NORTH CAROLINA BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

SPORTS & ENTERTAINMENT

Published by the NCBA's Sports & Entertainment Law Section Section Vol. 11, No. 2 June 2011 www.ncbar.org

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The Chair's Comments

A Word from Coe W. Ramsey


Ramsey

That's a wrap! Another NCBA fiscal year has quickly come and gone.

Our section had a great year. We provided two very successful CLEs. In January we co-sponsored a joint CLE with the Antitrust & Trade Regulation Law Section on antitrust in the sports and entertainment fields. Also, as summarized later in this newsletter, along with the Indianapolis Bar Association, we co-sponsored the 4th annual TRAC (The Racing Attorney Conference) which was held in Indianapolis in April. Both of our CLEs were well attended, each with over 75 attendees. Special thanks to Matt Efird and Brooke Beyer for their respective roles in these programs.

We also had a full social calendar, hosting three networking events. On October 7, we had a well-attended event at The Players' Retreat in Raleigh. In November, we enjoyed a tour of the RBC Center, dinner, and a Hurricanes game. In March we toured and held a networking event at the N.C. Music Factory in Charlotte. Each of these events provided an opportunity for our section members from across the state to get to know each other. Many law students also accepted our invitations to attend these events, which provided forums for the students to get to know our members and learn about sports and entertainment practices in North Carolina.

To close the year, we have another stellar newsletter. This issue features articles about N.C. State's dispute with Loyola over the trademark "Wolfpack," talent agency licensure laws, UNC fullback Devon Ramsay's experience with the NCAA's investigation into UNC's football program, and a summary of pending entertainment and sports law-related legislation in N.C. General Assembly. We also catch up with one of our distinguished members and Past Chair William Bray, in this issue's member spotlight. Thanks again to Brooke Beyer who has done a tremendous job as our newsletter editor and has been particularly instrumental in providing writing opportunities for law students. Although Brooke is turning over the reins after this issue, his efforts with the newsletter over the past several years have made lasting impressions which are sure to carry on.

I am grateful to our section's leadership and their support over the past year. In particular, special thanks are warranted to Julie Fink, Stephanie McGee, and the rest of the NCBA staff whose assistance this year has been invaluable.

We are in great hands in 2011-2012 with our incoming Chair Jonathan Fine, Vice-Chair Rick Conner, Secretary Dennis Gibson, Treasurer Mac Alston. The new 2014 council members are Mac Alston, Matt Efird, Richard Farley, and Andy Gerber.

My involvement in the section has been very rewarding to me-both professionally and personally. I can highly recommend it. There are plenty of opportunities for members of our section in the coming year. We have several committees and other ways for members to participate. Just let us know how you'd like to be involved and I am sure we can find a place for you.

Hope you have a great summer and thanks for a great year! ■

SPORTS & ENTERTAINMENT

VOL. 11, NO. 2 JUNE 2011

Published by the NCBA's
Sports & Entertainment Section

NORTH CAROLINA BAR ASSOCIATION
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Speaker

Professor John V. Orth, University of North Carolina at Chapel Hill
John V. Orth is the William Rand Kenan, Jr. Professor of Law at the University of North Carolina at Chapel Hill. He received his A.B. degree from Oberlin College, his J.D., M.A. and Ph.D. degrees from Harvard University. After completing law school and graduate school, Professor Orth clerked for Judge John J. Gibbons of the United States Court of Appeals for the Third Circuit. He is the author of a number of books on legal subjects, as well as many scholarly articles and book reviews. His areas of expertise are Constitutional Law, Legal History and Property Law.

Program

In this colloquium, we examine the origin and sources of law, with particular reference to the American legal tradition. Part of America's English heritage was a 600-year-old legal system based primarily on decisions made by judges, applying "the common law." A compound of ancient custom, sporadic legislation, and occasional reform, this system was transported to the English colonies in North America. Confronting the challenges, not just of a new environment, but eventually of a new political system based on written constitutions, the common law proved remarkably adaptable. Over the course of two and a half centuries, a growing number of statutes led to the complex interaction between common law, constitutions and legislation that has created the dynamic system in operation today.

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NORTH CAROLINA FOUNDATION BAR ASSOCIATION
CONTINUING LEGAL EDUCATION

Defending the Pack

N.C. State Plays Hardball

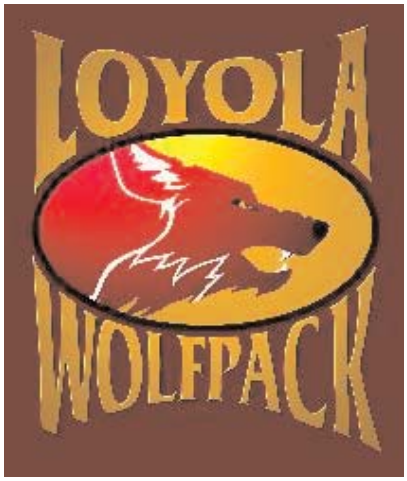
by Eddie Ramirez

For over 60 years, North Carolina State University (N.C. State) has been known as the Wolfpack. During this time, N.C. State won two NCAA Basketball National Championships in 1973 and 1984, as well as seven NCAA Football ACC Championships, and over 50 combined ACC and National Championships in 13 other men's and women's NCAA sports.

The athletic teams at Loyola University New Orleans are also known as the Wolfpack. The athletics program was shut down in 1972 for financial reasons, but was reinstituted in 1991. The school's athletic teams now compete in the Southern States Athletic Conference. The Loyola Wolfpack women's basketball is the only Loyola team to have won any form of Championship. They have won three Southern States Athletic Conference titles.

Despite the striking differences in the historical caliber, success, reputation, and tradition of their athletic programs, the two school's athletic programs are now legally connected. N.C. State has issued Loyola University New Orleans a cease and desist request, claiming that Loyola's use of the "Wolfpack" name constitutes trademark infringement. Under Federal law, the owner of a trademark has the duty to affirmatively protect their trademark from any possible infringement. Defense of the mark serves as a means for its owner to maintain federal protection of the mark. Federal law mandates this type of active protection of the trademark even in situations where the infringement is not willful or malicious.

