

# The PASPA decision and the options left for New Jersey

On 17 September 2013, a three-judge panel of the US Court of Appeals for the Third Circuit issued a split decision affirming the US District Court for the District of New Jersey's decision that the federal Professional and Amateur Sports Protection Act ('PASPA') is constitutional and prevents the implementation of New Jersey's Sports Wagering Law. Linda J. Shorey, Anthony R. Holtzman and Tad J. Macfarlan of K&L Gates, Harrisburg, assess the Third Circuit's decision and the options available to New Jersey in seeking to overturn the decision.

All three judges agreed that the NCAA, NBA, NFL, NHL, and MLB (collectively 'Leagues') had standing, that Congress has the power to regulate sports wagering under the Commerce Clause, and that PASPA does not violate the equal sovereignty principle. However, one of the judges concluded that PASPA violates the anti-commandeering principle and, therefore, is unconstitutional. This dissent may assist New Jersey should it decide to seek rehearing by the Third Circuit or petition the US Supreme Court to hear an appeal from the decision.

## Background

PASPA prohibits states from 'sponsor[ing], operat[ing], advertis[ing], promot[ing], licens[ing], or authoriz[ing] a lottery, sweepstakes, or other betting, gambling, or wagering scheme based...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.' Under PASPA, states that had established sports betting programs at the time of the statute's enactment were permitted to continue implementing those programs. Included within this group was Nevada, which alone among the grandfathered states offered a full array of wagering on individual professional and amateur sporting events. While PASPA, enacted in 1992, gave New Jersey one year to join Nevada in offering full-scale sports wagering, it did not do so until January 2012.

In August 2012, the Leagues filed a complaint, asking the New Jersey District Court to declare that the Sports Wagering Law violates PASPA and enjoin New Jersey from implementing sports wagering. After the District Court decided the Leagues had standing to bring the action, the US was invited to seek intervention and then permitted to intervene in the case as a plaintiff because New Jersey, in defence, asserted that PASPA is unconstitutional.

On 28 February 2013, the District Court determined that PASPA is constitutional and enjoined implementation of the Sports Wagering Law. New Jersey appealed to the Third Circuit. Four States (West Virginia, Georgia, Kansas, Virginia) filed an *amici* brief in support of New Jersey.

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## The decision

### Commerce Clause

The Commerce Clause gives Congress the power 'to regulate Commerce with Foreign nations, and among the several States, and with Indian Tribes.' US CONST. art. I, §8, cl. 3. While the power provided by the Commerce Clause is broad, it is not unlimited.

All three judges agreed that Congress can regulate sports

wagering because 'both wagering and national sports are economic activities' and both activities 'substantially affect' interstate commerce. The majority rejected the argument that PASPA goes beyond regulating interstate commerce and unconstitutionally regulates local activity such as a 'casual bet' between family members, reasoning that PASPA only prohibits 'gambling "schemes" ...carried out "pursuant to law or compact."' It explained that even if purely intrastate activity was caught up in the PASPA prohibition, it would not change the outcome, because Congress had 'a "rational basis" for concluding that the activity in the aggregate has a substantial effect on interstate commerce.'

### Equal sovereignty

New Jersey's claim that PASPA violates the equal sovereignty principle is based on the 'preferential treatment' Nevada received by being the only State allowed 'to maintain broad state-sponsored sports gambling.' The principle of equal sovereignty flows from the concept that the US is 'a union of states, equal in power, dignity, and authority.' *Coyle v. Smith*, 211 U.S. 559, 567 (1911).

All three judges rejected New Jersey's argument. The majority concluded that PASPA's 'grandfathering' of the states already authorising some form of sports wagering was 'narrowly tailored' to PASPA's purpose of 'stop[ping] the spread of state-sanctioned sports gambling.' The majority stressed that the relief requested undermined the equal sovereignty argument: 'The remedy New Jersey seeks - a complete invalidation of PASPA - does far more violence to the statute, and would be a particularly odd result given the law's purpose of curtailing state-licensed gambling

on sports. That New Jersey seeks Nevada's preferential treatment, and not a complete ban on the preferences, undermines the Appellants' invocation of the equal sovereignty doctrine.'

