

N.J. Supreme Court Sacks Challenge To Super Bowl Ticket Sales

January 22, 2019 | by Stanley Zator

As an update to our October 5, 2018 Einhorn Barbarito Appellate Watch Blog, [NJ High Court Tackles Super Bowl Ticket Sales](#), and after having considered oral argument by the parties in [Finkelman v. National Football League](#) (A-38-17) (080501), the New Jersey Supreme Court ruled in favor of the NFL on January 9, 2019, putting to rest any further doubt over whether the NFL's 2014 Super Bowl ticket sales violated a now-repealed provision of New Jersey's Consumer Fraud Act under N.J.S.A. 56:8-35.1 ("Section 35.1").

The provision in question, Section 35.1, states that "[i]t shall be an unlawful practice for a person, who has access to tickets to an event prior to the tickets' release for sale to the general public, to withhold those tickets from sale to the general public in an amount exceeding 5% of all available seating for the event."

You may recall this case arose when Josh Finkelman filed a putative class action in the United States District Court for the District of New Jersey, alleging the NFL violated Section 35.1 by offering only 1% of available tickets for sale to the general public contrary to the statute's requirement of at least 5%. More specifically, the NFL offered 1% of the tickets to the general public via a lottery system while retaining 99% of the tickets for league insiders. Mr. Finkelman purchased tickets on the secondary market at inflated prices. The NFL moved for dismissal of Mr. Finkelman's action, in part, on the basis that he lacked standing to sue.

Through a convoluted procedural history, the case found its way to the Third Circuit Court of Appeals, where it was eventually remanded by the panel to the New Jersey Supreme Court ("the Court") to decide the threshold issue of whether Mr. Finkelman asserted a valid claim under Section 35.1.

The Court accepted the certified question and reformulated it as follows: (1) Is Section 35.1's use of the term, "person", limited to ticket brokers and resellers? (Stated differently, can the NFL be considered a "person" under Section 35.1?); (2) Are the 1% of tickets sold to the lottery winners considered tickets "release[d] for sale to the general public" under Section 35.1; and (3) If so, are the 99% of tickets retained for league insiders, considered unlawfully withheld from sale to the general public?

Before addressing its rationale in favor of the NFL, the Court noted the legislature's intent behind Section 35.1 was to "make the greatest number of tickets available to the greatest number of ordinary fans".

In a seemingly favorable move to Mr. Finkelman, the Court answered the first question by holding the NFL could be considered a "person" for purposes of Section 35.1. This aspect of the holding is significant because it permitted Mr. Finkelman to overcome the initial threshold question of whether the NFL, based upon its status as a corporate entity as opposed to a ticket broker/reseller, could be held liable for any purported violations under the statute. Once established, the Court moved on to consider the remaining questions focused solely on the NFL's actual conduct at issue vis-à-vis the lottery system.

Mr. Finkelman was not as successful from this point on. The Court opined that the 1% of tickets sold to lottery winners did constitute a "release" of tickets for sale to the "general public". Particular emphasis was placed on the fact that the lottery winners were (1) members of the general public; (2) the tickets were not donated to the lottery winners; and (3) the lottery winners were permitted to buy 2 tickets at face value.

Lastly, and most importantly, the Court noted Mr. Finkelman was not a participant in the 1% of tickets sold to the lottery winners. He purchased tickets on the secondary market. Mr. Finkelman did not allege that the NFL withheld a portion of tickets from the 1% of tickets sold to the lottery winners. Moreover, the Court did not find the 99% of tickets withheld for league insiders to be unlawful under Section 35.1, as those tickets were never intended to be sold to the general public; and, as a public policy matter, the statute did not specifically prohibit reserving seats from public sale, otherwise there could never be reserved playoff tickets for season ticket holders and/or reserved tickets at college

sporting events for student fans.

In sum, the NFL did not violate New Jersey's Consumer Fraud Act because Section 35.1, according to the Court, "[did] not impose a limit on withholding any tickets, but restricts only the withholding of the subset of tickets that would otherwise be made available in a public sale."

It appears the "ball" is now in the Legislature's court. It remains to be seen whether this case will prompt legislative action for greater consumer protections when purchasing tickets to entertainment events.