

November 2014

This article originally appeared in *World Sports Law Report* Volume 12 Issue 11, November 2014.

Betting: New Jersey's Attempts to Allow Sports Betting

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On 20 October, US sporting leagues and associations filed a complaint seeking to prevent New Jersey from allowing sports betting. Linda J. Shorey and Anthony R. Holtzman, of K&L Gates, examine the background to the complaint, what will happen next and potential outcomes.

When, on 23 June 2014, the United States Supreme Court declined to hear New Jersey's appeal from the decision of the US Court of Appeals for the Third Circuit affirming the decision of the US District Court for the District of New Jersey that New Jersey's legislation authorising and regulating sports wagering - the Sports Wagering Law - violated the federal Professional and Amateur Sports Protection Act (PASPA), it seemed that sports wagering in New Jersey would not happen anytime in the near future. New Jersey, however, has yet to concede defeat. On 16 October 2014, relying on language in the Third Circuit's decision, the New Jersey Legislature passed Senate Bill 2460 ('S2460'), which states that it repeals the prohibition on sports wagering previously applicable at licensed casinos and racetracks. Upon receipt of the bill on 17 October 2014, the New Jersey Governor signed it. On 20 October 2014, the same professional and amateur sports leagues ('Leagues') that brought the litigation challenging the 2012 Sports Wagering Law filed a complaint, again seeking to stop sports wagering from taking place in New Jersey. This article looks at the language of the Third Circuit's decision, the repealing legislation, the activity that occurred between the US Supreme Court's decision and the enactment of S2460, the new complaint filed by the Leagues, the actions taken by the District Court in connection with the complaint, and some possible outcomes and implications related to the complaint.

The Language of the Third Circuit's Decision

In defence of the 2012 Sports Wagering Law, New Jersey argued that PASPA is unconstitutional because it violates the US Constitution's anti-commandeering rule. This principle provides that the federal government may not require State governments to carry out federal policy. New Jersey contended that PASPA not only prohibited it from authorising sports wagering, but also prohibited it from repealing its ban on sports wagering. The Third Circuit concluded that PASPA did not 'prohibit New Jersey from repealing its ban on sports wagering¹.' The Third Circuit explained that, under PASPA, it is 'up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be².'

¹ National Collegiate Athletic Ass'n v. Governor of New Jersey, 730 F.3d 208, 232 (2013), cert denied, 134 S.Ct. 2866.

² Id. at 233.

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The New Jersey Repealing Legislation

S2460 contains six sections. Sections 1, 2, 5, and 6 are most pertinent to this article. Section 1 of S2460 repeals New Jersey statutes, rules, and regulations that:

- require or authorise a State agency 'to license, authorize, permit or otherwise take action to allow any person to engage in the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event;' or
- prohibit participation in or operation of a pool that accepts such wagers [...] to the extent they apply or may be construed to apply at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, to the placement and acceptance of [such] wagers [...] by persons 21 years of age or older' who are present at those locations 'or to the operation of a wagering pool that accepts such wagers from persons 21 years of age or older' who are present at those locations, if 'the operator of the casino, gambling house, or running or harness horse racetrack consents to the wagering or operation.'

Section 2 of S2460 provides that none of that bill's provisions are intended to, or should, be construed 'as causing the State to sponsor, operate, advertise, promote, license, or authorize by law or compact the placement or acceptance of any wager on any professional, collegiate, or amateur sport contest or athletic event.' Section 2 goes on to provide that S2460's provisions 'are intended and shall be construed to repeal State laws and regulations prohibiting and regulating the placement and acceptance, at a casino or gambling house operating in this State in Atlantic City or a running or harness horse racetrack in this State, of wagers on professional, collegiate, or amateur sport contests or athletic events by persons 21 years of age or older situated at such locations.' Section 5 repeals the 2012 Sports Wagering Law, and Section 6 provides that the enactment will take effect immediately upon becoming law, which occurred on 17 October 2014.

In addition to its substantive provisions, S2460 contains a statement explaining that the repealing legislation 'implements the decision of the United States Court of Appeals for the Third Circuit in *National Collegiate Athletic Ass'n v. Governor of New Jersey*³,' and includes language from the opinion quoted above. The statement also refers to language on page 11 of the brief that the United States submitted in opposition to New Jersey's request for the US Supreme Court to hear an appeal from the Third Circuit decision, stating: 'PASPA does not even obligate New Jersey to leave in place the state law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part⁴.'

The Period Between 23 June and 17 October 2014

While S2460 is now the focus of the dispute between the Leagues and New Jersey, its passage was preceded by other, now abandoned, attempts by New Jersey to take advantage of the Third Circuit language noted above. The Legislature, on 26 June 2014, passed Senate Bill 2250, which provided: 'All prohibitions, including, but not limited to, chapter 37 of Title 2C of the New Jersey Statutes, against wagering on the results of any professional, college, or amateur sport or athletic event, are partially repealed to the extent

³ 730 F.3d 208 (2013).

⁴ S2460, Statement.

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they would apply to such wagering at casinos or gambling houses in Atlantic City or at current running and harness horse racetracks in this State.' On 11 August 2014, Governor Christie vetoed the bill, noting in his veto message a need to 'examine the Third Circuit's opinion carefully and determine if a different approach towards sports wagering would comply with federal law.'

