Fall 2016 Litigation Update

A. Sports Law Update

I. ***Third Circuit Strikes Down New Jersey Sports Gambling Law…Again*** – Amanda Alasauskas

In early August 2016, an en banc Third Circuit United States Court of Appeals struck down a New Jersey law that legalized sports gambling, finding that the state law conflicts with a federal law that bans state-sanctioned sports gambling in a majority of states.

This federal law is the Professional and Amateur Sports Protection Act (PASPA), passed in 1992, in an effort to prohibit state-sanctioned sports gambling. 28 U.S.C. §§ 3701–3704. Within PASPA, there is a provision allowing sports leagues whose games may be subject to gambling to bring an action to enjoin such gambling. 28 U.S.C. § 3703. However, PASPA does include exceptions for Nevada, Oregon, and Delaware. 28 U.S.C. § 3704(a). New Jersey was included in this exception, but only if a system for sports gambling was enacted within a year of PASPA's enactment. New Jersey failed to do so.

In 2012, New Jersey enacted the Sports Wagering Act ("2012 Law") after a referendum wherein sixty-four percent of New Jersey voters voted in favor of amending the state's Constitution in order to permit sports gambling. N.J. Stat. Ann. §§ 5:12A-1 *et seq.* (2012). The 2012 Law regulated sports wagering in casinos and racetracks in New Jersey, and created a regulatory scheme, which included licenses for operators and minimum cash reserves. However, this law was short lived, as five sports leagues—the National Collegiate Athletic Association (NCAA), National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL), and the Office of the Commissioner of Baseball, collectively referred to as "the Leagues"—sued in an effort to enjoin the law due to its violation of PASPA. The District Court enjoined the implementation of the 2012 Law, holding that PASPA was constitutional and was affirmed by the Third Circuit Court of Appeals in *NCAA v. Governor of New Jersey*, 730 F.3d 208 (3d. Cir. 2013) (*Christie I)*.

However, none of this dissuaded New Jersey, as the state's legislature passed SB 2460 in 2014 ("2014 Law"). The 2014 Law included language specifically prohibiting wagering on New Jersey college teams' competitions, as well as any collegiate competition that would occur within the state of New Jersey. N.J. Stat. Ann. § 5:12A-7. It also restricted any sports wagering to those persons' age twenty-one or over. *Id.* Again, the Leagues filed suit to enjoin the 2014 Law, and again, the District Court held that the 2014 Law violated PASPA. The District Court reasoned that *Christie I* held that PASPA offered two choices, maintain sports gambling prohibitions or repeal them entirely, and that PASPA preempts the 2014 Law because it is a partial repeal.

On appeal, New Jersey argued that the 2014 Law was in compliance with PASPA and constituent with *Christie I* because the state legislature had effected a repealer that was specifically permitted with *Christie I*. Further, New Jersey argued that any injunctive relief granted should be limited to those games of entities who are parties to the action and that the Leagues have supported sports gambling in other contexts, and, therefore, have unclean hands. On the other hand, the Leagues argue that the 2014 Law "authorizes" and "licenses" sports gambling, thus violating PASPA.

Again, the Third Circuit held that the 2014 Law violates PASPA due to its authorization of sports gambling. The court pointed to the "repeal" language used in the 2014 Law, rejecting New Jersey's argument that the 2014 Law simply repealed the sports wagering prohibition, which is not the same as authorizing sports wagering. The court also pointed to the language in the 2014 Law dictating who could participate and where sports gambling could occur, citing the definition of the word "authorize"—"[t]o empower; to give a right or authority to act." *Authorize, Blacks Law Dictionary* (6th ed. 1990). This definition enables the court's position that the 2014 Law authorized those persons' twenty-one years and older to participate in sports wagering in casinos, gambling house, and horse racetracks. While the 2014 Law contains a construction provision that stated that the 2014 Law was not to be "intended and . . . construed as causing the State to sponsor, operate, advertise, promote, license or authorize by law or compact" sports wagering, the court ruled that "clever drafting" does not save the law, as this provision mirrored language in PASPA. N.J. Stat. Ann. § 5:12A-8; 28 U.S.C. § 3702(1). *NCAA v. Governor of N.J.*, 799 F.3d 259, http://www2.ca3.uscourts.gov/opinarch/144546p.pdf. The Third Circuit reaffirmed its decision following an en banc hearing in February 2016. It is likely that New Jersey will seek cert from the United States Supreme Court in the future.