N.C. State has been known as "Wolfpack" since the 1940s, but the school did not register the name as a trademark until 1983. Since that time, the school colors have been red and white, and the mascot has been the "Strutting Wolf," affectionately known as "Tuffy." In the past, it has become necessary for N.C. State to defend its trademark of the Wolfpack name. In 2008, N.C. State and the University of Nevada were involved in a similar trademark infringement lawsuit. The University of Nevada dons the mascot "Wolf Pack," and its colors are also red and white. Furthermore, the University of Nevada's mascot once wore a hat similar to the one worn by N.C. State's "Tuffy." Upon discovery of the potential infringement, N.C. State and the University of Nevada entered into an agreement that would protect N.C. State's trademark rights in the Wolfpack name. Under the terms of this agreement, Nevada agreed not to depict its mascot wearing red and white colors, or the hat which was similar to that of N.C. State's. The University of Nevada also agreed to use "Wolf Pack" as two words, unlike the single word used by N.C. State.



Loyola University has been known as the Wolfpack since the 1930s. Its athletic program, however, has experienced many ups and downs. In 1972, Loyola decided to suspend its athletic program, citing financial reasons. The program remained inactive until 1991, when the school reinstated six intercollegiate athletic teams. Loyola's entire athletic program is funded by student fees, and it offers only one athletic scholarship for all of its teams. Loyola's colors are maroon and gold, and its mascot continues to be the Wolfpack.

Though the situation between N.C. State and the University of Nevada is different from that of N.C. State and Loyola, legal counsel for N.C. State believes the a valid infringement claim exists, prompting N.C. State to take action against Loyola. N.C. State's claim rests on the trademark of the word "Wolfpack" and its association with apparel, merchandise, and the promotion of sporting events. N.C. State asserts that if Loyola or any other collegiate program uses the name Wolfpack, it is likely to result in confusion with N.C. State. At this early stage a situation with the potential for litigation between the schools, N.C. State only alleges that Loyola has potentially infringed on its trademark. Loyola's apparent lack of willful misconduct or malice has prompted N.C. State officials to propose negotiations between the two schools.

During these negotiations, N.C. State will propose various options to Loyola. These options would allow Loyola to maintain the use of the Wolfpack as its mascot, but to do so in a manner not infringing on N.C. State's trademark. Much like those offered to the University of Nevada, these options may include that Loyola be required to make physical changes to its logos differentiating them from those of N.C. State. N.C. State officials have also alluded to a requirement that Loyola to differentiate its Wolfpack by using the name in combination with another identifying and differentiating word. For example Loyola might use the "Loyola Wolfpack."

Loyola's reaction to the situation has been

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a calculated response. Until the current factual situation is completely determined, it is Loyola's position that its current usage of Wolfpack does not infringe on N.C. State's trademark. The differences between the two uses of the name, some say, could be stark enough to give Loyola a plausible defense to trademark infringement. Barbara Osborne, J.D., Associate Professor at the Department of Exercise and Sports Science at the University of North Carolina Chapel Hill, believes that: "[I]f it's just the name alone, without identifying school colors or a similar mascot logo, that the other institution is using, it can be argued that the term 'Wolfpack' is just too generic for N.C. State to have sole claim over it." However, Osborne appreciates N.C. State's position and understands the federal law. "But, N.C. State has an obligation to zealously protect their mark, and that is what they're doing in this situation."

N.C. State, with its storied and successful athletic tradition, certainly has reason to protect its trademark. It is N.C. State's position that there can only be one "Wolfpack" and consequently, it is seeking trademark protection for the name. Loyola University's athletic program has overcome adversity to establish itself as a credible institution, doing everything possible to demonstrate its school pride. Loyola's response to N.C. State's cease and desist letter, as well as its future conduct, must involve careful consideration of its program's future and the legal ramifications of its actions.

Eddie Ramirez is a rising 3L at Charlotte School of Law.

Member Spotlight: William Bray

by Julia Kirby


Bray

Sports and entertainment law is a field that many desire to pursue, but only a few actually practice. Countless times we hear stories of people "making it" in this area of the law who attribute their success to luck, or "being in the right place, at the right time." While this may be true for many people, William Parks Bray finally gave me the answer I was looking for: "You make your own luck."

How did he do that? He worked very hard. As the founding member of Bray & Long, PLLC, he has done an outstanding job of marketing his firm. He has made it a point to diversify his business, while still honing in on the extensive, primary areas of his practice, including general corporate representation, mergers and acquisitions and private placement transactions, motorsports, entertainment, and business litigation. While remaining relatively small, the versatility of the firm is one of its main selling points.

Bray reminded me that his vast clientele did not sprout overnight. Over the past eighteen years, Bray's extensive career has taken him in many directions. After graduating with a B.A. from Davidson College and a J.D. from the University of South Carolina, Bray began his legal career as an Assistant Solicitor for the 16th Judicial Circuit of South Carolina. There, he prosecuted drug-related offenses and violent crimes throughout York and Union Counties, including the devastating Susan Smith trial. He then became an associate at Morris, York, Williams, Surles & Brearly in Charlotte, North Carolina. After that, he returned to South Carolina where he went into practice for himself, becoming a partner in the firm of Bray & Chiarenza in Rock Hill. While continuing his law practice, Bray became the managing director of The Links Golf Group, a sports marketing company, providing corporate entertainment for major companies at sporting events throughout the world.

As I sat with Bray, he candidly told me that he did not even think of finding a legal job in sports. After the tragic events of 9/11 and the ".com bubble burst," the economy took a dip in 2002 and overseas travel was not what it used to be when Bray started at The Links Golf Group. Companies reduced spending in reflection of current economic conditions. With the ever-present encouragement of his wife and children, Bray made the decision to open this office in 2003.

Aided by his extensive business experience with NASCAR and golf, Bray's practice has been booming. His focus in opening the practice was not in the realm of litigation or the legal area as a whole. Bray wanted to build a business that excelled in corporate law and that is exactly what he has done. His day-to-day work consists of drafting contracts and transactions as well as buying and selling companies. He explained to me that 50 percent of his work is that of a general corporate attorney. Bray works with software developers, construction, restaurants, intellectual property, mergers, and acquisitions. These transactions range from $200K to $2M in value.

Through his law practice, Bray has gained extensive contacts in the business world and fostered his reputation as a sports lawyer. Bray reminded me that it is "a small world." His referral network is invaluable to his firm. There are few people who work in areas such as NASCAR, and there are still fewer with Bray's wide range of experience, which includes working with such organizations as the American Le Mans Series and the American Powerboat Association. Bray still does legal work for these corporations, such as drafting contracts, and he explains that his practice is very similar to others, except that his is unique and much more fun.

