Insights: Perspectives

5 Key Takeaways From ANA/BAA Marketing Law Conference | Rapid Changes in Gaming, Gambling, and Fantasy Sports Law

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Rapid Changes in Gaming, Gambling, and Fantasy Sports Law

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 2021 ANA/BAA Marketing Law Conference. The session, titled "Gaming, Gambling, and Fantasy Sports," discussed the complex and layered federal and state laws, rules, and regulations governing legal gaming, gambling, and fantasy sports wagering. For lawyers providing guidance to clients, this complex legal landscape can cause frustration due to the lack of clarity and consistency both within states and across the country. As a mostly local, not national, area of regulation, lawyers must be aware of the different legislative and regulatory structures in each state, in addition to judicial case law interpretations that layer on further potential inconsistencies and questions. The session gave a broad but detailed overview of the laws, rules, and regulations around gaming, gambling, and fantasy sports, and provided key insights into how to execute national sponsorship and advertising deals in this space.

Takeaways from the program include:

1

Gambling has similar legal elements to lotteries. The definition of gambling, and whether particular game structures are therefore legal or illegal, generally consists of three elements: (a) staking or risking something of value, (b) on 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.

Gambling is regulated in a similar fashion as lotteries, primarily at the state level. Just like lotteries and other highly regulated industries (tobacco, alcohol), the regulation of gambling is left primarily to the states. In May 2018, the Supreme Court issued a decision reaffirming that the federal government must leave to the states the ability to regulate, legalize if they wish, and govern how gambling may be conducted, if at all, on a state-by-state basis. In addition, any legalization of state-permitted gambling must often be done at the constitutional level, as states like New York are now learning. The highest court in New York State is currently deciding (as of Nov. 2021) whether a 2016 state law passed by the legislature purporting to legalize daily fantasy sports was legal under the New York State constitution. Generally, state regulation 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 in a limited fashion. 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. Over the years, 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 1961 Wire Act prohibited the use of telephone wires (and later, the Internet), in connection with illegal gambling activities. Litigation about a Dept. of Justice interpretation as to the scope of the Wire Act worked its way through the courts from 2017 through early 2021, and was only recently resolved at the First Circuit Court of Appeals. The federal government also passed the 2006 Unlawful Internet

Court of Appeals. The federal government also passed the 2006 Unlawful Internet Gambling Enforcement Act (UIGEA), which addressed gambling over the Internet. Thus, 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.

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Fantasy Sports gaming has elements of both chance and skill. The law is clearly trending toward legalization of fantasy sports and, in particular, daily fantasy sports. Fantasy sports games are considered contests of skill, rather than chance, because they ostensibly test participants' knowledge of particular players, teams, strategies, and the ultimate performance of various professional athletes and outcomes of sporting contests. The 2006 UIGEA contains a carve out and definition for fantasy sports games, giving fantasy sports operators legal leeway 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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Legally Conducting Gambling Today. Given the ubiquity of the Internet and smart phones, companies offering gambling and fantasy sports services need to be very careful that their customers are in states where such offerings are legal. Online gambling service companies go to great lengths to ensure that their customers maintain a residence in a state where gambling is legal, as well as using geo-location technologies to confirm that they are present within the state when making their wagers. In addition, gambling companies offer opportunities for sponsorships and advertising deals with brands, retired athletes, and celebrities, and are therefore highly incentivized to ensure that their services are offered only in states where gambling is legal.

Whether using the term gaming, gambling, wagering, skill contest, or any other synonym, the legal environment around these activities has rapidly changed over the past few years, expanding the legal bases upon which to capture consumer spending, and its attendant tax revenue. For lawyers in this area, it is crucial to understand and keep up with the ever-changing 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.

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