



STINSON

AT THE CORNERS

IN THIS ISSUE

02

WHAT'S LOOT GOT TO DO WITH IT?

Aalok Sharma & David Kim

03

SHOULD INVESTORS BE WARY OF ESPORTS ARENAS? TRADITIONAL STADIUM LITIGATION HINTS AT RISK

Erick Orantes & Benjamin Eastburn

05

AN OVERVIEW: COLORADO'S EXPANSION INTO LEGALIZED SPORTS WAGERING

Aalok Sharma, Judith Araujo & Hailey Perkins

07

THE LINE UP

CONTACTS



David Kim

PARTNER \ ST. LOUIS

david.kim@stinson.com
314.259.4569



Benjamin Eastburn

ASSOCIATE \ MINNEAPOLIS

benjamin.eastburn@stinson.com
612.335.1582



Hailey Perkins

ASSOCIATE \ DENVER

hailey.perkins@stinson.com
303.500.7197



Judith Araujo

ASSOCIATE \ DENVER

judith.araujo@stinson.com
303.560.9180



Erick Orantes

ASSOCIATE \ KANSAS CITY

erick.orantes@stinson.com
816.691.2627



Aalok Sharma

ASSOCIATE \ MINNEAPOLIS

aalok.sharma@stinson.com
612.335.1428

WHAT'S LOOT GOT TO DO WITH IT?

AALOK SHARMA & DAVID KIM

The monetization of video game ecosystems is complex and loot boxes have come under scrutiny as publishers look for a continuous revenue stream. In video games, a loot box is a digital treasure chest that may be opened to reveal a randomized prize. In some cases, the prize is a coveted and rare item. In other cases, the prize is generic. Often sold through in-game microtransactions for real or virtual currency, loot boxes have turned into a multibillion dollar industry. Indeed, “freemium” game models are largely supported by these types of transactions. However, as frustrations with loot box mechanics continue to rise¹, regulators², legislators³, and others are now monitoring the use of loot boxes and other microtransactions in video games. As a result, game publishers and software developers should consider incorporating strategies from the FTC Staff Perspective Paper on Loot Boxes.

No court has directly examined the legality of loot boxes, and there are only a handful of decisions that tangentially discuss loot box mechanics.⁴ It should be noted, however, that the controversy over the loot box model is not unique, as there have been other industries that have faced similar controversy. For example, there have been several court cases involving allegations that trading card manufacturers were duping unsuspecting consumers.⁵ In those cases, consumers purchased sports trading cards, with some looking for the rarest of cards.⁶ As with loot boxes, many consumers never found

those valuable items, and complained that this activity constituted illegal gambling. Courts generally disagreed with that conclusion, noting that consumers received exactly what they bargained for—a pack of trading cards.⁷ Some courts even ruled that the trading card purchasers lacked standing because they never actually lost anything.⁸

GREATER DISCLOSURE REQUIREMENTS

On August 7, 2019, the FTC hosted a workshop where industry experts offered ideas for improving the loot box experience. Much of the workshop centered around disclosure requirements, noting that children are particularly vulnerable to loot boxes. Industry experts stated that games should disclose odds for prizes and that greater disclosure of loot box odds should reduce consumer disappointment. After the workshop, the Entertainment Software Rating Board (ESRB) issued guidance to its constituents recommending certain disclosures for in-game purchases. Such disclosures should be clearly provided when a game allows a user to purchase a digital item with currency, real or virtual, for any prize when the user does not know the specific prize they are acquiring. The Apple and Google stores require all apps with loot boxes to disclose odds for certain prizes, and Microsoft, Nintendo and Sony are expected to follow suit by the end of this year.

Other disclosures could also help reduce consumer disappointment

and possibly even improve the loot box experience. For example, game publishers might consider educating parents on how they can talk to their children about the use of loot boxes. Many parents do not know that they can set parental controls or remove credit card information from their game profile. The FTC also noted that game publishers or app developers could direct users to a website explaining loot boxes and the mechanics of loot boxes. Another consideration may include displaying a user’s in-game spending in “real world” money, as some may be confused by the conversion of virtual currency to real currency.

EDUCATION AND CONSUMER SELF REGULATION MEASURES

The importance of consumer education is critical. In addition to greater disclosure requirements, game publishers and app developers could offer the option for users or parents to self-exclude or set personal limits. In such scenarios, users could limit how much they could spend on loot boxes, or to wholly prevent spending any money on loot boxes. The industry could also help establish reasonable rules for how much screen time for children is appropriate.