Bray reminded me to "go after it." Marketing, networking and involvement are invaluable. For example, to further his involvement, four years ago he was one of the founders (and currently on the planning committee) of The Racing Attorney Conference (TRAC), which brings the world of motorsports together annually (See *www.racingattorneys.com* for more information).

The advice I received from Bray was threefold: (1) Contacts: maintain all connections because there are many ways to be

involved in sports. For example, there are attorneys who only handle traffic violations for athletes. (2) Open Mind: Keeping an open mind, in terms of what type of services one can offer for example, makes possible numerous ways to get in the door. (3) Volunteer your time! Volunteering builds experience and that experience helps create opportunities.

Over this Memorial Day Weekend, while many of us were attending one of the most anticipated events of the year, Bray was at work representing NASCAR race teams and drivers in Charlotte's very own Coca-Cola 600. With Bray's extensive experience serving as lead counsel in more than 60 jury trials throughout North and South Carolina and serving as primary outside counsel for several dozen corporations in a variety of industries, one searching for an expert attorney need look no further than Bray.

Bray's story is motivational to say the least. He reminds all of us that no matter how challenging, one must do the work.

Julia Kirby is a rising 3L at Charlotte School of Law.

Indianapolis Hosts 4th Annual TRAC

by Zach Daniel & Cate Sabatine

With each of the major motorsports' seasons well under way, the latest stop on the circuit for many attorneys in the racing industry was none other than Indianapolis, Indiana for 2011's The Racing Attorney Conference (TRAC). Presented by the Entertainment and Sports Law Sections of the Indianapolis Bar Association and the North Carolina Bar Association, TRAC 2011 was held at the luxurious Conrad Indianapolis in the heart of downtown Indy on April 13-14. With many panels reaching into less discussed legal topics as they relate to the motorsports industry, this year's event provided its attendees with a unique array of legal advice and insight from many well-qualified panelists currently practicing in motorsports.

TRAC 2011 had over 80 attendees, including some excited (and attentive) new faces.

Lauri Eberhart Wilks moderated a panel on creating new events in motorsports.

Injunctive Litigation in Motorsports

After a hearty Hoosier State welcome from this year's host and TRAC co-founder Wesley Zirkle, the event kicked off with a panel dedicated to the handling of time sensitive emergency or injunctive relief, as it relates to motorsports. Moderator William Bray of The Bradley Law Firm, PLLC in Charlotte presented an often-feared hypothetical in which a driver under contract informs his team that he has decided to leave and race for a competitor's team in the upcoming weekend's race.

Panelists Joel Tragesser, of Frost Brown Todd LLC in Indy, and Cliff Homesley, of Homesley & Wingo Law Group in Mooresville, NC, discussed the delicate balancing act between seeking relief through court enforcement and not upsetting the racing community via bad public relations. Bray and Homesley shared humorous anecdotes from their days as opposing counsel, battling over attachment orders allowing the local sheriff to lock down team racing haulers in response to outstanding debt.

Tragesser went on to explain other remedy options, including Indiana's replevin statute, and stressed the need to be able to differentiate between a client's "sudden emergencies" which require quick thinking and "predictable emergencies" that can be prepared for in advance. Bray suggested that clients in the motorsports industry may be particularly difficult to represent in this area because their competitive nature causes

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4th Annual TRAC *from page 5*

them to find "sport" in litigation, which may have negative repercussions in future business relationships.

The panel concluded with a quick overview of topics such as expedited discovery, the goals of a well-drafted employment contract, and whether arbitration clauses have become useless in that they provide an alternative that has become just as expensive as litigation.

IndyCar CEO Randy Bernard was featured as the TRAC 2011 keynote luncheon speaker.

From Austin to Baltimore: Creating New Events in Motorsports

The next panel brought together a wide variety of speakers offering legal, business and marketing expertise relating to the process of bringing new motorsports events and attractions to new markets. Moderated by Lauri Wilks, who plays a vital role in the marketing of the new NASCAR Hall of Fame in Charlotte, the panel discussed matters that arise when looking at international markets to assist in landing project funding from local municipalities.

IndyCar Senior Director of Business Affairs Sarah Davis and Administration Director Tiffany Hemmer discussed the upcoming addition to the IndyCar road circuit, an August 2011 race through the streets of Baltimore. Davis suggested that a crucial step in the planning process is finding a promoter who is well connected in the desired market and willing to convince the community that the event will be successful. Brett Scharback of International Speedway Corporation added his experience in trying to bring a NASCAR track to Staten Island, discussing the need to understand zoning entitlements and potential environmental problems at the proposed site before taking the first steps in the planning process.

The panel went on to discuss the high hopes and likelihood of success in bringing Formula 1 racing back to the United States in Austin, Texas in 2012. Timothy Frost of Frost Motorsports, LLC talked about the lack of success that local markets in the U.S. have had with Formula 1 and added that he is curious to see what Austin will do differently to turn that trend around. Ice Miller's David Mattingly went on to explain the cultural differences, both racing and law-related, that may contribute to the historical lack of Formula 1 success in the United States, such as the fact that customary practices such as liability releases may be considered offensive to Formula 1 drivers.

In the end, the panel agreed that careful planning and preparation, along with political and community support, are the deciding factors in the success of a new event. It will be exciting to see how that preparation plays out in Baltimore and Austin in the next few years.

Non-Profits and Foundations

Next up was a particularly useful panel for attorneys representing drivers or other talent who wished to engage in charitable activities. Moderated by Eric Anderson, Marketing Senior Counsel at Sears Holding Corporation, the panel offered many do's and don'ts when helping a client start up a non-profit or charitable foundation.

Marilee Springer of Ice Miller in Indianapolis began by explaining the many entity options available, including giving direct gifts to existing charities through a donor-advised fun and starting a public charity. Michael Giannamore offered his experience in tax planning for athletes across all major sports by suggesting that one consider the client's long term outlook and inform them of the many hidden costs and fees in establishing a charitable legal entity before deciding which route to take.

Diane Bailey of Robinson Bradshaw & Hinson in Charlotte warned the audience that financing and fundraising for operating charities involves many tedious steps that require careful attention, but hoped that her warnings did not discourage the crowd from involving themselves in non-profit ventures that mean so much to communities.

The panel concluded with a discussion about registering for solicitation licenses and offered some advice and suggestions in order to meet the many filing requirements, such as using the form clearinghouse website GuideStar.org.

