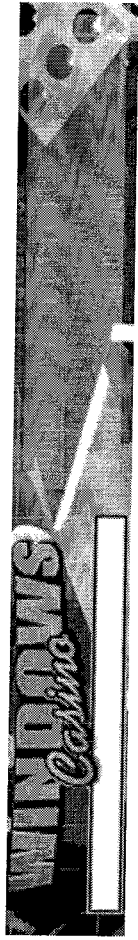
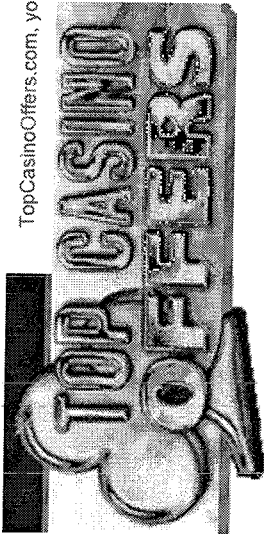


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Dec 17th, 2003

Legalized Gambling in New York

ALBANY — New York state's bet that legalized gambling is the answer to its fiscal woes encountered a constitutional road bump yesterday, when an appellate panel in Albany heard a case that could decide if casinos, video lottery terminals and multi-state mega lotteries are a cash cow for a desperate state or an outright illegal scheme orchestrated by the Pataki administration and the Legislature.

The Appellate Division, Third Department, yesterday permitted unusually lengthy and detailed arguments in *Dalton v. Pataki/Karr v. Pataki*, a consolidated case that could determine the parameters of the ban on gambling contained in Article 1, §9 of the state Constitution.

At issue is legislation passed in 2001 that authorized Governor George E. Pataki to enter into gaming compacts with Indian tribes, permitted the New York State Division of the Lottery to install video lottery terminals at race tracks, and allowed the state to participate in the "Mega Millions" multi-state lottery.

The suit was brought by two legislators, Senator Frank Padavan, R-Queens, and Assemblyman William Parment, D-Jamestown, and an assortment of plaintiffs who oppose gambling on religious, economic or other grounds. They claim that the Constitution bans precisely the type of gaming at issue here and bars Mr. Pataki from entering into agreements with Indian tribes for the operation of commercial casinos.

Earlier this year, the Court of Appeals touched on the topic in *Saratoga*

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County v. Pataki and Wright v. Pataki. Those cases hinged on the separation of powers doctrine and resulted in a split decision that said Mr. Pataki cannot enter into Indian gaming compacts without legislative approval. The Legislature approved the compacts at issue in Dalton.

Although the Court of Appeals, aware that Dalton was on the horizon, specifically declined to resolve the constitutional question in the prior case, two judges currently on the Court — Pataki appointees Victoria A. Graffeo and Susan Phillips Read — said the sort of gaming at issue in those cases and this one is not unconstitutional. Judge George Bundy Smith concluded that the gambling provision of the Constitution prohibits that type of activity.

In July, Albany Supreme Court Justice Joseph C. Teresi decided Dalton v. Pataki and Karr v. Pataki in favor of the defendants. Justice Teresi quoted extensively from the dissenting opinion of Judge Read and upheld legislation allowing up to six casinos in Western New York and the Catskills and video lottery terminals at some racetracks. That decision was appealed yesterday.

The Third Department permitted five attorneys to argue for nearly two hours, far more than usual, and the judges repeatedly came back to one main issue: whether the federal Indian Gaming Reform Act (IGRA) preempts a state constitutional provision that bans commercial gambling.

Attorneys for the state, Park Place Entertainment — which would build and operate the casinos — and race tracks largely relied on the preemption argument.

Solicitor General Caitlin J. Halligan led off for the defendants, and was immediately struck with a barrage of questions about the interplay between IGRA and the Constitution.

Also appearing for the defendants were Randy M. Mastro of Gibson, Dunn & Crutcher in Manhattan for Park Place Entertainment; Frederick J. Martin of Bleakley Platt & Schmidt in White Plains for Yonkers Raceway; and Kevin M. Kearney of Hodgson Russ Andrews Woods & Goodyear in Buffalo for the Finger Lakes Race Track.

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