outcome of the game is determined more by the partici-

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pants’ relative skill than by chance – the “Dominant Factor Test”) (2) Is chance a material element in the outcome (i.e. chance plays any significant, if not dominant, role in determining the outcome of the game – the “Material Element Test”) or (3) Is any chance at all involved (the “Any Chance Test.”) But in addition to these three tests, at least two states (Arizona and Illinois) have up to now been understood as going further by enacting statutes that generally prohibit the playing of both “games of chance or skill” for money. See A.R.S. Sec. 13-3307(A); 720 ILCS 5/28-1(a). The *Dew-Becker* decision has now changed that understanding, at least for Illinois.

The Illinois Criminal Code criminalizes both the “play[ing] of a game of chance or skill for money or other thing of value” and the “establish[ing], maintain[ing], or operat[ing] of an internet site that permits a person to play a game of chance or skill for money or other thing of value by means of internet or to make a wager upon the result of any game, contest, political nomination, appointment, or election by means of the Internet...” subject to certain enumerated exceptions. 720 ILCS 5/28-1(a)(1) and (12). Illinois

law provides an exception, however, for the “[o]ffers of prizes, award or compensation to the actual contestants in any bona fide contest for the determination of skill, speed, strength or endurance or to the owners of animals or vehicles entered in such contest.” 720 ILCS 5/28-1(b). In December 2015, the Illinois attorney general issued an advisory opinion which concluded that the exception for a “bona fide contest for the determination of skill, speed, strength or endurance” did not apply to fantasy sports contests because “[i]n the contest of daily fantasy sports, the ‘actual contestant’ upon whose performance success or failure is based is the athlete or athletes whose ‘skill, speed, strength, or endurance’ determine the outcome,” not the participants in the DFS contest themselves. See Illinois Attorney General Opinion, No. 15-006, at pp.10-11 (Dec. 23, 2015).

In *Dew-Becker*, the Illinois Supreme Court upheld that understanding and held that, at least in the context of head-to-head DFS contests (i.e. those in which one participant challenges just one other to see who can select the athletes that will accumulate the most fantasy points in their next game), DFS is not gambling at all. In so concluding, rather than focusing on whether the participants in a DFS contest were participating in a contest for the determination of their own “skill, speed, strength or endurance” or, as the Illinois Attorney General had concluded, the “skill, speed, strength or endurance”

of the athletes competing in the relevant sporting events, the majority of the Illinois Supreme Court focused on determining what should be the proper test under Illinois law to determine whether skill or chance determines the outcome of the contest. *Dew-Becker*, 2020 IL 124472 at Para. 22-25. After very briefly reviewing the merits of each test, the Illinois Supreme Court determined that the “predominate factor” (i.e. Dominant Factor) test should apply. *Id.*, at Para. 25. Having done so, the court went on to recognize a number of fairly recent studies published between 2015 and 2019 that supported the conclusion that, “DFS contests are predominately determined by the skill of the participants in using their knowledge of statistics and the relevant sport to select a fantasy team that will outperform the opponent.” *Id.*, at Para. 26. The majority dismissed the Illinois attorney general’s 2015 advisory opinion on the grounds that it lacked the benefit of the recent studies cited by the court and relied heavily on an opinion by the Texas Attorney General’s Office under Texas’s law employing the Any Chance test. *Id.*, at Para. 27.

Although the *Dew-Becker* decision is addressed specifically to head-to-head DFS contests, there is nothing in the analysis which distinguishes head-to-head contests from other types of DFS contests (including contests involving many more than just two players) or other types of contests involving various games of skill.