Preparing Your Driver for Opportunities Outside of the Car

Day One at TRAC wrapped up with a discussion about helping a driver-client develop and maintain his or her brand in today's social environment. Moderator Jonathan Faber, President and CEO of Luminary Group, began by discussing the various means of establishing a brand, from charitable endeavors to maintaining websites and IP portfolios. That opened the door for a discussion of a successful brand management plan such as that of McQueen Racing LLC. McQueen Racing co-founder and Microsoft Senior Counsel David Green told the story of Chad McQueen and how they have developed his brand online through purposeful planning and authenticity.

Wesley Zirkle added to the conversation by discussing the importance of a sound marketing plan, which is often best achieved by seeking out a good marketing advisor. The panel then discussed recent developments regarding the right to publicity and ended the day by advising the audience on developing a sound strategy and sticking to it to make that strategy successful.

TRAC attendees and speakers were then ushered to a cocktail reception at the Conrad, followed by a private dinner party at Indianapolis steakhouse Harry & Izzy's, where motorsports law legend Jack Snyder was honored with the Second Annual TRAC Star

Award of Excellence. Retiring from his legal practice in 2004, Snyder has been involved in motorsports for over 40 years and still serves on the Indianapolis Motor Speedway Corporation Board of Directors. Snyder has maintained working relationships with some of the biggest names in both open wheel and stock car racing and is credited with playing a key role in bringing NASCAR to Indianapolis Motor Speedway, among many other achievements.

Authentic NASCAR die cast cars, sporting the fresh new TRAC logo, were presented to speakers.

DAY TWO

Understanding Guilds: The Nuts and Bolts of AFTRA/SAG

David Ervin, a Partner with Kelley Drye & Warren LLP in Washington, D.C., addressed the requirements performers' labor unions impose on both drivers acting as principal performers in productions, and signatories. SAG is the performers' union that covers film, and AFTRA is the performers' union that covers taped and digital radio and television programming. An AFTRA/SAG signatory is an advertising agency, production company, or client that has signed an AFTRA/SAG contract requiring them to adhere to the working conditions and methods of payment set forth in that contract. In some cases, a company hired by a production company or ad agency to administer payroll for the production, may also be a signatory.

A driver, who is a principal performer in a union production and paid at union scale wages, must join the union thereafter, in order to perform in a future union production. Membership is for life. Additionally, once a union member, a driver is prohibited from participating in non-union productions. Productions include all forms of media, even productions created for distribution on the Internet. However, public service announcements are not covered by union rules.

Becoming a union "signatory" allows a production company to hire union members for its productions, and, in exchange, obligates itself to comply with union policies regarding wages, pension and health ("P&H") Plan contributions, unemployment and disability insurance payments and social security. The current P&H contribution requirement is an uncapped 15.5% of gross, computed on the total compensation paid to a performer. In most cases, drivers are paid more than scale wages, which can make the 15.5% contribution rather substantial.

SAG also requires that any distributor who sells a production must sign a Distributor's Assumption Agreement binding the distributor to the contract with SAG. Assumption agreements typically come into play when a driver is a party to a multi-service endorsement contract. The agreement allows a distributor to assume a producer's obligations to the union to pay residuals. Under SAG agreements, SAG members are entitled to receive residual payments for certain exploitations of a production, such as a commercial aired on television. A signatory to a SAG agreement is obligated to pay residuals and require any entity to which it sells, transfers or assigns rights to exploit the production, to assume and be bound by the signatories obligation to make residual payments.

Ervin recommended attorneys make sure assumption agreements contain mandatory arbitration and confidentiality clauses. He also noted a motorsports industry "carve out" provision in SAG rules, which makes it possible to negotiate special consideration on how P&H payments should be allocated, such as based on actual use.

The Paradox of Competition & Cooperation in Motorsports

The economic climate over the past few years has forced racing teams to think outside of the box to secure and protect sponsorships, supply agreements and other types of contracts. Mark Owens, a Partner with Barnes & Thornburg LLP, and Wendy Watts, General Counsel of Roush Fenway Racing, discussed the alternatives available to teams to protect proprietary rights, and deal with troubled and possibly bankrupt vendors, suppliers and sponsors.

The panel first addressed the question of "what if our supplier goes out of business or files bankruptcy?" If a supplier of a team product enters bankruptcy proceedings or is experiencing operational troubles, the team may experience difficulty obtaining its product from the supplier. In some cases, certain parts cannot easily be obtained from another supplier. For example, to avoid the chaos of knowing brakes are no longer being produced and shipped, teams should negotiate certain protections in their supplier agreements or possibly consider an accommodation agreement. Teams may consider negotiating bailment arrangements and/or obtaining security interests concerning tooling, equipment or parts; contracting for a right-of-first-refusal buy-back provision; and obtaining consents from secured lenders and landlords to protect their interests. Also, to ensure sufficient parts are available in the event that a critical supplier experiences trouble or files for bankruptcy protection, teams should have a parts bank to facilitate an uninterrupted schedule. In extreme circumstances, a team may consider temporarily helping the supplier financially.

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TRAC co-founders (from left to right) Wes Zirkle, Stoke Caldwell and Brooke Beyer.

If a team anticipates that a supplier or contract party will repudiate the contract or breach the contract, the team should consider sending an adequate assurance letter under the applicable state Commercial Code. If adequate assurance is not provided, the team may suspend performance or even terminate its performance under the contract and seek an alternative source to cover itself. However, this is a factually intense area and the team should be sure it meets the appropriate and applicable standards under the applicable state Commercial Code, and all communications should be documented. Otherwise, the team will be liable for the breach.

This panel next, addressed the question of sponsors not paying or filing for bankruptcy. Because of the difficulty in securing sponsorship for an entire season, many teams have multiple sponsors. Each may sponsor four or five races, or sponsor certain races within a geographic market. Often times, such sponsorships are not secured until the season has already begun. If the car is already painted, fire suits have been ordered, signage has been printed and the cost to remove or change logos is too high, it is likely the only option will be to file suit for breach of contract. If it is a multi-race deal, contracts should include provisions which would relieve the team from having to perform its obligations under the contract. In such a case, a team could inform the sponsor they have 48 hours to pay before their logos are removed from team property before the next race. However, mitigation of damages may be required, so if enough time exists to secure another sponsorship for those races, a team should use its best efforts to do so. If a sponsor files for bankruptcy, however, a team must perform its obligations under any contract until a bankruptcy court says otherwise. In this case, selling the races to another sponsor would violate the bankruptcy stay.