While the Third Circuit's ruling is binding for three states, it also sets precedent for the entire United States.

While not controlling for other circuits, the Third Circuit's finding will undoubtedly weigh heavily on the scales for states who are considering legalizing sports betting in the future, a hot topic in many states today. It is also likely that this decision will weigh heavily on future regulations on Daily Fantasy Sports, which could also bring up similar concerns with PASPA. *See also* Dustin Gouker, *If New Jersey Wins Sports Betting Appeal, What Might Happen Next in U.S.?*, LEGAL SPORTS REP. (Feb. 16, 2016), http://www.legalsportsreport.com/7524/new-jersey-sports-betting-case-impacts/; John Brennan, *Federal court ruling could be a fatal blow to legal sports betting in N.J.*, N. JERSEY (Aug. 9, 2016), http://www.northjersey.com/news/federal-court-ruling-could-be-a-fatal-blow-to-legal-sports-betting-in-n-j-1.1642017.

II. ***Jenkins v. NCAA* Reopens the Door to Compensation for Student Athletes** – Patrick Ouellette

Any discussion of *Jenkins v. NCAA* begins with the backdrop of the famous *O'Bannon v. NCAA* court holding in August 2014 that continues to have far-reaching ramifications. In *O'Bannon,* Northern District of California federal Judge Claudia Wilken held that the NCAA's efforts to ban student athletes from using their names and likenesses constituted "unreasonably restrained trade" and, therefore, violated the Sherman Act—the federal antitrust law—15 U.S.C. § 1. The court issued an injunction to the NCAA to end its anti-competitive prohibitions and stated that students may receive up to $5,000 per year for the use of their likenesses. The United States Court of Appeals for the Ninth Circuit later upheld Judge Wilken's decision, but it removed the $5,000 allowance and barred any compensation beyond the scholarship to the full cost of attendance. The removal of the allowance was a small victory for the NCAA because the Ninth Circuit made specific references to protecting amateurism. Both parties have appealed to the United States Supreme Court and will likely hear by late September or early October if the Court will take the case.

The status of the *O'Bannon* case will loom large in the *Jenkins* class action case, which also features Judge Wilken on the bench. The *Jenkins* Plaintiff class is made up of student-athletes who played NCAA Division I Football, Bowl Subdivision football, and men's and women's basketball from March 5, 2014 to present. The class argued that the NCAA's cap on the grant-in-aid (GIA), which included only the value of tuition, fees, room and board and required course books, violates the Sherman Act because it prevents schools from competing to recruit athletes based on compensation beyond what is allowable under the GIA cap. The Plaintiffs in *Jenkins* requested an injunction against the NCAA's rules limiting compensation for student-athletes, and some of the consolidated Plaintiffs sought damages for the difference between the GIAs awarded and the cost of attendance. The class also challenged NCAA rules prohibiting the provision of other "benefits" and "in-kind" compensation and cash compensation. Alternatively, the NCAA argued that removal of the GIA cap would mean the end of amateurism and moved for judgment on the pleadings in accordance with FED. R. CIV. P. 12(c) by arguing that "offering [student-athletes] cash sum untethered to education expenses was not a less restrictive alternative to the NCAA's current rules under the rule of reason." On December 4, 2015, the *Jenkins* court granted the Plaintiffs' amended joint motion for class certification under FED. R. CIV. P. 23 and also dismissed the consolidated Plaintiffs' claim under California's Unfair Competition Act.

