The Current Status of Sports Wagering in New Jersey

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The appeal of sports wagering in the United States, as well as internationally, cannot be overstated. As described by the United States Court of Appeals for the Third Circuit Court (the “Third Circuit”), “[w]agering on sporting events is an activity almost as inscribed in our society as participating in or watching the sports themselves.”

The American Gaming Association (the “AGA”) estimates that $92 billion in wagers was placed on NFL and college football games for the 2016-2017 season, with only $2 billion of that total wagered legally.

Further, Americans wagered more than $15 billion on Super Bowl 51 and March Madness this year, but only 3% of that amount was wagered legally. These numbers not only show the extent to which sports wagering is embedded in our society but also the substantial amount of wagering that exists outside of a legal framework and is unregulated and untaxed. The AGA estimates that legalized sports wagering in the United States could support 152,000 new jobs, create an estimated $26 billion in economic output and generate up to $5.3 billion in tax revenue.

For almost 25 years, the Professional and Amateur Sports Protection Act of 1992 (“PASPA”) (28 U.S.C. §§ 3701-3704) has prevented the expansion of legalized sports wagering in the United States by prohibiting state-sanctioned sports wagering. PASPA provides, in part, that it is unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or “authorize by law” sports wagering. In enacting PASPA, however, Congress included exceptions for state-sanctioned sports wagering in Nevada and sports lotteries in Oregon, Delaware and Montana. Additionally, Congress carved out an exception that permitted New Jersey, as well as other states, to authorize sports wagering had it chosen to do so within one year of PASPA’s enactment. New Jersey missed out on that opportunity, but some 18 years later, began taking steps to undo its failure.

I. New Jersey Legislative History, and Federal District Court and Appellate History

In 2010, the New Jersey Legislature held public hearings on the desirability of allowing sports wagering. Proponents of legalization argued that sports wagering would generate revenues for New Jersey’s struggling casinos and racetracks. In 2011, the legislature held a referendum asking New Jersey voters whether sports wagering should be permitted, and 64% voted in favor of amending the New Jersey Constitution to permit sports wagering.

The amendment permitted the New Jersey Legislature to “authorize by law” sports wagering at casinos or gambling houses in Atlantic City and at current or former running and harness horse racetracks. The amendment, however, excluded wagering on New Jersey college teams or on any collegiate event occurring in New Jersey.

Following the constitutional amendment, the New Jersey Legislature enacted the Sports Wagering Act in 2012 (the “2012 Law”) (N.J.S.A. 5:12A-1 to A-6), which provided for regulated sports wagering at New Jersey’s casinos and racetracks. Specifically, “[t]he 2012 Law established a regulatory scheme, requiring licenses for operators and individual employees, extensive documentation, minimum cash reserves, and Division of Gaming Enforcement access to security and surveillance systems.”

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In 2012, the National Collegiate Athletic Association (“NCAA”) and the four major professional sports leagues (collectively, “the Leagues”) filed suit in the United States District Court for the District of New Jersey (“District Court”) to enjoin the Governor of the State of New Jersey, along with other state executive officials (collectively, “the State”), from implementing the 2012 Law (“Christie I”). The Leagues alleged that the 2012 Law violated PASPA’s prohibition on state-sanctioned sports wagering. The State did not dispute that the 2012 Law violated PASPA, but instead relied on a number of arguments to challenge the constitutionality of PASPA. Specifically, the State argued that PASPA violates Congress’s powers under the Commerce Clause, the Tenth Amendment’s limitations on Congress’s powers and the Due Process Clause and Equal Protection Principles.

With respect to the Commerce Clause, the State challenged the exceptions in PASPA as unconstitutionally discriminatory, while the Leagues argued that PASPA is a permissible exercise of Congress’s Commerce Clause powers. The District Court found that, despite its exceptions, Congress acted within its Commerce Clause powers because it had a rational basis to conclude that legalized sports wagering would impact interstate commerce and a rational basis to exempt pre-existing sports wagering systems.