Loot boxes serve as a critical revenue stream for game publishers. With the assistance of counsel, publishers and developers should take affirmative steps to educate users, and offer disclosures that avoid confusion.

¹ *Altes v. Epic Games, Inc.*, No. 5:19-cv-325-BO, 2020 WL 865420 (E.D.N.C. Feb. 20, 2020).

² FTC Staff Perspective Paper, 2020 WL 4727008.

³ See generally S. 1629, 116th Congress (2019).

⁴ In *Mason v. Machine Zone, Inc.*, 851 F.3d 315 (4th Cir. 2017), the appellate court concluded that there was no “loss” under Maryland law when a user spun a wheel to win a virtual prize. In order for there to be a “loss”, there also needs to be a “winner”. The game publisher retained money, regardless of whether the user won a valuable prize. In *Kater v. Churchill Downs, Inc.*, 886 F.3d 784 (9th Cir. 2018), the Ninth Circuit interpreted a Washington statute and concluded that virtual chips were a thing of value and that an online casino could be considered illegal gambling.

⁵ See *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998); *Chaset v. Fleer/Skybox Intern., LP*, 300 F.3d 1083, 1086 (9th Cir. 2002).

⁶ *Chaset*, 300 F.3d at 1086 (“There is a secondary market for trading cards . . . which places higher value on some cards than others”).

⁷ *Price*, 138 F.3d at 607 (“[P]laintiffs do not allege they received something different than precisely what they bargained for: six to twenty cards in a pack with a chance that one of those cards may be Ken Griffey, Jr.”)

⁸ *Dumas v. Major League Baseball Props., Inc.*, 104 F. Supp. 2d 1220, 1223 (S.D. Cal. 2000).

SHOULD INVESTORS BE WARY OF ESPORTS ARENAS? TRADITIONAL STADIUM LITIGATION HINTS AT RISK

ERICK ORANTES & BENJAMIN EASTBURN

As esports have remained resilient during the pandemic, investors have shown a commitment to leveling up esports infrastructure. Historically, esports contests have been held in retrofitted convention centers, casinos and clubs. The accelerated growth of esports, however, has led to billions of dollars in investments, including a focus on esports-specific stadium construction and other capital expenditures. Indeed, dozens of esports arenas have been built, including one in Arlington, Texas.¹ Another esports arena is currently being built in Philadelphia by an ownership group that has several entities in its portfolio, including the Philadelphia Flyers and Wells Fargo Center.² But with slow returns and rising construction costs,³ esports investors, like their traditional sports counterparts, need to consider the additional risk of litigation when

putting their money into esports arenas.

ADA LITIGATION IN STADIUMS

The Americans with Disabilities Act (ADA) is a law that was passed to provide a national mandate and consistent standards for individuals with disabilities. The ADA is frequently invoked in litigation against stadium owners, operators and lessees, and therefore it should be a consideration in the construction of arenas.⁴ As an example of potential liability, Levi’s Stadium, the home of the San Francisco 49ers professional football team, was the subject of recent ADA litigation. In that action, a class of plaintiffs alleged multiple ADA violations at the stadium, including: (i) being unable to locate the elevators; (ii) that the stadium lacked accessible

stadium seating; and (iii) the security checkpoints were not large enough for wheelchair access. After almost four years of litigation, the court approved a historic settlement that required the defendants to pay over \$24 million to the class.⁵ Because of the risk of protracted litigation, esports arenas should consider whether they are in compliance with the ADA, and take reasonable action to meet standards set forth by state and federal law.⁶

COMPLIANCE WITH LOCAL AND STATE RULES

Litigation frequently occurs when zoning and constructing planning does not comply with local and state rules.⁷ Accordingly, it is prudent that esports-specific construction take into consideration this regulatory framework before proceeding. For

example, Major League Soccer's Nashville Soccer Club encountered a dispute surrounding the construction of their new stadium near the fairgrounds in Nashville.⁸ In that action, a group of plaintiffs made multiple claims against the City of Nashville and halted the construction of the stadium. Specifically, the dispute centered around whether the City of Nashville complied with the city charter, and whether those city officials abided by the rules when they approved a 30,000 seat stadium for Nashville SC.⁹ After months of litigation, the City of Nashville complied with city requirements by holding another vote that was consistent with local and state rules and regulations. After the vote, construction was allowed to proceed.