Though *O'Bannon* technically opened the door for athletes to challenge the NCAA's ability to control how they are compensated for their likenesses to a degree, the *Jenkins* Plaintiffs' lead attorney Jeffrey Kessler would like to open that door completely by arguing that there should be no compensation restrictions at all. While there will likely continue to be some type of limits on amateur athlete compensation, Kessler and the Plaintiffs' argument that the NCAA policies equate to anticompetitive behavior will likely depend on how the court views *O'Bannon*. Specifically, the argument will be affected by whether the court focuses on the "unreasonably restrained trade" portion of the *O'Bannon* District Court holding or the Appellate Court's decision to continue promoting amateurism in the NCAA. Defendant NCAA's motion for judgment on the pleadings was denied on August 5, 2016. *Jenkins v. NCAA* (*In re* NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 2016 U.S. Dist. LEXIS 103703 (N.D. Cal. Aug. 5, 2016).

III. ***Third Circuit Determines Fans Lack Standing Over Super Bowl Tickets*** – Patrick Ouellette

The lead Plaintiffs in the class-action *Finkelman v. NFL* lawsuit were Ben Hoch-Parker and Josh Finkelman. Finkelman bought two Super Bowl XLVIII tickets for himself and Hoch-Parker through a third-party reseller at higher than face value for the tickets. Finkelman and Hoch-Parker alleged that their inability to access face value tickets through the National Football League (NFL), forcing them to resort to the resale market, was in violation of New Jersey's Ticket Law. The Ticket Law summer-2003/hospital-reality-show-falls . The Defendants classified themselves as journalists and contended the footage was newsworthy; thus permitting the application of the state shield that protected reporters from being compelled to reveal sources and other confidential information. Devon Douglas-Bowers, *"Freedom of the Press" and "The Shield Law": "Protecting the Public" from Independent Alternatives to the Mainstream Media*, GLOB. RESEARCH (Apr. 8, 2014), http://www.globalresearch.ca/freedom-of-the-press-and-the-shield-law-protecting-the-public-from-independent-alternatives-to-the-mainstream-media/5377081.

The Superior Court of New Jersey provided an inclusive perspective, noting that in light of "the variety of topics covered by news shows and [the] shadowy boundary between 'news' and 'entertainment,'" a show that presents "primarily human interest stories," but has "educational and public policy aspects" may be considered a form of "news media" under the law." Tannenbaum, *supra*. The Superior Court cited case law that provided a "broad definition of news, broad definition of news media, and a shield law that applies to unpublished and unaired as well as confidential information." *Id.*

In consideration of this ruling, and the fact that New Jersey contains one of the strongest shield laws in the United States of America, many producers of unscripted content, as well as networks that distribute unscripted programming, categorize unscripted programming as "news programming." *Id.*

For example, in California, KKI Productions, a company that films footage for an unscripted program titled, "Bait Car," argued that the state's shield laws protected the company from complying with a subpoena for footage because the content constituted a news program. Kristina Ackermann, *'Bait Car' Not Protected Under Shield Law*, EDITOR & PUBLISHER (Apr. 25, 2011), http://www.editorandpublisher.com/feature/bait-car-not-protected-under-shield-law/. Last year, A&E network became entangled in a private suit amongst participants of its show, "Married at First Sight." The network attempted to quash a subpoena for footage by claiming the requested footage constituted "newsgathering material" and handing it over would "intrude into the editorial process." Julia Marsh, *Reality TV Show tries to use journalist shield law to protect footage*, N.Y. POST (Nov. 19, 2015), http://nypost.com/2015/11/19/reality-tv-show-tries-to-use-journalist-shield-law-to-protect-footage/.