A New Paradigm in Motorsports Licensing and Sponsorship

Chad Warpula, a partner with the Charlotte office of K&L Gates LLP, and Jason Weaver, of NASCAR, discussed the recent formation of the NASCAR/Teams Licensing Trust ("Trust"). The Trust, named "NASCAR Team Properties," combines the licensing rights of NASCAR and the teams into one centralized framework. The Trust was established to accomplish three primary goals: (1) to create an efficient and centralized model for licensing and servicing the numerous intellectual properties throughout the sport, (2) to improve and grow the quality, selections, prices and channels of licensed merchandise and souvenirs available to the NASCAR fan base, and (3) to achieve pro-competitive benefits of inviting investment into sport across all levels and all teams and create a more competitive balance among the participants in NASCAR. The Trust is a Delaware Statutory Trust, and operates much like a partnership or limited liability company. It is managed by an elected board, may have officers and enjoys flow through tax treatment. The Trust may enter into contracts and conduct business. Currently, Trust beneficiaries include NASCAR and a majority of the NASCAR race teams.

Before formation of the Trust, a licensee that desired to make licensed products would have to obtain several separate license agreements such as from race teams (for the team, driver and sponsor marks), NASCAR, contingency sponsors, race tracks, car manufacturers, and equipment manufacturers or suppliers. Each licensor required its own license agreement, separate royalty rates, advances, guarantees, reporting formats, and timing of royalty payments. The Trust consolidates all of the rights from the beneficiaries and issues a single license agreement to a licensee. Thus the Trust offers a single point of contact and single entity through which

royalties are paid, approvals are managed, samples are received and licensing guidelines are issued.

Keynote Address

Attendees broke from the morning session to attend a lunch and keynote address by IndyCar CEO Randy Bernard. Bernard discussed his transition to IndyCar last year from the same position with Professional Bull Riders Inc. (PBR), and explained how his hopes and goals for IndyCar's success started with one task: surrounding himself with the right people. Bernard went on to discuss the latest buzz around his growing league, from new car designs and multi-million dollar driver challenges to growing the sport's fan base, particularly with younger generations. Despite proclaiming his intentions of making IndyCar the premier motorsports league in the world, Bernard expressed to all the non-IndyCar related attendees that it is his sincerest hope that the growth of IndyCar will benefit the motorsports industry as a whole, reiterating one of his most recited quotes that "all boats rise on a high tide."

State and Local Government Support in Motorsports

After lunch, Jason Fulk of Hoover Hull, LLP moderated a panel discussion about the importance of a strong working relationship between state and municipal governments and motorsports sanctioning bodies, promoters, and participants – particularly in Indiana and North Carolina. Tom Weisenbach, Executive Director of Indiana Motorsports Association, explained that this relationship is crucial for the economic growth of both the state and the racing industry, and how IMA plays a role in bringing those interests together. One example of this was the Indiana initiative to create a motorsports directory of all companies and participants involved in any level of motorsports within the state, which benefited not only those working in the industry, but also Indiana by giving it a strong indicator of how and where motorsports business is thriving.

Rollie Helmling, Director of Motorsports Initiatives for Indiana Economic Development Corporation, and Matt Macaluso of Keller Macaluso, went on to discuss some of the tax incentives that Indiana and North Carolina offer to attract motorsports business into those states. Such incentives include sales tax exemptions on all components of race cars, except for tires, as well as tax credits for employee training programs and research and development equipment. Coupled with municipality incentives like the sharing of costs for building leases with race teams, the panel couldn't stress enough how these benefits have made the economic relationship between racing and the states of Indiana and North Carolina extremely successful.

A New Generation of Racing

The final motorsports panel of TRAC 2011 offered the audience a look into "A New Generation of Racing", where the personalities of the drivers define the sport just as much as the action on the track. Moderator Stokely Caldwell Jr. and Matthew Efird, both from Robinson Bradshaw in Charlotte, set the stage for an entirely new corporate environment in racing where the ability to market driver personalities to sponsors and fans is increasingly important. Ty Norris of Michael Waltrip Racing echoed the importance of marketing a driver and offered examples of his success using social media to speak directly to sponsors and driver audiences in ways they will appreciate. Norris shared a few of MWR's promotional videos on YouTube with the audience, including an introduction of X Games superstar Travis Pastrana to the world of NASCAR.

The conversation then shifted to the use of unique driver personalities to bring niche audiences to the world of motorsports, using Pastrana and NASCAR Truck Series driver Narain Karthikeyan of India as examples. Miguel Abaroa, Founder and CEO of Karthikeyan's race team, Starbeast Motorsports, shared his driver's inspiring story and talked about the process of bridging the gap between U.S. sports and international communities. Abaroa then discussed some of the unique issues such as immigration and taxation that must be considered when employing an international driver. The panel then concluded with further discussion about Pastrana's NASCAR debut and the risks MWR is facing with its new daredevil owner/driver, who had plans to compete in the X Games before his first Nationwide Series race.

Ethics – Multi-jurisdictional Practice

TRAC 2011 concluded with a motorsports twist on ethics, where Chuck Kidd from the Indiana Supreme Court Disciplinary Commission offered some "black flags" that often come up when attempting multijurisdictional practice. Kidd discussed some of the unique requirements that apply in Indiana, including the process of obtaining temporary admission and having qualified co-counsel. Kidd stressed that temporary admission is not multi-jurisdictional practice – it is only the first step. Given the many different rules that apply for different states, including conflicts of interest rules, Kidd suggested that any questions or uncertainty should be directed to the appropriate ethics committee of the state in which the attorney seeks admission.

Wrapping up in the early afternoon, TRAC's schedule allowed its attendees time to take a trip over to the Indianapolis Motor Speedway, check out the Indianapolis 500 pace car parked outside the Conrad, or grab a beverage with old friends before catching a flight home for the weekend. Be on the lookout for next year's TRAC 2012, as the fifth year of the event returns TRAC to Charlotte next spring. ■

Zach Daniel is a recent graduate of the University of Miami School of Law and can be reached at zdaniel@students.law.miami.edu. Cate Sabatine recently earned her J.D./M.B.A. from the Indiana University School of Law - Indianapolis, and the Indiana University Kelley School of Business. Cate has been hired as an Associate by Krieg DeVault, LLP in Indianapolis, and can be reached at csabatin@iupui.edu.

