NJ, THE LEAGUES AND THE BILLION DOLLAR QUESTION

The long-running battle over legalized sports betting in New Jersey returned to federal appeals court in March, with the dispute between the state and the sports leagues centering around one critical question, as Christopher Soriano of Duane Morris LLP explains.

New Jersey’s effort to implement sports betting at its casinos and racetracks has been rebuffed several times by the courts. Another battle in this effort is currently playing out in the United States Court of Appeals for the Third Circuit in Philadelphia, which heard oral arguments on March 17, 2015 and is expected to issue a written decision in the next several months. That decision could result in sports betting being implemented in New Jersey, and could also open the door for other US states to follow the same path. But how did we get here?

Simply put, the federal Professional and Amateur Sports Protection Act (“PASPA”) prohibits “a governmental entity to sponsor, operate, advertise, promote, license or authorize by law or compact” sports betting in the US. Several states, including Nevada, are exempt from PASPA to varying degrees because of sports betting those states had in place prior to PASPA’s enactment. For the remaining states, however, state-authorized sports betting is not permitted.

New Jersey first tried challenging PASPA on constitutional grounds, arguing that it impermissibly commandeered the legislative power of the state, in violation of the Tenth Amendment to the United States Constitution. Both the District Court and Court of Appeals rejected this argument, and the Supreme Court refused to consider the case. Interestingly, however, the Court of Appeals observed that PASPA leaves “much room for the states to make their own policy” and that it is left up to each state “what the exact contours of the prohibition will be.”

Seizing upon that language, in 2014 New Jersey took a different approach. Rather than enact a statute authorizing sports betting, it repealed the state’s criminal prohibitions on sports betting. But, it limited that repeal to casinos, racetracks, and sites of former racetracks only. Essentially, sports betting at those sites would be unregulated by the state’s gaming regulatory authorities, but would not be subject to criminal prosecution as would someone who simply set up an unregulated sports betting shop at some other location. In deciding to legislate in this manner, New Jersey claimed that it was simply following the Third Circuit’s decision and determining the “exact contours” of the prohibition on sports betting.

Not so fast, argued the sports leagues. They argued that this type of a repeal necessarily puts the state imprimatur on sports betting, which violates PASPA. The District Court agreed, finding that a partial repeal of sports betting prohibitions could not be accomplished in such a way as to comply with PASPA. It is against that backdrop that oral arguments occurred in the Third Circuit on March 17.

The arguments by the parties centered around one critical question: what does it mean to “authorize” something? What seems like a simple question had many lawyers and judges looking hard for a clear answer, and no clear answers were quickly found. Much of the legal analysis centers on whether repealing a prohibition on something – even in a partial, restricted way – amounts to ‘authorizing’ it. “Much of the legal analysis centers on whether repealing a prohibition on something – even in a partial, restricted way – amounts to ‘authorizing’ it.”
and racetracks. The state also argued that there is a distinction between authorizing something by law and repealing a criminal prohibition on that activity. The state argued that the Court’s prior opinion stands for the proposition that to “authorize” requires some affirmative act. However, in their questions, the judges seemed to suggest that language was dicta and the precise question of whether “authorizing” requires an affirmative act was not before the Court at that time. The Court seemed to believe that the question was one that it still had to resolve.

The sports leagues also were closely questioned by the Court as to what it means to authorize, with the court exploring whether “authorizing” requires the implementation of some sort of scheme or requires the state to do more than just repeal a prohibition. The leagues cited to the legislative history of PASPA, saying that Congress was concerned with stopping casino-style sports betting. The leagues argued that New Jersey’s actions, however styled, create casino-style sports betting, and that doing so was contrary to the intent of Congress. As a result, according to the leagues, New Jersey’s actions run contrary to congressional intent and should be construed in that manner.

Another question that arose was whether any “partial repeal” of prohibitions on sports betting was permissible, or whether the state had two and only two choices: a total ban or complete deregulation (such that anyone, not just casinos and racetracks, could offer sports betting). The leagues suggested that some partial repeal could be permissible, but that what New Jersey has done is impermissible. The leagues argued that a partial repeal that keeps the vast majority of the statute in place amounts to a state authorization. According to the leagues, a statute that still broadly prohibits sports betting but makes a small opening for casinos and racetracks is not a repeal – it is just another way to “authorize.”

The Court engaged in a discussion about how far a repeal would have to go in order to truly constitute a repeal. The leagues argued that a repeal cannot be limited to just a few licensed venues in the state. The leagues suggested that it would be acceptable to repeal the sports betting prohibition to permit wagers under $100, limited to family members or acquaintances. The leagues further suggested that at least half of a statute needs to be repealed in order for it to be a true partial repeal rather than an implicit authorization. In the sports betting context, it would be admittedly difficult to determine precisely how to repeal half of the prohibition, and no specific suggestions were offered at argument.

The Court appeared concerned about the prospect of sports betting occurring in a completely unregulated fashion, were it to accept New Jersey’s argument. However, the Court also observed that the text of PASPA itself does not prohibit “regulating,” but simply “authorizing” or “licensing.” Thus, the Court suggested that were it to adopt New Jersey’s reading of the statute, New Jersey might still be able to impose some level of regulation on sports betting short of “authorizing” or “licensing” it.

The dispute over what seems like a simple word – “authorize” – holds in the balance potentially millions of dollars in wagering and ancillary revenue to New Jersey casinos and racetracks. In the next several months, we should hear the Third Circuit’s perspective on the question. Indeed, if New Jersey’s argument succeds, other states could piggyback onto the construction and consider repeals of their own. That could lead to widespread sports betting in the US – or it could lead to Congress rewriting PASPA such as to close the door. Whatever happens, we can certainly expect sports betting to continue to be a hotly contested topic for years to come.

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