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# Daily Fantasy Wide Open For Student-Athlete Publicity Suit

By **Zachary Zagger**

Law360, New York (August 31, 2016, 11:29 PM ET) -- College athlete publicity rights have been much litigated in recent years with mixed results, but experts say the athletes may have found the right target in the embattled daily fantasy sports industry with a lawsuit against DraftKings and FanDuel.

The suit targets the use of college football and basketball players' names and likenesses in daily fantasy contests and promotions.

With the college football season about to kick off, the ability of student-athletes to recover on claimed publicity rights has taken some big hits over the past year. Last September, the Ninth Circuit held that the NCAA and schools **could agree not to compensate** student-athletes for use of their names, images and likenesses. And just two weeks ago, the Sixth Circuit **shot down** a publicity rights lawsuit over the broadcasting of college sports games, which brings in billions of dollars for schools and athletic conferences.

But now, three former college football players at Indiana University and Northern Illinois University are **going after** DraftKings Inc. and FanDuel Inc., alleging they violated an Indiana right of publicity law by using the athletes' names and likenesses in daily fantasy sports contests and promotions without their permission. In defending their suit against dismissal this week, the players argued that the companies couldn't hide behind the **First Amendment** because their games are **"illegal gambling" operations**.

"I would think this would survive a motion to dismiss, but I think it is an interesting question whether a fantasy game deserves a First Amendment protection, because they are doing more than just commenting on the games," said Michael Marrero, an intellectual property litigator at Ulmer & Berne LLP. "They have created a whole separate industry."

DraftKings and FanDuel have faced a number of lawsuits in the past year over their pay-to-play daily fantasy sports, or DFS, contests, in which participants compete against each other for cash prizes by assembling imaginary rosters of athletes, with scores based on the real-life performance of those athletes.

The companies are bolstered by an Eighth Circuit decision from 2007, CBC Distribution and Marketing v. Major League Baseball Advanced Media, which held that Major League Baseball players do not have a publicity right to their names and statistical information when it comes to fantasy sports.

But the college players' case goes beyond alleging that DraftKings and FanDuel were just using their names and likenesses in the actual contest platforms. They claim each company used their names and likenesses in "a comprehensive advertising campaign … to

promote [the companies'] commercial enterprise, amassing millions of dollars in revenues from entry fees, without the athletes' authorization."

Their complaint points to the companies' strategy of using blog posts touting certain players as "value picks" or players whom a "customer could profit from" as a way to drive more users to their DFS contests.

"It is an interesting question as to whether or not those blog posts are promotions," said intellectual property attorney Marc Misthal, a principal with Gottlieb Rackman & Reisman PC. "It doesn't seem like they are traditional commercials, television commercials and print ads, but the line between promotion and not promotional in blog posts can get blurred. … As a practical matter, they probably served both purposes."

DraftKings and FanDuel actually have licensing deals with professional athlete organizations like the National Football League Players' Association — notably, FanDuel struck its deal after being hit with a publicity rights lawsuit by NFL wide receiver Pierre Garcon. And both companies have caved to pressure from the NCAA and dropped contests based on college and amateur sports for the time being.

But the matter is even more complicated, and potentially problematic for DraftKings and FanDuel, experts said. The student-athletes are arguing that the companies really can't fall back on the First Amendment or newsworthiness exceptions to Indiana's publicity law because their games, the players claim, are illegal gambling.

Questions over the legality of DFS contests on a state-by-state basis have dogged the industry for months. This has led several states, including Indiana, to pass laws specifically exempting the games from their definitions of gambling and explicitly legalizing the activity. But Indiana's law, signed by Gov. Mike Pence in March, still prohibits DFS contests based on college or amateur sports.

"Of course, the plaintiffs here are saying that [the companies] are doing a lot more than just using our names and statistics," said J. Michael Keyes, an intellectual property partner at Dorsey & Whitney LLP. "What they are doing is actually an illegal gambling operation, and in the process using our names and statistical information. That is the big distinction they are trying to make."

However, even if the games are illegal, student-athletes have had trouble proving they have a right to publicity tied to their participation in intercollegiate athletics, as they are classified as amateurs by the NCAA and must waive publicity rights when they agree to scholarship and aid packages.

In the much publicized O'Bannon v. NCAA antitrust case, the Ninth Circuit last September ruled that college athletes are not entitled to compensation beyond their scholarship and aid packages, striking down a lower court ruling that would have allowed schools to pay student-athletes up to $5,000 per year in deferred publicity rights compensation.

Further, in the Sixth Circuit case on broadcasting rights, the appeals court shredded arguments by former college football and basketball players who claimed to have a right of publicity under Tennessee law.

"If I were DraftKings and FanDuel, I would be looking at that as something where maybe the players have a right of publicity, but they have assigned it to the NCAA, and they are the ones who have to assert it," Misthal said.

But that doesn't mean college players are precluded from raising publicity rights claims. In Keller v. NCAA, a suit related to O'Bannon, video game maker Electronic Arts Inc., licensor Collegiate Licensing Co. and the NCAA agreed to pay a total of **$60 million** to settle claims

over the use of former student-athletes' likenesses in video games.

And experts said that here, if the players are able to show that DFS is or was illegal under Indiana law, that could go a long way toward showing their damages, since the players could argue their association with DFS has tarnished their names and likenesses.

"The only reason a college player doesn't have a right of publicity [is] because he or she has bargained it away as part of a scholarship deal to play Division I college sports," Marrero said. "But that doesn't mean that third parties like FanDuel or DraftKings have that right."

The case is Akeem Daniels et al. v. FanDuel Inc. et al., case number 1:16-cv-01230, in the U.S. District Court for the Southern District of Indiana.

--Editing by Mark Lebetkin and Philip Shea.

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