Former Justice Orr Helps UNC Fullback Clear His Name and Get Back in the Game

by Rick Conner

Caught in the wake of an NCAA investigation of UNC football in the fall of 2010, things looked bleak for UNC fullback Devon Ramsay.

Fourteen UNC players, including Ramsay, missed at least one game during the 2010 season due to an investigation of possible improper contact with agents and possible academic misconduct involving a tutor, Jennifer Wiley. Ramsay played the first four games of the season, but he was withheld from further participation in football after questions arose about his involvement with Wiley.

In mid-November, the NCAA ruled Ramsay permanently ineligible, meaning he would not be allowed to play college football for the remainder of his junior year or during his senior year in 2011.

Ramsay's mother, Sharon Lee, said she was shocked by the ruling. She began calling and meeting with University officials and newspaper reporters in an effort to understand how her son was found to have violated NCAA rules and ruled permanently ineligible although she believed he had done nothing wrong. "I wanted him to have the opportunity to fulfill his dream that he had worked so hard for," she said. After reading a newspaper article about Ramsay and Lee, former N.C. Supreme Court Justice Bob Orr decided to get involved.

Orr retired from the Supreme Court of North Carolina in 2004 to become executive director and senior legal counsel for the North Carolina Institute for Constitutional Law. He learned the NCAA had ruled that Ramsay was permanently ineligible based on an email exchange Ramsay had with Wiley a couple of years earlier. Allegedly, Ramsay was told that Wiley had notes from a sociology class in which Ramsay was enrolled, so he contacted her to request copies of the notes, though he had never worked with Wiley before. Ramsay also asked Wiley to look over a three-page paper that was due in the sociology class the next day. Wiley made a few suggested edits to the paper and sent it back to Ramsay the next morning. Orr said it was unclear whether any of Wiley's suggestions were actually incorporated into the paper.

The matter was brought to the attention of the UNC Honor Court, and the Undergraduate Student Attorney General declined to pursue the case after finding no evidence that Ramsay had committed a violation of the UNC Honor Code, Orr said.

However, based on the e-mail exchange between Ramsay and Wiley, and an advisory opinion they received on the situation from the NCAA, Orr said University officials found that Ramsay had violated Rule 10.1(b) of the NCAA Division I Manual regarding "Unethical Conduct", which prohibits "[k]nowing involvement in arranging for fraudulent academic credit or false transcripts for a prospective or an enrolled student-athlete." The University self-reported the violation to the NCAA, and the NCAA ruled Ramsay permanently ineligible. Orr said that the University then petitioned to have Ramsay reinstated, and a hearing was scheduled for early December 2010.

Lee said Orr was very patient and understanding, and took the time to understand the concerns that she and Ramsay had. "It definitely seemed to be a huge case of no one quite knowing what the problem was or why it was a problem, and [Orr] took the time to sort that out."

Shortly before the reinstatement hearing, Orr learned that in order to participate in the hearing, Ramsay would have to admit he violated NCAA rules. "And I said no," Orr said. "We don't think there is a violation, and there had never been a hearing on whether there was a violation – not at the University level, or at the NCAA level."

Having no experience with the NCAA prior to this case, Orr said he reviewed the lengthy NCAA Division I Manual and found no process for a student-athlete to contest the NCAA's finding of a violation. "It was stunning from a lawyer's perspective that there was no process … in which you could contest the violation on the front end, and there was no way to appeal it once the University and the NCAA determined there was a violation. It was all about eligibility."

According to Orr, in addition to the loss of his athletic eligibility, Ramsay and his mother were particularly concerned about the stigma that could come with being found to have violated an NCAA rule prohibiting "unethical conduct" and "academic fraud," and the impact that might have on Ramsay's reputation and his ability to secure employment after graduation.

Working with the Associate University Counsel Steve Keadey, Orr convinced the NCAA to agree to reconsider its ruling finding a violation if there was new evidence. They prepared a "Request for Review" describing all of the facts surrounding Ramsay's contact with Wiley. By mid-February 2011, the NCAA reversed its previous ruling, finding that Ramsay had not committed a violation, and restoring Ramsay's athletic eligibility.

Ramsay is a good student, Orr said. "He's a very bright, articulate guy … the poster child for what you want your student-athletes to be." Orr said that the suggested changes Wiley recommended were "pretty minimal." "Even if (Ramsay) had submitted the paper as revised by the tutor, it shouldn't have been a violation. It certainly wouldn't have been fraud."

Orr said he would like to see a process implemented through which student-ath-

letes would have the ability to contest a finding of a NCAA violation rather than being limited to appealing eligibility decisions after the fact. He said he has asked UNC System President Tom Ross to conduct an inquiry regarding the procedures of the NCAA disciplinary system. "I have found the process for protecting the rights of students appalling." He said. "As a lawyer, I'm offended by the lack of rights these kids have."

Lee said she understands that it is very rare for the NCAA to reverse a decision, and is excited to watch her son play football once again this fall. She plans to attend all of the home and away games, although she admits that due to her concern for her son's safety and well-being, she often looks away when he is involved in a play, which she did when Ramsay scored his first collegiate touchdown on Sept. 4, 2010 against LSU. "I saw it the next day in the newspaper," she said. ■

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Talent Agency Licensure Law Poses Traps for Unwary

by Matthew F. Tilley & Nichelle N. Levy

Those who represent talent, including managers and publicists, may be unaware that, in many states, their efforts to promote and advance the careers of the artists they represent may subject them to regulation as talent agents, putting their fees and commissions at risk. A recent case provides a telling example.

In 2006 and 2007, Billy Blanks Jr., son of the popular fitness personality, began developing a set of workout tapes that combined cardio with karaoke, which he dubbed "Cardioke." Like many rising celebrities, Blanks hired a manager and a talent agent to help promote his new product.

The relationship between Blanks, his manager, and his agent was to follow the traditional model. The manager was to provide management of the business, access to capital, and be a partner in the venture. The talent agent would secure work on Blanks' behalf. Yet, when Blanks allegedly failed to pay his manager and the manager sued, Blanks haled his manager before the California Labor Commissioner for securing appearances on TV talk shows on his behalf without a talent agent's license. The result: the Commissioner found Blanks' manager was entitled to nothing and had to return any proceeds from his work promoting Cardioke. *See* **Blanks v. Cardioke Inc.**, Case No. TAC-7163 (Cal. Lab. Comm'r 2010).