On 8 September 2014, the Acting Attorney General of New Jersey (appointed by the Governor) issued a directive and opinion, called the New Jersey Law Enforcement Directive 2014-1, in which he opined that - based on the Third Circuit's language - there was still life in the Sports Wagering Law. The Acting Attorney General determined that the provisions of the Law permitting casinos and racetracks to offer sports wagering were, in effect, partial repeals of the ban on sports wagering. He concluded that, based on the Third Circuit's language, the only provisions that violated PASPA were those addressing the licensing of sports wagering, which could be severed. This construction left the provisions permitting sports wagering at licensed casinos and racetracks in effect. Moreover, in conjunction with New Jersey Law Enforcement Directive 2014-1, New Jersey asked the District Court to clarify or modify its order enjoining the Sports Wagering Law to recognise that the law's surviving portions 'exempt certain sports wagering activities in casinos and race tracks from criminal and civil liability' and, if necessary, to 'modify' its order to reflect this proposition⁵.

The Leagues and the United States opposed New Jersey's request, arguing that there were no surviving provisions of the Sports Wagering Act. New Jersey was going to respond to their opposition on 17 October 2014. Instead, with the enactment of S2460 on 17 October 2014, New Jersey withdrew its motion for Clarification and/or Modification.

The Leagues' New Lawsuit

In response to the enactment of S2460, the Leagues, on 20 October 2014, filed a new complaint in the United States District Court for the District of New Jersey against Governor Christie, the Director of the New Jersey Division of Gaming Enforcement, the Acting Attorney General, the Executive Director of the New Jersey Racing Commission, the New Jersey Thoroughbred Horsemen's Association, Inc. (operator of Monmouth Park), and the New Jersey Sports and Exposition Authority (lessor of Monmouth Park) (collectively 'New Jersey'). The complaint asks the District Court to declare that S2460 violates PASPA or, alternatively, violates the New Jersey Constitution. It also asks the court to preliminarily and permanently enjoin New Jersey from implementing S2460⁶.

On 21 October 2014, the Leagues asked for a Temporary Restraining Order (TRO) pending resolution of their request for a Preliminary Injunction (PI) because of statements appearing in the press that sports wagering on football games would be offered at Monmouth Park, a licensed racetrack in New Jersey, beginning on 26 October 2014⁷.

In this regard, the Leagues' argue that S2460, despite being denoted as repealing legislation, is really authorising legislation in violation of PASPA. The argument is based on, among other things, the fact that the 'repeal' is restricted to licensed casinos and racetracks,

⁵ See New Jersey's Memorandum in Support of Defendants' Motion for Clarification and/or Modification of the District Court's 28 February 2013 Injunction submitted in Civil Action No. 3:12-cv-04947.

⁶ See Complaint docketed at 3:14-cv-06450 in the United States District Court for the District of New Jersey.

⁷ See, e.g., <http://bit.ly/1uW9vIW>. To obtain the TRO, the Leagues were required to show, among other things, that they are likely to prevail on the merits of their suit.

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the theory being that their licensure effectively constitutes authorisation. Alternatively, the Leagues argue that even if the limited repeal is not an authorisation and is therefore permitted under PASPA, S2460 violates the New Jersey Constitution because, under the Constitution, sports wagering at casinos and racetracks is only permitted if it is expressly authorised by the legislature.

New Jersey, on 23 October 2014, filed oppositions to the Leagues' request for a TRO. With respect to the PASPA claim, New Jersey argues, based on the Third Circuit language and statements in the brief of the United States in opposition to New Jersey's request for US Supreme Court review, that S2460 is not an authorisation of sports wagering, because all that New Jersey has done is exercise its right to repeal its sports wagering prohibition, in part, by limiting the repeal to sports wagering carried out at casinos and racetracks. With respect to the New Jersey Constitution claim, New Jersey argues that the Leagues are barred by the Eleventh Amendment to the US Constitution from asking a federal court to enjoin State officials from violating State law and that, in any event, the claim lacks merit because a repeal is either outside the scope of the New Jersey Constitution or consistent with it.

The District Court's Response

On 24 October 2014, the District Court held a thirty-minute telephone hearing on the Leagues' request for a TRO. At the end of the hearing, the Court granted the request. In a written order, the District Court explains that the TRO applies with respect to any 'competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games,' which would cover games not under the Leagues' jurisdiction, such as tennis, golf, and car racing.

On 28 October 2014, the District Court issued a scheduling order in connection with the resolution of the Leagues' request for a PI: New Jersey must file any additional briefing in opposition to the PI request by 3 November 2014; the Leagues must respond with any additional briefing by 7 November 2014; and oral argument will be held on 20 November 2014 at 10:00am.

Some Possible Outcomes and Implications

New Jersey is keeping its hopes of providing some economic relief to its casinos and racetracks alive, offering some hope to other States that might see sports wagering as a generator of new revenue. While the District Court appears primed to act quickly on the PI request, its decision will likely not end the new litigation. It seems likely that the loser will appeal to the Third Circuit, which will then be able to explain what it meant in its decision in the first lawsuit. As of the end of October 2014, the United States has chosen not to intervene in the new litigation. Some commentators speculate that the Leagues did not want it to participate because of the statement in its brief in opposition to New Jersey's request for US Supreme Court review that New Jersey included in S2460 and repeatedly quotes in its filings⁸.

A decision on whether the Third Circuit's resolution of the anti-commandeering issue permits a partial repeal of State bans on sports wagering activities will be important to any State,

⁸ See, e.g., <http://bit.ly/1tU1uua>

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even those outside the Third Circuit, interested in generating new revenue through those activities. If, ultimately, New Jersey's law does not violate PASPA, States with licensed gaming operators may consider similar partial repeals. And, States with constitutions that prohibit gambling in a fashion similar to New Jersey's will likely be interested in what the courts do with the claim that the S2460 violates the New Jersey Constitution.

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