



UNITED STATES

## *New Jersey:* **'Let's Make A Deal'**

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**T**he premise is simple enough: Someone has an asset that it undervalues and doesn't use. Someone else covets that asset but has no way of obtaining it. The solution, of course, is for the party that covets the asset to try to buy it from the party that possesses it. Transactions such as this happen on a regular basis in a free-market society. It's considered healthy for business.

Now tweak the scenario. New Jersey, California, New York, even Minnesota, covet an asset that only four states currently possess: the exemption that was granted in the 1992 federal ban on sports betting.

The law has been in the news recently since the state of New Jersey, under the direction of governor and former U.S. Attorney Chris Christie, announced in early 2012 that it would allow the state's casinos and horse race tracks to accept wagers on sporting events, in direct violation of the federal ban. The Professional Sports Protection Act, also known as PASPA, is the legislation that formally bans states — other than Nevada, Delaware, Oregon and Montana — from allowing wagers on professional or collegiate sporting events. At the time the legislation was passed, the aforementioned four states had some sort of sports wagering scheme already in place and Congress granted those states an exemption. The law's primary sponsor, ironically, was former New Jersey senator Bill Bradley, a former collegiate and professional basketball player.

In order to appease the Atlantic City

casinos, Congress gave New Jersey one year to implement a sports wagering scheme and thus be eligible for the PASPA exemption. But the state, thanks to some maneuvering by Senator Bradley, was unable to overturn its own law banning sports betting and ended up joining the forty-six other states that were subject to PASPA.

Twenty years later, New Jersey voters overwhelmingly approved a measure to allow sports betting, and the state announced its intentions to press ahead despite the federal ban. The state was promptly sued by the four professional sports leagues and the governing body of collegiate athletics, the NCAA, and on February 28, a U.S. District Court ruled against New Jersey, saying the state's initiative was in violation of PASPA. The legal theory that New Jersey was unable to overcome is simple and powerful: the Supremacy Clause. Under the Supremacy Clause — Article VI, clause 2 of the Constitution — a state may not enact legislation that is in violation of federal legislation. New Jersey's legislation allowing sports betting is in direct violation of PASPA; hence, it violates the Supremacy Clause and was, correctly under the letter of the law, struck down.

New Jersey argued that PASPA is unconstitutional for a variety of reasons, al-



**NJ Gov. Chris Christie says he isn't throwing in the towel in the fight to legalize sports gambling in New Jersey.**

leging it violates the Tenth Amendment's state sovereignty provision, that Congress abused its Commerce Clause powers and the law "commands" the state to enact or comply with a federal initiative. Those arguments were dismissed at the district court level but will likely be raised again when the state formally appeals to the 3d Circuit Court of Appeals. New Jersey's odds may not be much better at the appellate level considering that

in 2009 that same court denied Delaware (which, remember, already has an exemption) its plan of expanding its sports wagering scheme from a parlay system to single-game wagering.

So if New Jersey loses again in the 3d Circuit is it just out of luck?

The state still has two avenues available to it. First, it can lobby Congress to repeal or amend PASPA. There are two pieces of legislation currently in committee in the House of Representatives that would amend the law. One would give New Jersey an exemption, the other would create a window for any state to enact sports betting if it chooses.

At a time in which taxes and trying to find additional revenue is an obsession in Washington, framing a repeal or amendment of PASPA on purely economic grounds as a revenue enhancement hasn't happened. PASPA results in hundreds of

millions of potential tax dollars not being collected, not to mention the additional costs of enforcing the law.

The Gaming industry may be among the few, if only, industries that would welcome government regulation and taxation if it meant legalized sports wagering. And yet, the economic impact of moving forward has been muzzled by the antiquated arguments put forth by the sports leagues in defense of PASPA. Barring a Congressional repeal or amendment of PASPA, New Jersey, and any other state that wanted to get into the sports wagering business, still has another card it could play: Buy Oregon's or Montana's exemption, or have either of those states assign the "right" to PASPA's exemption to New Jersey.

Under this theory, the exemption that Congress granted Nevada, Delaware, Oregon and Montana in the PASPA legislation is considered a contractual "right." The four states have a "contractual right" to offer sports betting. Contractual rights can be assigned from one party to another. A party can either completely assign the right or partially assign a right. Under our example, Oregon and Montana could sell its PASPA exemption completely, or partially assign, or lease it to another state.

Selling or leasing the PASPA exemption would not result, technically, in an increase in sports betting, since only four states would still be legally entitled to offer it. From that standpoint, it should matter very little to the federal government which four states are exempt. The state acquiring the exemption would be bound to implement only the betting scheme that the assigning state could implement. It could be that New Jersey would not be able to offer single-game wagering but instead just a parlay system similar to Delaware. However, a limited version of sports betting is more than what it can currently offer.

Also, it would be difficult for one of the professional sports leagues to challenge the transfer because, again, there wouldn't be a net increase in states that would be exempt from PASPA. It would still be four.

Most importantly, however, allowing

New Jersey or another state to negotiate with either Oregon or Montana to acquire its exemption would result in the asset being used, unlike the current situation. It can be argued that by granting the exemptions in the first place, Congress did so in order for the beneficiary states to use, or continue to use, them. In fact, another argument can be made that it would be more economically beneficial for Oregon and Montana to lease the exemptions than to use them within their own borders. If either state was able to negotiate a deal in which it would receive a percentage of the tax revenues generated by sports betting being offered at Atlantic City or throughout California, the revenue would likely be far higher than if it offered sports betting itself, based on larger populations and potential customers in New Jersey and California.

Any income that Oregon or Montana would derive would be pure profit and free from all expenses of regulation and oversight that would be required by licensing casinos within its borders. Every dollar the states generated by leasing its exemptions would be more than what it is currently generating by letting the exemption sit idle.

Allowing this sort of transaction between willing parties (in this case sovereign states) benefits both parties. The acquiring party is able to obtain an asset it had little opportunity to acquire by other means (barring unlikely Congressional or judicial action), and the selling party is able to monetize an asset that was being wasted.

One argument against this proposal is that states should not be allowed to sell, or lease, rights granted to them by Congress. That, however, is a far grayer area than the battle New Jersey is currently fighting by enacting a law that is in direct conflict with a federal law. And if selling the exemption is considered against public policy, then

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Congress should revoke the exemptions granted to Oregon and Montana for lack of use and offer them to states that would make use of them.

As much as New Jersey wants to claim (correctly) about the unfairness of PASPA, there is very little wiggle room for a judge when the Supremacy

Clause is so clear and established. It is also extremely difficult to get a court to declare a law unconstitutional that has been on the books for as long as PASPA has.

Congress rarely enacts broad, nationwide legislation while concurrently granting exemptions from that legislation to a select few states, as was the case with PASPA. That was one of the theories advanced by New Jersey in district court and will likely reprise before the court of appeals.

By not enforcing PASPA in all fifty states, Congress is discriminating against states in favor of the four that were granted exemptions. The federal government should not be allowed to further discriminate against the states, this time all fifty, who want to negotiate for the sale or use of that exemption.

Since amending the law does not appear to be on Congress' agenda in the coming months, and a Constitutional challenge to PASPA appears difficult to establish (and even if it was established, would only be binding in the 3d Circuit), allowing the sale or lease of the PASPA exemption from Oregon and Montana to a willing state not only is sound business, but a common-sense solution to make use of a law that really no longer makes much sense. ♣

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