The State also argued that PASPA violates the Tenth Amendment’s limitations on Congress’s powers because it requires New Jersey to prohibit sports wagering in violation of the Anti-Commandeering principle established by the United States Supreme Court. The Leagues responded by insisting that PASPA does not commandeer or compel New Jersey to do anything, rather PASPA only prohibits the states from authorizing sports wagering. The District Court again sided in favor of the Leagues and determined that PASPA neither compels nor commandeers New Jersey to take any action.

The State’s final constitutional argument rested on the theory that PASPA violates the Fifth Amendment protections of the Due Process Clause and Equal Protection Principles, specifically, that the exceptions within PASPA are insufficient to survive rational basis scrutiny. The Leagues challenged the standing of the State to assert such a claim on the theory that it is not a person for purposes of Fifth Amendment analysis. Despite concerns over the State’s standing, the District Court nevertheless entertained the argument but ultimately concluded that the reliance interests of the excepted states, coupled with the government’s legitimate interest in stemming the tide of legalized sports wagering, provided sufficient support for upholding PASPA pursuant to rational basis review.

The District Court granted summary judgment for the Leagues and held that a permanent injunction was warranted. The State responded by filing an expedited appeal with the Third Circuit. The State’s expedited appeal was granted, and on appeal, the State first argued that the Leagues lacked standing to bring the case because they suffer no injury from the State’s legalization of wagering on the outcomes of its games. The Third Circuit held that the Leagues had standing in the case due to the threat of reputational harm, particularly given the stigmatizing effect of having sporting contests associated with gambling.

The State did not fare better with respect to its arguments on the merits. The Third Circuit addressed each of the State’s constitutional arguments in turn, each time siding with the District Court. First, the Third Circuit held that PASPA is within Congress’s Commerce Clause.
powers. Specifically, the court concluded that PASPA is aimed at an activity that has substantial effects on interstate commerce. Next, the Third Circuit held that PASPA does not impermissibly commandeere the states. In support of this conclusion, the court explained that PASPA lacks an affirmative command that the states enact or carry out a federal scheme, but, rather, it operates simply as a law of pre-emption via the Supremacy Clause. Finally, the court held that the exceptions contained within PASPA do not violate the equal sovereignty of the states.

Following the Third Circuit’s affirmation of the District Court’s judgment, the State petitioned the United States Supreme Court for writ of certiorari, which was denied in June 2014. As a result, New Jersey went back to the legislative drawing board.

On October 17, 2014, the New Jersey Legislature enacted SB 2460 (the “2014 Law”) (2014 N.J. Sess. Law Serv. Ch. 62, codified at N.J.S.A. 5:12A-7 to A-9), repealing the 2012 Law and other provisions of New Jersey law that prohibit sports wagering in certain contexts. Notably, the 2014 Law only repealed these laws to the extent they applied to sports wagering at a casino or racetrack by persons 21 years of age or older. Further, its repeals did not extend to wagering on collegiate sporting events that take place in New Jersey or sporting events in which any New Jersey college team participates. In enacting the 2014 Law, the New Jersey Legislature stressed that the law implements the Third Circuit’s decision in Christie I.

On October 20, 2014, in response to the 2014 Law, the Leagues filed a complaint for declaratory judgment and injunctive relief against the State in the District Court (“Christie II”). While Christie I addressed PASPA’s constitutionality, Christie II concerned the extent to which PASPA preempted the 2014 Law. The State interpreted the Third Circuit’s decision in Christie I to allow New Jersey to partially repeal any existing laws that apply to sports wagering. The Leagues insisted that the Third Circuit’s decision required New Jersey to either maintain its prohibitions or completely deregulate the field of sports wagering.