Because many producers of unscripted programing continually classify their shows as "news program," the Gawker ruling may have a compelling effect on reality television. The Gawker case included a prominent journalistic entity that hosted over 23 million visitors per month in 2015. *Gawker*, SIMILARWEB (July 19, 2016), https://www.similarweb.com/website/gawker.com#. In addition, the case involved the publication of footage containing a celebrity, a person whose privacy rights are invaded for sport by the paparazzi and whose banal, daily activities are even deemed newsworthy by *The New York Times*. Stephanie Marcus, *Kim Kardashian is Newsworthy, Even the New York Times Thinks So*, HUFFINGTON POST (Mar. 5, 2015), http://www.huffingtonpost.com/2015/03/05/kim-kardashian-newsworthy-new-york-times_n_6809526.html .

In light of these elements, how much longer can reality television entities that do not practice traditional journalism and lean on the participation of private citizens, rely on the categorization of their programming as "newsworthy?"

III. ***Pokémon Go and Sue for Nuisance!*** – Amanda Alasauskas

If you haven't heard by now, Pokémon Go, a game in which players use their smartphones to "catch" Pokémon in the real-world surroundings of the player by utilizing the camera and GPS features, has taken the world by storm. It was only released in early July and already has more than 25 million users hunting their favorite Pokémon on a daily basis. Throughout the game, players are able to stop at real locations that have been set as "Pokéstops"—where a user can collect valuable items to use through the game—and "gyms"—where users are able to battle their Pokémon to earn coins to spend in the game store. In light of such popularity, Pokémon Go has also been the centerpiece for legal concerns across the board, whether it be privacy, personal injury, or employment. One growing concern that surrounds the game is that of nuisance.

On July 29, 2016, Jeffrey Marder, a homeowner in New Jersey, filed a class action lawsuit against Niantic, Inc. (the game developer), The Pokémon Company, and Nintendo Co. Ltd. (who both co-own the franchise) in the Northern District of California. *Marder v. Niantic, Inc.*, No. 4:16-cv-04300-KAW, https://www.scribd.com/document/319936053/Marder-v-Niantic-Complaint-7-29. The proposed class includes "[a]ll persons in the United States who own property (i) the GPS coordinates of which were designated by Defendants, without authorization, as Pokéstops or Pokémon gyms in the Pokémon Go mobile application or (ii) abutting property the GPS coordinates of which were designated by Defendants, without authorization, as Pokéstops or Pokémon gyms in the Pokémon Go mobile application."

In his complaint, Marder alleges that the developers of Pokémon Go placed many of the Pokéstops and gyms "on or directly adjacent to private property" without the consent of the property owners and this has led to trespassers impeding on the enjoyment and use of the properties, thus, constituting a nuisance. Marder states that during the week of the game's release, he noticed strangers lingering on his property—at least five of those individuals had knocked on his door to ask for access to his backyard in order to catch a Pokémon—and an increase in vehicular traffic in his neighborhood allegedly due to the release of the game. Marder also cites to other instances, such as a similarly situated homeowner in Massachusetts, as well as the fact that Pokéstops had been placed inside of the United States Holocaust Memorial Museum in Washington, D.C.

Owners of private and commercial property have the right to protect their property, as well as their enjoyment of that property. Therefore, property owners are able to bring a suit for common law trespassing against an individual or they may follow Marder's example and file a claim for public nuisance. With respect to homeowners, a claim against individual trespassers is always possible, but at the rate it seems to be happening due to Pokémon Go, this route may become costly and time consuming. Meanwhile, business owners and managers may be covered by a commercial general liability policy. However, this does not enable property owners to ignore the problems that come with games such as Pokémon Go.

