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Leagues challenge NJ's regulated sports betting plans

New Jersey has sought to authorise sports betting through its 'Sports Wagering Law', which is opposed by US sporting leagues. Linda Shorey, Anthony Holzman and Tad Macfarlan of K&L Gates, assess New Jersey's chances of success.

New Jersey and its citizens took all the steps required under New Jersey law to authorise sports wagering at Atlantic City casinos and racetracks. Whether anyone will be able to place a legal sports wager in New Jersey, however, depends on the outcome of litigation in which the question of the constitutionality of the federal law that prohibits New Jersey from authorising sports wagering is the decisive issue.

PASPA and New Jersey

The Professional and Amateur Sports Protection Act¹ (PASPA), enacted in 1992, makes it unlawful:

- for a state 'to sponsor, operate, advertise, promote, license, or authorise'; and
- for a person 'to sponsor, operate, advertise, or promote' -

'a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more 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'².

PASPA, however, contains three exceptions to this prohibition. The first exempts States where sports wagering was legally conducted at any time between 1 January 1976 and 31 August 1990. The states in this category are Nevada, Oregon, Delaware and Montana, although only in Nevada was wagering on individual college and professional games allowed. The second



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exempts *pari-mutuel* wagering on races and *jai-lai*. The third was for New Jersey, if within one year, it authorised sports wagering³. PASPA authorises professional and amateur sports organisations to file civil actions to enjoin violations of its prohibition, if their competitive games are the alleged basis of the violation⁴. New Jersey failed to authorise sports wagering in the year provided by PASPA.

Sports wagering was not authorised in New Jersey until January 2012. The authorisation was possible because in November 2011, citizens voted to amend the New Jersey Constitution to permit the legislature to authorise sports wagering at Atlantic City casinos and current or former New Jersey racetracks⁵. The authorising legislation - the 'Sports Wagering Law' - became effective on 17 January 2012⁶. Any casino or racetrack wanting to offer sports wagering has to obtain a license⁷. Regulations governing sports wagering, required by the Sports Wagering Law, were proposed on 2 July 2012 and issued on 15 October 2012⁸.

The litigation

In August 2012, the NCAA, NBA, NFL, NHL, and MLB (collectively, 'Sports Leagues') filed a complaint against New Jersey's Governor and the Directors of the New Jersey Division of Gaming Enforcement and the New Jersey Racing Commission (collectively, 'New Jersey'), asking the US District Court for the District of New Jersey to declare that the Sports Wagering Law violates PASPA and to enjoin New Jersey from implementing sports wagering⁹.

Three days after filing the complaint, the Sports Leagues asked the District Court to enter summary judgment in their favour, asserting that there were no disputed facts and that it was clear

that New Jersey was in violation of PASPA. New Jersey countered by asking the District Court to dismiss the complaint because the Sports Leagues lacked standing to bring it, as they could not show any injury resulting from the Sports Wagering Law.

After a period of discovery, New Jersey, on 21 November 2012, filed a cross-motion for summary judgment in which it asserted not only that the Sports Leagues lacked standing, but also that PASPA violated the United States Constitution. On the same date, the New Jersey Thoroughbred Horsemen's Association (NJTHA) and two legislative leaders asked to intervene in the case. Intervention was granted on 11 December 2012. NJTHA then filed an answer and affirmative defences to the complaint and a legal memorandum in opposition to the Sports Leagues' motion for summary judgment. The affirmative defences asserted that PASPA was unconstitutional.

New Jersey's constitutional challenge, asserted on 21 November 2012, triggered a 60-day period for the United States to decide to intervene, during which time the District Court could not decide the constitutional issue. As a result, the District Court, on 18 December 2012, heard oral argument only on the question of the Sports Leagues' standing.