The result of the dispute between Blanks and his manager is not unique, and the issues raised in this scenario are not limited to clients based in California. Several states have enacted laws requiring licenses for those who work as talent agents. Further, almost all states have laws governing employment agencies that at least raise issues for managers and publicists.

Three states, California, Florida, and Texas, have specific talent agency licensure laws. Of those, California's licensure law is both the most stringent and most zealously enforced. Further, California's licensure law applies to both in-state entities, and out-of-state entities soliciting or negotiating engagements in California. Thus, due to California's central role in the entertainment industry, clients who represent talent must be aware of its requirements, no matter the state in which they reside.

In California, any unlicensed attempt to procure employment on behalf of an artist – no matter how incidental or minimal – violates the state's Talent Agencies Act ("TAA"). Cal. Labor Code § 1700, *et seq.* In other words, a manager may not solicit, procure, or even negotiate the terms of an engagement in California on behalf of an artist, even on an isolated or incidental basis, without a talent agent's license or working through licensed agents. This poses a problem for managers and publicists who are approached with opportunities for their clients but are not licensed talent agents.

The penalties for violating the California licensure law are harsh. Most often, violations result in an order declaring that the unlicensed agent's contract is void ab initio and disgorging of all of the fees or commissions paid to the agent. Since enactment of the TAA, the California Labor Commissioner, who is charged with enforcing the act, has reportedly ordered the return of over approximately $250 million in fees and commissions paid to managers who have run afoul of the act's provisions.

The need to understand the requirements of the California licensure law is heightened not only by its harsh penalties, but also its expansive application. The TAA's licensure requirement applies to a number of situations that one would not initially expect, and which are not covered by licensure requirements in other states.

First, the TAA's definition of "talent agent" includes anyone who procures, or attempts to procure, an "employment or engagement for an artist." Cal. Labor Code. § 1700.4(a) (emphasis added). This means the act covers not only the procurement of employment on behalf of an artist, but any "engagement" as well. The California Labor Commissioner has read the term "engagement" to mean virtually any appearance by an artist in an artistic capacity.

For example, in one case the Commissioner found managers for the country singer Dwight Yoakum violated the TAA by negotiating the singer's appearances on TV talk shows, such as *The Tonight Show* and *The Ellen Degeneres Show*. The Commissioner's decision reasoned that Yoakum's status as a popular country singer meant his appearances on those shows were appearances as an artist, and thus were "engagements" under the TAA. *See* **Yoakum v. Fitzgerald Hartley Co.**, Case No. TAC-8794 (Cal. Lab. Comm'r 2010).

Second, the definition of "engagement" also extends to agreements for product endorsements involving appearances in commercials or other performances. The California commissioner has found that an appearance by an artist on behalf of a product constitutes an "engagement" if the artist either (i) makes use of a persona she has developed through other artistic work to promote a product; or (ii) makes an appearance that would otherwise be considered an artistic performance. Thus, the more famous a personality, the more likely it is that her appearance will be considered an "engagement" and thus subject to the licensure requirement.

The fame of the artist has played a major role in several product-endorsement cases, the

See LICENSURE *page 12*

Licensure *from page 11*

most notable of which is **Styne v. Stevens**. That case involved Connie Stevens' appearances on the Home Shopping Network in support of a line of skin care products she developed. When a dispute arose between Stevens and her managers, she argued she owed nothing because her appearances were "engagements" and her managers were unlicensed. The Commissioner agreed, and ordered the managers to return all of the fees and commissions they had been paid. The Commissioner's decision reasoned that Stevens' appearances made use of her "name, personality, and charisma" developed in other artistic work. *See* **Styne v. Stevens**, Case No. TAC-33-01 (Cal. Lab. Comm'r 2001)).

Even where the artist is not well-known, the Commissioner's opinions suggest that an appearance is nonetheless an "engagement" if it is of high production value. Thus, if an appearance is scripted, involves multiple takes, or uses elaborate sets, it likely falls under the California licensure requirement.

The expansive reach of California's licensure requirement, as well as its strict application, means that those who represent talent in connection with appearances in California must understand and comply with that state's laws governing talent agents.

Still, even those who do not represent talent in connection with engagements in California must become familiar with local laws regarding talent agents as well as those governing *employment agencies*. Many states, including New York and North Carolina, do not require talent agents to acquire a separate talent agent license, but have license requirements for employment agencies that may cover talent agents, managers, publicists, and others in certain circumstances.

In North Carolina, the laws governing employment agencies (which the law refers to as "private personnel services") apply broadly and cover many traditional functions of both talent agents and managers.

North Carolina requires anyone who owns or operates a business which, for a fee, provides "private personnel service[s]" to secure a license. *See* N.C. Gen. Stat. § 95-47.2. The definition of "private personnel service," includes (i) securing employment for a client, (ii) holding oneself out as able to secure employment for a client, or (iii) providing "information or service of any kind purporting to promote, lead to, or result in employment for the applicant." *See Id.* § 95-47.1(16). Rules issued by the North Carolina Department of Labor ("NCDOL") make clear that a "model or talent agency" is a private personnel service and must be licensed. *See* N.C. Admin. Code. § 17.0202(b).

Because the definition of "private personnel service" includes services "of any kind" in seeking employment on behalf of an artist, the definition appears to cover not only talent agents, but managers as well. Indeed, the regulations issued by NCDOL provide examples of the types of activities that are covered by the law and include "setting up an appointment on behalf of an applicant," "making contact with a prospective employer," and even "recommending a specific potential employer to an applicant."

While the list of covered activities under the North Carolina law is broad, there is an important and notable difference between the North Carolina and California laws. The North Carolina law applies only to activities aimed at securing *employment* on behalf of applicants – it does not apply to "engagements" generally. Thus, whether a manager must obtain a license to solicit or procure endorsement deals on behalf of an artist depends whether the artist becomes an employee of the product manufacturer.

No matter what the arrangement, those who represent talent must become familiar with the laws governing talent and employment agencies in the states in which they operate, and take care to structure deals in a manner that ensures they are properly protected. ■

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Young Lawyers

Opportunities Abound in Sports & Entertainment Law

by Brooke A. Beyer, Jr.