There are, however, alternatives to funding litigation costs and filing suit. There are, of course, the "traditional" ways of dealing with trespassing and nuisance of this sort: signage displaying "no trespassing" and enlisting the help of local governments. Signage gives an explicit warning, meaning that liability may be greater for a person who ignores it and local government help can help create leverage if it comes down to a lawsuit. The game itself also offers an option through a request form, which is used to add or remove a stop or gym from a property. As the game is still fairly new, the viability of this method is unseen, but it is possible that proof of requests will help in the event of a lawsuit. *See* Nicholas Kanter, *Pokémon Go Away: Monsters Creating Nuisance Problems*, JD SUPRA (Aug 12, 2016), http://www.jdsupra.com/legalnews/pokemon-go-away-monsters-creating-46618/; Ashley Cullins, '*Pokémon Go' Sparks $5M Class Action Lawsuit,* HOLLYWOOD REP. (Aug. 2, 2016), http://www.hollywoodreporter.com/thr-esq/pokemon-go-sparks-5m-class-916722.

IV. *Wiz Khalifa Pulls a 180 on Record Company Concerning 360 Deal* – Amanda Alasauskas

What do you get when an up-and-coming teenage artist signs a 360 deal with his manager and recording company? Well, in the instance of Wiz Khalifa, you get a lawsuit if you're the manager and record company. Wiz Khalifa—whose legal name is Cameron Jibril Thomaz— now 28, sued his former manager and label in May 2016 in order to void a 360 deal he signed when he 16. He is seeking $1 million plus punitive damages and legal fees. A 360 deal gives a percentage of profits from all of the commercial activities of the artist to the artist's management and label. Not to be overlooked is the fact that Benjy Grinberg, Khalifa's former manager, is also conveniently the founder and president of Rostrum Records, the label being sued. Grinberg began representing Khalifa in 2004.

Khalifa is suing for fraud and breach of fiduciary duty, and alleges that Grinberg and Rostrum had "induced" the rapper into signing a "360 agreement," allowing for Rostrum to share in Khalifa's songwriting, touring, and merchandising income streams. It further alleges that Grinberg failed to disclose alternative arrangements that had the opportunity to be more beneficial to Khalifa, but instead failed to disclose all material information required to make an informed decision and that Khalifa was persuaded to sign an agreement that "reached for more than a decade into virtually every aspect" of Khalifa's professional life.

Because Khalifa filed in California state court, he is able to invoke California's seven-year statute, which states that workers are not able to be held to personal service contracts for longer than seven years once service begins. Under the statute, if a musician is contracted for the production of a specified number of "phonorecords," the employer can sue for damages if the musician does not meet that obligation. Cal. Labor. Code. Sect. 2855(b). In his complaint, Khalifa claims that he has delivered six studio albums when the deal he signed required him to deliver only five.

In response to the lawsuit, Grinberg has stated he was "very disappointed and surprised" at the "egregious lawsuit filled with inaccuracies" and that it is disheartening when you support an artist for years and they turn on you. He wasn't too disappointed to file a cross-complaint against Khalifa in response. Grinberg and Rostrum are suing Khalifa for $2 million dollars for an alleged breach in their operative agreement, which states that Rostrum and Grinberg are entitled to receive fifteen percent of all royalties earned, fifteen percent of tour proceeds, and twenty percent of merchandise sales from Khalifa.

While this bout was just getting started, as Khalifa's attorney, Alex Weingarten, has stated, "[a]n artist's most trust advisor is his or her personal manager. Generally nothing good comes out when the manager decides to go into business against his artist." It will be interesting to see how the seven-year statute argument plays out, as this has notoriously been a problem with recording artists. The seven-year statute recently came to light when Kesha sought a preliminary injunction to nullify her contract so that she may record without involvement from Dr. Luke. Other acts, such as 30 Seconds to Mars and Metallica, have cited the statute in an effort to void their contract with their labels, but settlements have been reached before the statute could properly be reevaluated. Because a one or two album option has the possibility of tying a musician up quite a significant amount of time and labels are using 360 deals, more money is at a higher stake than ever before.

