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5 TAKEAWAYS FROM A BAA MARKETING LAW PRESENTATION

The Maze of Laws, Rules, and Regulations at the Intersection of Gambling, Gaming, Sports Betting, and Fantasy Sports

Barry M. Benjamin, managing partner of the New York office and chair of Kilpatrick Townsend's Advertising and Marketing group, was honored to present at the 41st annual 2019 ANA/BAA Marketing Law Conference. The session, titled "The Maze of the Gambling, Gaming, Sports Betting, and Fantasy Sports Intersections," discussed the complex, layered federal and state laws, rules, and regulations applicable to the conduct of legal gaming, gambling, and sports wagering. Takeaways from the program include:

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Gambling has similar legal elements to lotteries. The definition of gambling, and whether game structures are legal or illegal, generally consists of three elements: (a) staking or risking something of value, on (b) a contest of chance or future contingent event not under the player's control or influence, (c) for the chance to receive something of value in the event of a certain outcome. These elements echo, if not overlap directly, with the elements of a lottery, that is, prize, chance, and consideration. Also, just as the definition of a lottery varies from state to state, the definition of gambling similarly varies.

Gambling is regulated in a similar fashion as lotteries, primarily at the state level. Just like lotteries and other "sin" industries (tobacco, alcohol), the regulation of gambling is left to each state. State regulation generally starts with a state's constitution banning gambling, followed by the state's statutory code that defines and specifically regulates gambling, and in some states, legalizes it. Carve-outs are often included for activities like charitable gaming nights, raffles, bingo, and other areas where otherwise illegal activities are rendered legal under heavily prescribed circumstances.

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Federal law also applies to gambling. At various times, the U.S. federal government has passed laws regulating gambling that crosses state lines, such as with the federal Wire Act (18 U.S.C. § 1084). The Wire Act, passed in 1961 along with a raft of other laws intended to strengthen the federal government's ability to address organized crime activities, prohibited the use of telephone wires (and later, the internet), in connection with illegal gambling activities. An unsettled issue currently under litigation in the courts is the extent of the Wire Act's application to non-sports wagering activities, such as state governments' ability to conduct legal lottery games and sales over the internet. Another federal law used by federal authorities to enforce laws against illegal interstate gambling is the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA). When engaging in gaming and gambling activities, companies must navigate not only the laws of the particular state in which they are operating, but also these federal laws.

Fantasy Sports gaming has elements of both chance and skill. The attraction of fantasy sports games is that they are intended to test players' knowledge and experience with particular players, teams, strategies, and the ultimate performance of various professional athletes and sporting contests. Over time and over the course of many games, the theory is that the fantasy sports' players' skills will prevail over chance or luck to determine the winner. However, with the passage of the 2006 UIGEA, which contains a carve out and definition for fantasy sports games, fantasy sports operators felt empowered to operate paid daily fantasy sports games, which take place over a much shorter time frame. The legality of these paid daily fantasy games is a state by state question, dependent on the definition of gambling in a particular state, and whether a state has passed specific statutes and regulations of short term fantasy sports gaming.

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The legality of Loot Boxes rests on a vexing legal analysis of whether virtual goods have material value. So-called "loot boxes" are employed in video games, where boxes of digital items with unknown value can be obtained either through game play or through purchase with real world currency. Free to play video games have used loot boxes to monetize their games. The idea that video game players may use real world dollars to buy items (albeit virtual) of unknown value, leads some to argue that the three elements of an illegal lottery are present: prize, chance, and consideration. Others argue, however, that because the items are entirely virtual and cannot be cashed out by purchasers or players for real world value, that any payment is part of furthering the entertainment experience and is not equal to consideration for lottery law purposes. The U.S. Federal Trade Commission recently (August 7, 2019) conducted a workshop analyzing the legal status of loot boxes, but has yet to issue any follow up opinion or response. Other countries, however, have taken action on loot boxes, with Belgium and the Netherlands having taken action to ban certain types of loot box activity, while the United Kingdom has found them to be legal under U.K. law.

"Gaming" could mean any number of things: gambling; promotions; video games; sports wagering; lotteries; esports; and others. Whatever the term conjures up in the mind, however, the legal environment around "gaming" in general has expanded the legal bases upon which to capture consumer spending, and its attendant tax revenue. Entering the fray of paid gaming activities means tiptoeing through a patchwork quilt of federal and state laws and regulations, which have been the subject or more changes in the past few years than the previous 50-75 years combined. The gaming and gambling industries are pushing into disparate areas, including online casino-style gambling, sports book, video games and paid virtual prizes (loot boxes), skill games such as fantasy sports wagering, and others. Ultimately, companies that would like to engage in a particular gaming endeavor must engage in an extensive, state by state legal analysis, inclusive of federal law and regulation as well.

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