I am constantly asked by law students and young lawyers, many of whom are looking for career opportunities in sports and entertainment law, to assess the job market, tell them what they should be doing to land jobs, advise them on how to get more involved, and enhance their experience and resume. While the job market is beyond our control, there is no shortage of opportunities for folks who want to make an effort, and the recommendations below are merely a sampling of things these new lawyers or law students can do to improve their chances of being in the right place at the right time.

• For starters, join the NCBA and this section. It is free of cost for law students and first year lawyers. Moreover, the section has created a Law Student Advisory Committee that presents some exciting possibilities. Frankly, although the response to the Law Student Advisory Committee from the law student community has been favorable on paper, the section has not yet determined the best way to leverage this resource. It is understandable that law students are typically pressed for time and over-committed, but for those who want to take initiative, this is a great place to start.

• I have been the editor of this newsletter for several years, and during this time (including this issue), we have featured many student articles. But there is certainly room for more, and all relevant ideas will be considered. Students and/or young lawyers who take on such assignments inevitably will be exposed to practitioners in the process-and besides, it never hurts to have credible, published writing samples.

• Students and young lawyers should plan in advance to attend section CLEs such as The Racing Attorneys Conference (see Page 5 for coverage) and other relevant section functions. These events not only offer great substantive panels and resources, but they offer an invaluable chance to socialize and network with influential lawyers in sports and entertainment. One word of caution: try not to be too pushy or over-emphasize the fact that you are desperate for a job. The art of "schmoozing" is a delicate one. There is a time and a place for everything, but you need to use professional discretion and judgment in your approach. Again, simply make the connections naturally and you might be surprised what comes of it.

• Don't be afraid to ask a lawyer to lunch or coffee. Again, try not to be too aggressive in this realm – and don't necessarily expect a free meal.

• Volunteer for different activities related to sports and entertainment. Many teams and properties have affiliated non-profit initiatives which may provide exposure to lawyers and related business people. In a similar vein, consider applying for business jobs or internships with some of these organizations – this is a great way to get experience that might ultimately lead to a legal job. You need to think outside the box to distinguish yourself.

• Perhaps more schooling is an option. That might seem daunting to debt-ridden law students and young lawyers, but there are many types of programs (degrees, certificates, etc.) that can complement a law degree in a chosen, targeted field – and many of these programs provide access to highly-relevant internship experiences.

The bottom line is that, despite a poor economy and a surplus of lawyers seeking high-profile jobs in sports and entertainment, there is real experience and opportunity available for those willing to dig in and work hard. I would encourage you to take on as much as you possibly can, because, in the end, this is how real life works. Good jobs won't fall in to your laps – rather, you need to prove yourself and make the most of the opportunities that are available. Then, with a little luck and the right timing, you might land the job of your dreams (or at least something that points you in that general direction). ■

Brooke A. Beyer, Jr. is Assistant General Counsel for NASCAR in its Charlotte, NC, office, as well as the immediate past chairman of the Sports & Entertainment Law Section.

Legislative Update

by Erik Albright

It has been an active year in the North Carolina legislature with proposed legislation of relevance to this section. As a result of the events over the past year in Chapel Hill involving agents and impermissible benefits to players, a bill has been introduced in the Senate (S.224) to amend the athlete agent act (G.S. 78C-85 et. seq.) to increase substantially the bonding required of athlete agents working in North Carolina, to increase record-keeping and reporting responsibilities for agents and to permit the Secretary of State greater access to those records, and stiffen the penalties for agents who violate the act, including making any violation a felony punishable by no less than 30 days in jail and a minimum $10,000 fine. Presently, the legislature is receiving comment and considering revisions to the bill and is addressing concerns raised by some that the earlier versions of the bill are inadvertently too broad and may have an unintended impact on the access of student-athletes to lawful agents. At the time of this writing, the bill remains in the Senate Committee on Rules and Operations.

The legislature is also considering bills introduced in both the House (H.253) and Senate (S.361) that would permit home-school students to play sports for public high schools. In the House bill, home schooled students would be able to play for the public school in which district they reside, provided that they meet the same "standards of acceptance, behavior, and performance" required of public school students and satisfy "academic eligibility requirements" as determined by a "method of evaluation agreed upon by the parent and [public] school principal." The Senate version would permit home schooled students – as well as students at public and private high schools – to play in a district for the sports team of a public school other than the one in which the student resides if the student's own public school did not offer the students' chosen sports. Both of these bills have received substantial criticism and opposition from the North Carolina High School Athletic Association, the N.C. Independent Schools Athletic Association, the North Carolina Coaches Association, and North Carolinians for Home Education, which represents N.C.'s home schools.

Since 2008, North Carolina has permitted internet ticket re-sellers to operate within the State provided that they satisfied certain requirements. Its stated purpose was to help protect ticket purchasers on the secondary market from counterfeit tickets and unsavory practices of street corner ticket scalpers. However, event organizers had the option to block internet re-selling of tickets to their events. The North Carolina legislature is considering a bill (H.308) that would eliminate that option for event organizers at venues seating 1,000 or more persons. The bill would also add certain disclosure requirements on event organizers regarding ticket allotments and pricing.

Lastly, on the sports front, a bill introduced in the House (H.333) would adopt stock car racing as the official sport of North Carolina. Though the history of stock car racing is rich in North Carolina, it is not clear whether owners, organizers and participants of basketball, football, baseball, hockey, soccer, and lacrosse (at the professional and/or amateur levels) will support this designation for stock car racing.

Legislators have introduced bills once again to change the sweepstakes and video poker laws in an effort to close loopholes that seemingly have existed with each variation of the prior laws. At least one bill has been introduced in the House (H.228), though with questionable support, that would concede that the loopholes cannot be closed and that would instead legalize (but regulate and tax) video poker. Another bill (S.582) would modify the manner in which North Carolina enters gaming compacts with recognized Indian tribes located in North Carolina.

Bills have also been introduced that would eliminate in the current year film industry production credits rather than permitting them to continue until the 2014 calendar year (S.711), as previously authorized, and that would cap the state income tax credit for qualifying film production expenses at the lesser of $20 million or the amount of taxes, after reduction for all other available credits, for the year in which the credit is sought (S.539). Additionally, a bill introduced in the Senate (S.764) would limit the amount of a credit against taxes that certain film production companies can receive and would make it clear that credits are not available for films containing obscene material or receiving an "NC-17" rating from the MPAA, or for the television production of news programs or live sporting events. ■

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