

NJ High Court Tackles Super Bowl Ticket Sales

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On September 27, 2018, the New Jersey Supreme Court heard oral argument in the case of *Finkelman v. National Football League, et al.* (A-38-17) to determine whether the NFL's practice of selling only 1 percent of its 2014 Super Bowl tickets to the general public via a lottery system violated a now-repealed provision of New Jersey's Consumer Fraud Act, known as the New Jersey Ticket Law, under *N.J. Stat. Ann.* §56:8-35.1. In sum, Section 35.1 prohibited the withholding of tickets for sale to the general public in an amount of more than 5 percent of all available seating. The Court has yet to reach its decision, but this case exemplifies an interesting intersection between Federal and State appellate practice.

Josh Finkelman sought to purchase tickets to Super Bowl XLVIII held at MetLife Stadium, East Rutherford, New Jersey, in February of 2014. The NFL withheld 99 percent of the tickets for the event from the general public in favor of league insiders. The remaining 1 percent of the tickets, as mentioned, were offered to the general public via a lottery system. Winners of the lottery system were not given tickets as a contest prize; they were merely afforded the *opportunity* to purchase tickets. Finkelman, rather than entering into the lottery system, turned to the secondary market, purchasing 2 tickets for a total of \$2,400 over face value. He filed suit 1 month before the Super Bowl alleging New Jersey consumer fraud violations in the United States District Court for the District of New Jersey (D.C. No. 3-14-cv-00096).

The case found its way to the United States District Court of Appeals for the Third Circuit on motion to dismiss by the NFL, claiming that Finkelman lacked Article III standing. The NFL argued Finkelman suffered no injury attributable to the NFL because he failed to enter into the lottery system. Finkelman ultimately overcame this argument, in the eyes of the Circuit Court, by offering opinions from an economic expert specializing in secondary market ticket sales.

The expert opined that Finkelman paid inflated prices as a result of the NFL's ticket distribution practices. The expert supported this opinion by contending that NFL insiders were likely to rely upon brokers to resell their tickets in the secondary market for the purpose of maintaining anonymity. The use of brokers, in turn, drove the cost of tickets higher than if more tickets were made available to the public and sold secondarily without brokers in fan-to-fan direct sales.

The Third Circuit held that Finkelman's factual allegations in the Complaint, through this expert opinion, sufficiently supported an injury by Finkelman to overcome the NFL's motion to dismiss. While Finkelman demonstrated Article III standing, the Circuit Court deferred action on the merits of the claim to the New Jersey Supreme Court because it involved underlying questions of state law.

The NFL argued before the New Jersey Supreme Court that Section 35.1 was not applicable to its Super Bowl ticket sales because the lottery did not constitute a release of tickets to the general public sufficient to invoke the 95 percent-rule; and, in the alternative, even if the 95 percent-rule applied to the 1 percent reserved for the lottery, Finkelman never alleged these tickets were withheld.

Finkelman argued use of the lottery was irrelevant, as the NFL withheld more than 5 percent of the total tickets in violation of the law.

It will be interesting to learn what effect, if any, the result of this case has on future high-demand sporting events.