On this point, the majority's opinion can be read to suggest that, under the Supremacy Clause, Congress can engage in 'selective' (or, in New Jersey's view, 'discriminatory') preemption by expressly preempting some states from authorising and regulating activities in a given field.

#### Anti-commandeering

The divisive issue was whether PASPA's prohibition on state-authorized sports wagering constituted impermissible commandeering of the states by Congress. On this issue, the views of the majority and dissent were starkly different.

While not completely ruling out the possibility that commandeering could result from legislation that prohibited states from acting, the majority was firm in its belief that PASPA's prohibition does not come close to doing so. In the majority's view, PASPA does what many statutes do: it preempts the states from regulating without requiring them to take any affirmative action. Moreover, the majority concluded that even if PASPA does 'coerce' states into maintaining bans on sports wagering, the coercion fits 'into the exception drawn in anti-commandeering cases for laws that impose federal standards over conflicting state rules, in areas where Congress may otherwise preempt the field,' explaining: 'PASPA gives states the choice of either implementing a ban on sports gambling or of accepting complete deregulation of that field as per the federal policy.' The majority stressed that the PASPA ban covers state-authorized sports

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wagering 'because Congress was concerned that state-sponsored gambling carried with it a label of legitimacy that would make the activity appealing.'

In the dissent's view, PASPA's prohibition commandeers the states because one way states regulate gambling is by taking the action that PASPA bans. Key for the dissent was that Congress prohibited these state regulatory options without providing any federal regulatory solution in their stead. The dissent disagreed with the majority's suggestion that other federal laws can collectively be considered 'to form the foundation of a federal regulatory scheme that can be interpreted as preempting state regulation of sports gambling.'

#### **What's next?**

Three options are available for New Jersey to seek to have the panel decision reversed. First, it could petition for a rehearing by the panel. Panel rehearings are meant for situations in which a panel overlooked or misapprehended a point of law or fact in reaching its decision. Second, it could petition for a rehearing by the full Third Circuit. *En banc* rehearings take place when needed to maintain the uniformity of the court's decisions or to address questions of exceptional importance. It is possible a majority of the Third Circuit's judges could be convinced that PASPA is unconstitutional. The split decision of the panel increases the chance the full Third Circuit would agree to rehear the case, but *en banc* rehearings are not common. New Jersey has until 1 November to ask for a rehearing.

Third, New Jersey could ask the US Supreme Court to hear an appeal from the decision. To do so, a petition seeking a *writ of certiorari* needs to be filed within

90 days of the decision.

#### **What's the impact?**

The only way the end result of this case would impact sports wagering in the US is if New Jersey wins and PASPA is declared invalid. At that point, individual states would be able to authorise sports wagering, unless Congress were to pass new legislation that provided otherwise.

An issue would exist, however, as to whether, in light of the Wire Act's prohibition on transmitting sports wagers in interstate commerce, individual states could authorise intrastate internet sports wagering. Yet to be resolved is the validity of the US Department of Justice's position that all wire communications (even if they start and end in the same state) cross state boundaries and, therefore, may implicate the Wire Act.

If New Jersey loses and the case is not heard by the US Supreme Court, the decision that PASPA is constitutional would be precedential only in the states and territories covered by the Third Circuit (New Jersey, Pennsylvania, Delaware, and the US Virgin Islands). A state within one of the other ten Circuits could authorise sports wagering, which would likely initiate the same series of events as New Jersey's authorisation did. Should that Circuit reach a different result, it would increase the chance of review by the US Supreme Court.

The game is not yet over. If New Jersey seeks to have the Third Circuit's decision overturned, there will be no final resolution in 2013.

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