The District Court shared the Leagues’ view and read the Third Circuit’s decision in Christie I to hold that, “anything outside of [maintaining prohibitions or completely deregulating the field of sports wagering] would leave states too much room to circumvent the ultimate intent of Congress.” The District Court explained, while styled as a partial repeal, the 2014 Law would have the same primary effect of the 2012 Law and, thus, go against PASPA’s goal of banning sports wagering pursuant to a state scheme. Further, the District Court reasoned that New Jersey’s attempt to allow sports wagering in only a limited context, coupled with New Jersey’s history of attempts to circumvent PASPA, led to the conclusion that the 2014 Law is in direct conflict with the purpose and goal of PASPA. The District Court granted summary judgment for the Leagues and held that the 2014 Law is invalid as preempted by PASPA.

Undeterred, the State appealed the District Court’s decision. On appeal before the Third Circuit, the State argued that the 2014 Law does not constitute an authorization in violation of PASPA and that it is consistent with Christie I because the New Jersey Legislature effected a repeal, as Christie I specifically permitted. The Leagues countered by arguing that the 2014 Law violates PASPA because it “authorizes by law” sports wagering and also impermissibly “licenses” the activity by confining the repeal of gambling prohibitions to licensed gambling facilities, i.e. casinos and racetracks. A panel of the Third Circuit affirmed the District Court’s Christie II ruling in a divided opinion; however, that decision was subsequently vacated on October 14, 2015, upon the grant of a petition for rehearing en banc. Sitting en banc, the Third Circuit agreed with the reasoning of the panel majority’s opinion and held that because PASPA, by its terms, prohibits states from authorizing by law sports wagering and because the 2014 Law does exactly that, the 2014 Law violates federal law. Further, the Third Circuit clarified its Christie I ruling, but reiterated that PASPA does not impermissibly authorize the states in a way that violates the Tenth Amendment.

The Third Circuit acknowledged that the 2014 Law’s statutory purpose was to legalize sports wagering in order to revive New Jersey’s struggling casino and racetrack industry. Aside from the legislature’s purpose, the Third Circuit provided three reasons why the 2014 Law impermissibly authorized sports wagering. First, it explained that the 2014 Law authorizes casinos and racetracks to operate sports wagering while other laws prohibit sports wagering by all other entities. Second, it opined that the 2014 Law authorizes sports wagering by selectively dictating where sports wagering may occur, who may place wagers, and which athletic contests are permissible subjects for wagering.

The AGA estimates that legalized sports wagering in the United States could support 152,000 new jobs, create an estimated $26 billion in economic output and generate up to $5.3 billion in tax revenue. Third, it opined that the 2014 Law authorizing licensed casinos to conduct sports wagering was remarkably similar to the New Jersey exception language in PASPA and since New Jersey did not authorize the PASPA exception, the 2014 Law violated PASPA.

The Third Circuit also reaffirmed its decision in Christie I that PASPA does
not unconstitutionally commandeer
the states; however, it explained that
the District Court’s conclusion
that PASPA presents states with
a binary choice — either maintain a
complete prohibition on sports
wagering or wholly repeal state
prohibitions — was incorrect.
Instead, it explained that PASPA
neither commands states to take
affirmative steps nor presents a
corrective binary choice. Rather, the
Third Circuit opined that PASPA
does not require states to take any
action at all. The Third Circuit
continued to find PASPA constitu-
tional and affirmed the District Court’s
decision.

The State once again petitioned the
United States Supreme Court for
writ of
certiorari, and on June 27, 2017, the
Supreme Court granted
writ of certiorari
for Christie II. It is worth noting that five
other states, including West Virginia,
Louisiana, Arizona, Mississippi and Wis-
consin, as well as the AGA, supported
New Jersey in
amicus brief and urged the
Supreme Court to hear the case. This is
reflective, in part, of recent efforts to
reassess PASPA and its prohibitions on
state-sanctioned sports wagering. These
efforts exist at the state level, as discussed
above, as well as at the federal level.

II. Federal Legislative Movement
Recently, the AGA has increased its
efforts to repeal PASPA and give states
the opportunity to offer sports wagering
if they so choose. To that end, in April
2017 the AGA announced a new set of
policy principals outlining the casino
industry’s approach to legalized sports
wagering, which include deference to
states regarding the desirability of regu-
larizing sports wagering, ensuring the
integrity of sports wagering and sport-
ing events themselves through state
licensing and regulation, and ensuring
that sports wagering operations are
transparent to law enforcement.