See Lorelei Laird, *Rapper Wiz Khalifa sues to void management and recording contract he signed as a teenager,* ABA JOURNAL (June 3, 2016), http://www.abajournal.com/news/article/rapper_wiz_khalifa_sues_to_void_management_and_recording_contract_he_s; Ted Johnson, *Wiz Khalifa's Lawsuit Challenges '360' Deal With Manager, Record Label,* VARIETY (May 31, 2016), https://variety.com/2016/biz/news/wiz-khalifia-rostrum-records-benjy-grinberg-1201786235/; Ashley Cullins, *Wiz Khalifa Sues to End Contract With Manager,* HOLLYWOOD REP. (June 1, 2016), http://www.hollywoodreporter.com/thr-esq/wiz-khalifa-sues-end-contract-898680; Althea Legaspi, *Rostrum Records Files Lawsuit Against Wiz Khalifa,* ROLLING STONE (June 29, 2016), http://www.rollingstone.com/music/news/rostrum-records-files-lawsuit-against-wiz-khalifa-20160629; Melinda Newman, *Following Kesha's Court Decision, Is It Time to Reexamine the Seven-Year Contract Statute?*, Forbes (Feb. 22, 2016), http://www.forbes.com/sites/melindanewman/2016/02/22/following-keshas-court-decision-is-it-time-to-reexamine-the-7-year-contract-statute/2/#1edf95ca5491.

V. ***DISH Network and Insurer Battle Over Forum Shopping*** – Kaaren Fehsenfeld

DISH Network Corp. has been in litigation with four major television networks (ABC, NBC, FOX, and CBS) since 2012 regarding Hopper, a technology allowing customers to record prime-time network programming, remove advertisements, and subsequently stream programs via mobile device. According to a complaint it filed in 2012, Ace American Insurance Co., DISH's insurer, denied any obligation to defend or indemnify DISH for the claims submitted by the networks. Complaint for Declaratory Judgment, *ACE American Insurance Co. v. DISH Network Corp. et al.*, No. 1:16-cv-01280-RBJ, (D. Colo. May 26, 2016.). Dish disputed Ace's denial of coverage in 2015.

Ace has contested its responsibility to pay DISH's litigation expenses related to the copyright claims brought by the television networks, claiming that 1) its excess policy does not apply to DISH's lawsuits; 2) the $500,000 retained limit (the amount Dish must pay before Ace will provide coverage) has not been met to trigger coverage; and 3) exclusions in the policy exempt Ace from its responsibility to cover Dish, including Dish's alleged "knowing violation of rights of another." Ace's coverage includes coverage for bodily injury, property damage liability, personal, and advertising injury liability.

In an unrelated suit, *Ace Am. Ins. Co. v. DISH Network*, LLC, 2016 U.S. Dist. LEXIS 40274 (D. Colo. Mar. 28, 2016), Ace won a declaratory judgment providing that Ace was not obligated to provide insurance coverage to DISH in a suit in which the United States and four states alleged DISH violated the Telemarketing Act and the Telephone Consumer Protection Act. *U.S. v. DISH Network LLC*, No. 3:09-cv-03073 (C.D. Ill.).

Ace filed suit against DISH in the United States District Court for the District of Colorado, , claiming it did not owe payment to DISH to cover the litigation expenses incurred fighting copyright infringement lawsuits related to its Hopper technology. Specifically, in its complaint, Ace asserts that there is no alleged property damage or bodily injury and that it is not obligated under several policy exclusions, including exclusions for "expected or intended" behavior, "contractual liability," "breach of contract," copyright infringement, and insureds in media and internet type business, among others. Ace sought a declaratory judgment pursuant to 28 U.S.C. §§ 2201–02. Ace seeks judgment that it has no obligation to pay "allocated loss adjustment expenses" to DISH with respect to the lawsuits with the television networks. According to Ace's complaint, each lawsuit with the networks' alleged primary or secondary copyright infringement and breach of contract. However, in each case the parties either reached a settlement, the case has been stayed, or the case has not yet been resolved.

Subsequently, DISH filed suit against Ace in the U. S. District Court for the Southern District of New York (*DISH Network Corp. and DISH Network LLC v. Ace American Insurance Co.*, No. 1:16-cv-0401, (filed May