On 21 December 2012, the District Court issued its opinion on standing. Stressing that the Sports Leagues had to show only a "trifle" of an injury, the District Court found they had shown an injury resulting from the Sports Wagering Law that would be addressed if the Law were found to violate PASPA and New Jersey enjoined from implementing the Law¹⁰. The injury was the reputational harm the Leagues would suffer because 'their fans'

perception of the integrity of [the Leagues'] games will decline if the Sports Wagering Law goes into effect.¹¹ As 'undisputed material facts' supporting its determination, the district court pointed to results from four surveys conducted (in 2003, 2007, 2008, and 2009) by the NBA and NCAA. The surveys showed, among other things, that:

- 36% or less of the fans of the various Sports Leagues felt that 'game fixing and gambling' were problems;
- small percentages of college players were asked to fix games because of gambling debt; and
- 38% of survey respondents opposed legalised sports wagering throughout the US and 17% would spend less on the Sports Leagues if professional sports franchises were located in Las Vegas¹².

In January, the United States filed notice to intervene, and on 22 January 2013, the District Court ordered that the United States 'is an Intervenor in this case for the purposes of defending the constitutional challenges' and would be permitted to participate in the oral argument on 14 February 2013 on the issue of PASPA's constitutionality.

The Constitutional claims

Collectively, New Jersey and the NJTHA argue that PASPA is unconstitutional because it:

- (i) exceeds Congress's power under the Commerce Clause;
- (ii) commandeers State legislative and police powers in violation of 10th Amendment to the United States Constitution;
- (iii) violates the principle of equal sovereignty (or footing) among the states; and
- (iv) violates due process and equal protection principles under the 5th and 14th Amendments to the United States Constitution.

First, it is important to recognise that the Commerce Clause and the

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10th Amendment are often in tension. The Commerce Clause¹³ gives Congress the power 'to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes'. The 10th Amendment¹⁴ provides that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people'. The regulation of gambling within a State falls within the police power, a power possessed by the States and not delegated to Congress. In many instances, however, an activity regulated by a State under its police power substantially affects interstate commerce and therefore becomes an area where Congress can act. While there is a basis to argue that sports wagering is such an activity, the way that Congress has regulated it through PASPA leads to the second and third key underpinnings.

Second, an element common to claims (i), (ii), and (iv) is the special treatment afforded to Nevada, Delaware, Montana, and Oregon. Assuming interstate commerce is affected, the question becomes whether Congress can constitutionally permit four States to authorise sports wagering, but prohibit every other State from doing so. The four States that permitted, or had permitted, sports wagering retain the freedom to change their public policy with respect to sports wagering. They can cease the practice, restrict it, and then reauthorise it. No other State has that ability.

Third, the key question with respect to claim (ii) is whether by prohibiting any non-grandfathered State from exercising its police power to authorise and regulate sports wagering within its borders, Congress has commandeered the State's legislative power. Assuming

interstate commerce is affected, Congress could have directly prohibited any person from engaging in sports wagering. But, it did not. Instead, it forbid any State from authorising sports wagering and therefore, the argument goes, effectively, commandeered the legislative power of each of those States to ban sports wagering, rather than doing so itself.

Conclusion

If the District Court's decision on standing, issued three days after oral argument, is an indication of how quickly it will act on the claims that PASPA is unconstitutional, we may see the decision on constitutionality before the end of February. Whenever it appears, however, expect the losing side to appeal to the United States Court of Appeals for the Third Circuit. In turn, regardless of the decision of the Third Circuit, expect the losing side to ask the United States Supreme Court to hear the case. The road will be long. Should, at the end, New Jersey prevail, additional States are likely to consider authorising sports wagering.

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1. 28 U.S.C. §§3701 et seq.
2. 28 U.S.C. §3702.
3. 28 U.S.C. §3704(a).
4. 28 U.S.C. §3703.
5. See N.J. CONST. art. IV, §VII, ¶12D, F.
6. See N.J.S. 5:12A-1 thru 6.
7. N.J.S. 5:12A-2.
8. See N.J. Admin. Code §13.69N.
9. See National Collegiate Athletic Assoc. v. Christie, No. 12-cv-04947 (D.N.J., filed 7 Aug. 2012).
10. National Collegiate Athletic Assoc. v. Christie, slip op. at 7.
11. Slip op. at 7-8.
12. Slip op. at 10.
13. U.S. CONST. art. I, §8,
14. 10th Amendment, U.S. CONST. amend X,