On May 25, 2017, the United States
House of Representatives Energy and
Commerce Committee released discussion
draft legislation, entitled the Gaming
Accountability and Modernization
Enhancement Act of 2017 (“GAME
Act”), which proposes to repeal
PASPA and is generally consistent
with the AGA’s policy principals.

The GAME Act provides that
individuals and governmental enti-
ties would not be subject to civil or
criminal liability under federal law
for engaging in a “gaming activity,”
through a gaming facility, where the
activity is lawful under the law of the
state in which the activity takes
place. “Gaming activity” includes, in
part, “in the case of a governmental
entity, sponsoring, operating, adver-
tising, promoting, licensing, or authoriz-
ing by law or compact” sport wagering.
This exclusion from liability, however,
would only apply if the relevant state law
provides for consumer protections with
respect to the gaming activity that includes
the licensing of gaming facilities, report-
ing requirements to ensure that gaming
facilities are operating in a transparent
manner, appropriate safeguards to ensure
gambling is conducted responsibly and
appropriate mechanisms to ensure that
customer and gaming facility taxes are
reported and collected.

In addition, the AGA launched the
American Sports Betting Coalition (the
“ASBC”), an advocacy coalition to repeal
PASPA, on June 12, 2017. The ASBC
brings together law enforcement officials,
states’ rights advocates, policymakers and
industry leaders in hopes of pushing for
legislative action in Washington. The
coalition includes an advisory council of
law enforcement and state and local
elected officials to solicit input as
stakeholders attempt to craft a legislative
solution.

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2. See 730 F.3d 208 (3d Cir. 2013).
3. The issue of standing was also addressed at the district court level, with the District Court concluding that the Leagues had standing.
6. Id. at 504 (emphasis in original).
7. See National Collegiate Athletic Ass’n v. Governor of New Jersey, 799 F.3d 259 (3d Cir. 2015).
8. 832 F.3d 389 at 395.
III. Conclusion

New Jersey faces long odds in the Supreme Court, but it is not alone in its battle. Nine other states (California, Connecticut, Maryland, Michigan, Mississippi, New York, Pennsylvania, South Carolina and West Virginia) have enacted or are considering the enactment of legislation to authorize sports wagering in the event New Jersey is successful or federal law is changed. We will know the decision of the Supreme Court soon. Neither a victory nor a defeat will be the end of the matter. If successful, federal legislation is virtually assured. If unsuccessful, federal legislation may still occur, thanks to the efforts of the AGA and others who are making a compelling case for legalization. One such person is Adam Silver, Commissioner of the National Basketball Association, who, in a November 13, 2014, Op-Ed in the New York Times, said:

But despite legal restrictions, sports betting is widespread. It is a thriving underground business that operates free from regulation or oversight. Because there are few legal options available, those who wish to bet resort to illicit bookmaking operations and shady offshore websites…. Times have changed since Paspa (sic) was enacted. Gambling has increasingly become a popular and accepted form of entertainment in the United States. Most states offer lotteries. Over half of them have legal casinos. Three have approved some form of Internet gambling, with others poised to follow…. Outside of the United States, sports betting and other forms of gambling are popular, widely legal and subject to regulation. In England, for example, a sports bet can be placed on a smartphone, at a stadium kiosk or even using a television remote control….

In light of these domestic and global trends, the laws on sports betting should be changed. Congress should adopt a federal framework that allows states to authorize betting on professional sports, subject to strict regulatory requirements and technological safeguards.

That was almost three years ago, and there has been no change in federal law. One thing we know for sure is that regardless of what happens in the Supreme Court or with federal law, football fans will surely wager another $92 billion dollars this Fall on NFL and collegiate contests. The only question is whether it will continue to be unregulated, untaxed and unlawful.