STADIUM CONSTRUCTION DEFECT LITIGATION

Many new stadiums contain state-of-the-art building materials, processes or designs, which almost inevitably lead to design or construction-defect claims. U.S. Bank Stadium, home of the Minnesota Vikings, was constructed with faulty nails that caused massive leaks, requiring an additional \$21 million to repair.¹⁰ In another instance, Atlanta's Mercedes-Benz Stadium, home to both the Atlanta Falcons and the Atlanta United, required millions in repair costs because of its defective cellular distributed antenna systems (DAS).¹¹ IBM, the contractor responsible for the DAS, sued a subcontractor for its "botched" design, after IBM purchased over \$20 million in equipment and materials to build

the DAS. Both Minnesota and Atlanta placed the bills on the companies and contractors rather than the taxpayers for faulty construction equipment, but luckily avoided costly litigation that may have exposed investors to more risk and delays in return.

Thus far, the esports construction disputes have not resulted in extensive litigation. There are, however, numerous plans to build world class arenas for esports. As exciting as these developments are, it would be naïve to believe that esports are somehow exempt from these litigation pitfalls. As the esports industry grows and invests in capital expenditures, it should learn from their traditional-sports counterparts and engage legal counsel early and often to head off potentially costly errors.

¹ Esports Stadium Arlington is a 100,000 square foot venue and can hold up to 2,500 spectators.

² Construction on Fusion Arena in Philadelphia has been largely halted because of the current COVID-19 pandemic.

³ See <https://esportsinsider.com/2020/07/esports-investors-roi/>; see also <https://www.thomasnet.com/insights/the-rising-costs-of-sports-stadium-and-arena-construction/#register>.

⁴ ADA lawsuits against stadium owners, operators, and lessees are common. As an example, over the last two decades, courts have heard arguments about line of sight for those in wheelchairs, and for claims for those who are deaf and hard of hearing. See *Colorado Cross-Disability Coalition v Colorado Rockies Baseball Club, Ltd.*, 336 F. Supp. 2d 1141 (D. Colo. 2004); see also *Feldmen v. Pro Football, Inc.*, 579 F. Supp. 2d 697 (D. Md. 2008).

⁵ See generally *Nevarez v. Forty Niners Football Co., LLC*, Case No. 5:16-CV-07013, N.D. Cal.

⁶ Developers and owners should consider whether an existing facility's noncompliance is excusable. As an example, federal regulations state that an accommodation shall remove barriers in existing facilities "where such removal is *readily achievable* . . .". 28 C.F.R. § 36.404(a) (emphasis added). Accordingly, a defendant could assert that a modification to an existing facility is not readily achievable, and is not required for ADA compliance.

⁷ Some states have imposed stringent requirements directly related to sports teams. See *Ohio v. Precourt Sports Ventures, LLC*, Case No. 2018 CV 001864 (Ohio Ct. Com. Plea 2018). In that case, litigation was initiated surrounding a potential move by Major League Soccer's Columbus Crew because an Ohio statute prohibits relocation if a team plays in a "tax-supported facility" and received government-provided "financial assistance" unless certain conditions are met.

⁸ See *Save Our Fairgrounds v. Metro. Govt. of Nashville*, No. M2019-00724-COA-R3-CV, 2019 WL 3231381 (Tenn. Ct. App. July 18, 2019).

⁹ In June of 2020, the district court held that city officials failed to abide by open meeting requirements which provide for adequate notice of government meetings. Because the city failed to hold an open meeting to discuss the merits of the construction contract, the contract was deemed invalid.

¹⁰ <https://www.coliseum-online.com/us-bank-stadium-exterior-repairs-to-cost-a-bomb/>

¹¹ <https://www.mobilesportsreport.com/2018/11/ibm-sues-corning-over-botched-mercedes-benz-das-deployment/>

AN OVERVIEW: COLORADO'S EXPANSION INTO LEGALIZED SPORTS WAGERING

AALOK SHARMA, JUDITH ARAUJO & HAILEY PERKINS

In order to enact legalized sports wagering in Colorado, voters were required to approve a ballot measure, Proposition DD in 2019. The initiative barely passed with 50.8% of the vote. With the passage of Proposition DD, sports wagering became legalized in Colorado, joining a slew of other states and Washington, DC. Beginning on May 1, 2020, all 33 of Colorado's casinos became eligible to offer legalized sports wagering. With the expansion of legalized wagering in Colorado, a host of financial and logistical questions will arise that may require consultation with counsel.

