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Indiana high court latest battleground for players' rights

SPORTS MARKETING PLAYBOOK

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The Indiana Supreme Court is set to weigh in on whether online fantasy sports companies need the consent of athletes to use their names, pictures and statistics in their video contests and in advertising their contests. Seven unions representing players for Major League Baseball, the National Basketball Association, National Football League and National Hockey League, among other leagues, want to be heard in proposed class-action litigation filed by three former college football players.

A lot of money is potentially at stake for all parties involved. The defendants, the daily fantasy sports industry's two titans, Draft Kings and FanDuel, are responsible for nearly all of the revenue generated by the industry — approximately $3.2 billion in entry fees and $335 million in revenue in 2017, according to the Legal Sports Report.

The plaintiffs hope to represent up to 2,000 college football and basketball players whose names and likenesses they say the defendants market to current and potential daily fantasy sports players without permission.

At the same time, DraftKings and FanDuel have been busy expanding their operations in the wake of the U.S. Supreme Court's ruling to legalize sports gambling in the United States. In May, the Supreme Court overturned the Professional and Amateur Sports Protection Act, enacted in 1992 to prohibit betting on amateur or professional sports in most states.

Since that ruling, DraftKings and FanDuel have been working in states that have already passed legislation authorizing sports betting to obtain operating licenses. Shortly after the Supreme Court ruling in *Murphy v. NCAA*, Dublin-based sports betting company Paddy Power Betfair also acquired a controlling interest in Fan Duel and DraftKings announced that it was partnering with Atlantic City's Resorts Casino Hotel to offer sportsbook in New Jersey under the hotel's casino license.

Ironically, as Fortune and other outlets have pointed out, both DraftKings and FanDuel maintained for years that daily fantasy sports isn't gambling because it's a game of skill, no chance. DraftKings and FanDuel did yield to pressure from the National Collegiate Athletic Association and agreed in 2016 to stop running college-based contests to protect the integrity of the games.

In fantasy sports, a participant pays an entry fee and selects a roster of real-life athletes, subject to a budget so that participants can't simply scoop up all the best players. The results from real sports contests determines how each participant's fantasy team does.

For example, if one of a participant's chosen football players scores a touchdown in a real game, that translates into points for the fantasy team. Participants whose fantasy teams rack up the most points win money.

Giving athletes a cut of the daily fantasy sports action has never been part of the business model. But the dispute now before the Indiana high court could change that.

In 2016, former University of Illinois football player Akeem Daniels sued Draft Kings and FanDuel, seeking to represent up to 2,000 college football and basketball players whose names and likenesses the defendants market to current and potential daily fantasy sports players, without consent. Daniels filed suit in federal court in Indiana, where the NCAA is headquartered.

The plaintiff, later joined by two other college football players, Cameron Stingily and Nicholas Stoner, argues that DraftKings' and FanDuel's daily fantasy college football and basketball enterprise wouldn't be so successful, or even possible, without the athletes' performances or popularity.

The Indiana federal court dismissed the claims, citing an exception to Indiana's publicity rights statute that allows the athletes' names and likenesses to be used because the information is newsworthy.

On appeal, the 7th U.S. Circuit Court of Appeals did an end run, asking the Indiana Supreme Court to weigh in on the dispute. In mid-June, seven professional athlete unions asked the state high court to let them participate in the oral arguments.

The Major League Baseball Players Association, National Basketball Players Association, National Football League Players Association, National Hockey League Players' Association, Major League Soccer Players Association, U.S. Women's National Team Players Association and Women's National Basketball Players Association together filed a motion asking the Indiana Supreme Court to let them participate in oral arguments along with the plaintiffs and defendants.

The state high court previously granted the unions permission to file briefs addressing the right of publicity issue as amici curiae.

While the plaintiffs are former college athletes, which are not unionized, the dispute could have significant implications for professional athletes represented by unions.

Among other things, the unions negotiate and enter into group licensing agreements authorizing companies to use the names, likenesses and other attributes of the pro athletes they represent in a wide range of commercial products and services. The effectiveness of these licensing agreements largely depends on the enforceability of state right-of-publicity laws, the unions note.

The unions argue that, in this case, the federal Indiana court focused too narrowly on college

athletes' in-game statistics in holding that college athletes' performances are newsworthy or a matter of public interest.

Instead, the proper analysis should address whether the commercial use of identifiable players' names, likenesses or achievements in the marketing and operation of defendants' daily fantasy sports contests is newsworthy or broadcasts matters in the public interest, the unions maintain.

The unions question whether daily fantasy sports contests can fall under the statutory exception to an athlete's right-of-publicity claim when the contests' outcome is determined by rules governing athletes' in-game "salaries," team "salary caps" and points systems created by DraftKings and FanDuel — none of which have anything to do with "newsworthiness."

Other circuit courts have taken up the issue of athletes' publicity rights a number of times, although daily fantasy sports contests were not involved.

For example, former college basketball players Patrick Maloney and Tim Judge sued T3Media alleging the company exploited their likenesses by selling non-exclusive licenses permitting the download of photographs of the athletes from the NCAA's photo library for noncommercial use.

A California federal court held that the Copyright Act preempts the former athletes' claims and granted T3Media's motion to strike pursuant to California's anti-SLAPP statute. The 9th Circuit affirmed in 2017.

In addition to different factual claims, the case before the Indiana Supreme Court coincides with the recent legalization of sports gambling, representing a seismic shift in the professional and college sports landscape.

While it's unclear exactly how the state high court will rule, its decision will undoubtedly have a significant financial impact on the daily fantasy sports industry, professional and college athletes and the organizations that represent them.