LICENSURE, FEES AND TAXES

Only licensed entities in Colorado may offer sports wagering. Under current Colorado law and state regulations, there are five different types of licenses: (1) a Master License; (2) a Sports Betting Operator License; (3) an Internet Sports Betting Operators License; (4) a Vendor Major License; and (5) a Vendor Minor License.

Similar to traditional gaming licenses, the application and investigative process for a license can be intrusive, time consuming and expensive. Per Colorado law, applicants must disclose personal background information, including sensitive financial information pertaining to the applicant's business operations.

Licensing fees in Colorado could cost up to \$125,000; however, the Colorado Division of Gaming has determined that the fees should be lower. As such, the licensing fee will vary upon the license, but will not exceed \$2,000. Each license must be renewed every two years.

Under Colorado law, sports operators' gross gaming revenue (GGR) is taxed at 10%. This is more favorable than other jurisdictions, which impose higher tax rates and higher licensure fees. Some tax revenue from legalized sports wagering will be directed to Colorado's water plan.

PROHIBITED CONDUCT AND WAGERS

Colorado prohibits various types of wagers and conduct. As an example, Colorado requires any individual seeking to wager on sports must be at least 21 years of age. In addition, individuals who possess nonpublic information, or are on an exclusion list, cannot place wagers. The statute also limits types of permissible wagers. In Colorado, no sports book can offer wagers related to a high school sports event, collegiate proposition bets, or esports events that are not sanctioned by a governing body.

COLORADO'S LAUNCH

Since the May 1, 2020 launch,

Colorado has licensed casinos located in three cities near Denver for sports wagering: Black Hawk, Central City and Cripple Creek. As far as online wagering, DraftKings, FanDuel, PointsBet, Betfred, BetMGM, FoxBet, William Hill, Elite Gaming and others have all entered the field. It is expected that the Colorado marketplace will continue to grow because of Colorado's generous mobile/online wagering platform, remote registration and low tax rates. During the month of September, over 98% of wagers were placed through mobile wagering platforms.

Commercial partnerships have also been struck between professional teams, collegiate teams and sportsbooks. The Denver Broncos have partnered with three sportsbooks – FanDuel, Betfred and BetMGM; the Denver Nuggets, Colorado Avalanche, and Colorado Mammoth (all owned by Kroenke Sports & Entertainment) have partnered with PointsBet; and the University of Colorado has also partnered with PointsBet.

The Division of Gaming reported that Coloradans wagered approximately \$25.6 million in May 2020, \$38.1 million in June 2020, \$59.1 million in July 2020, \$128.6 million in August 2020, and \$207.6 million in September 2020.

LOOKING FORWARD

While other states continue to lag with onerous tax rates, or the imposition of in-person registration, sports wagering in Colorado should expand quickly. Indeed, other jurisdictions that are considering enacting sports wagering should view Colorado's model for its simplicity and lower barriers to entry.

¹ Pursuant to a 1992 amendment to the Colorado Constitution, any approval of new taxes or increases in taxes requires voter approval. Since legalized sports wagering will be regulated and taxed in Colorado, voters were required to approve the measure.

² Operators are allowed to deduct free bets, payments to players, and the .025% federal excise tax.

³ In addition to in-house sports books, operators are allowed to contract with a separate internet sports betting operator. Thus, an internet sports betting operator does not need a brick-and-mortar location to offer sports wagering.

THE LINE UP

01

.25% AND 2%. In addition to licensing fees, state and local taxes, and other regulatory costs, the federal government imposes a .25% excise tax on all handle (i.e. the total dollar amount of wagers accepted) for legal sports wagers, and 2% excise tax for all unauthorized wagers. Based on new Internal Revenue Service guidance, fantasy sports operators could also be subject to new taxes typically reserved for legal sports wagering. If the new guidance is enforced, fantasy sports handle would generate millions of dollars in taxes, and additional regulatory and compliance costs. There are continued questions about the implementation of any IRS guidance, and whether the IRS regulations will conflict with case law that differentiates legal sports wagering from fantasy sports.

02

\$2 BILLION. On September 24, the Kentucky Supreme Court ruled that computer terminals that allowed for historical horse wagering could not be classified as pari-mutuel gambling, and thus were impermissible under Kentucky law. Among other reasons, the court held that there is no pari-mutuel pool without simultaneous access to the historical horse race for all bettors. Rather, the court stated that “pari-mutuel wagering requires that patrons generate the pools on the same discrete, finite events.” The court’s decision will have immediate ramifications to the state’s budget because over \$2 billion dollars was wagered in Kentucky on historical horse racing. Other states that utilize historical horse racing should review the creation of player pools, and determine whether their contests comply with federal and state law.

04

512. During this summer, Twitch streamers received notices that some of their clips contained copyrighted music, and was subject to a DMCA takedown. In an earlier post, Stinson attorneys Samir Mehta and Aalok Sharma discussed [Section 512 of the Digital Millennium Copyright Act, and its implications for streamers.](#)

06

\$575 MILLION. In August, RedBall Acquisition Corp. raised \$575 Million as a Special Purpose Acquisition Company (SPAC). Co-founded by Gerry Cardinale, founder of RedBird Capital, and Billy Beane, GM for the Oakland Athletics, RedBall joins the growing list of SPACs focused on sports-related entities. Far from a trend, economists believe that the sports industry is ripe for SPACs, or other investment vehicles, due to the COVID-19 pandemic and its adverse effect on revenue across the entire sports industry.

03

\$1.625 MILLION. The University of Colorado Athletic Department and PointsBet announced a five-year partnership with the sports wagering operator for an estimated \$1.625 million to be paid over the five-year term of the deal. While the University of Nevada Las Vegas was the first university to contract with an operator, the University of Colorado’s arrangement represents an expansion. It will allow the university to find new revenue streams, and refill their coffers, which have been decimated by the coronavirus. Given that sports wagering has not been legalized in all jurisdictions, universities and athletes need to comply with local and state law. In addition, universities and colleges should educate student-athletes on rules that prohibit sports wagering by student athletes, and enforce policies to preserve game integrity.

05

3. Over 40% of Americans live in jurisdictions that allow for legalized sports wagering. In November, that number will likely expand, as legalized sports wagering was on the ballot in three states: Louisiana, Maryland and South Dakota. In all three states, the ballot initiatives passed, and the opportunity to legalize sports wagering should provide for additional tax revenue, fan engagement and opportunities. Bettors, however, won’t be able to place legalized wagers until each state enacts the necessary regulatory framework, which will take several months. Additionally, three states (Michigan, Tennessee and Virginia) are expected to launch their sports betting within months. These six states represent roughly 12% of the adult population.

LOCATIONS

MINNEAPOLIS

50 South Sixth Street
Suite 2600
Minneapolis, MN 55402
612.335.1500

DALLAS

3102 Oak Lawn Avenue
Suite 777
Dallas, TX 75219
214.560.2201

KANSAS CITY

1201 Walnut Street
Suite 2900
Kansas City, MO 64106
816.842.8600

ST. LOUIS

7700 Forsyth Boulevard
Suite 1100
St. Louis, MO 63105
314.863.0800

PHOENIX

1850 N. Central Avenue
Suite 2100
Phoenix, AZ 85004
602.279.1600

WASHINGTON, DC

1775 Pennsylvania Avenue NW
Suite 800
Washington, DC 20006
202.785.9100

DENVER

Independence Plaza
1050 17th Street
Suite 2400
Denver, CO 80265
720.728.7650

DENVER TECH CENTER

6400 South Fiddlers Green Circle
Suite 1900
Greenwood Village, CO 80111
303.376.8400

OMAHA

1299 Farnam Street
Suite 1500
Omaha, NE 68102
402.342.1700

WICHITA

1625 North Waterfront Parkway
Suite 300
Wichita, KS 67206
316.265.8800

NEW YORK

1325 Avenue of the Americas
27th Floor
New York, NY 10019
212.763.8491

JEFFERSON CITY

230 West McCarty Street
Jefferson City, MO 65101
573.636.6263

BISMARCK

424 South Third Street
Bismarck, ND 58504
701.221.8600



STINSON

STINSON LLP \ STINSON.COM