

The Efforts to Legalize Sports Betting in New Jersey—A History

by Christopher L. Soriano

A complex and expensive battle between the National Collegiate Athletic Association (NCAA) and the four major professional sports leagues and the state of New Jersey over whether New Jersey's casinos and racetracks can offer sports betting to customers is playing out in the federal courts. It is difficult to predict how and when this battle will be decided. Although a federal judge recently enjoined New Jersey from implementing sports betting, this is probably not the last word. Based on the sheer dollar amounts involved—potentially hundreds of millions of dollars of annual revenue—it is likely this battle will end in the court of appeals, or perhaps even the U.S. Supreme Court.

But how did we get here? The history of the battle over legalized sports betting in New Jersey begins with the 1976 amendment to the New Jersey Constitution, which authorized the Legislature to enact the Casino Control Act.¹ That amendment authorized “gambling houses and casinos” within Atlantic City, and left to the Legislature the “type and number...of gambling games” that could be conducted in the casinos. Sports betting, however, was never authorized. With the nationwide spread of legalized gambling beginning in the early 1990s, Congress, by statute, severely limited the spread of sports betting. After many skirmishes, whether sports betting will be a reality in New Jersey comes down to whether this 21-year-old federal statute is constitutional.

Congress Acts to Stop Sports Betting

From their initial opening in 1978 through 1993, New Jersey's casinos did not move forward with any serious efforts to establish sports betting. In 1991—around the time casino gambling began to take footholds outside of Nevada and Atlantic City—Congress began taking steps to prohibit states from implementing sports betting. The end product was the Professional and Amateur Sports Protection Act (PASPA), which was signed by President George H.W. Bush in 1992, to take effect on Jan. 1, 1993.² Then-New Jersey Senator (and former professional athlete) Bill Bradley was one of the prime sponsors of the act.

The PASPA is relatively simple. It prohibits any governmental entity from sponsoring, operating, advertising, promoting,

licensing, or authorizing by law any lottery, sweepstakes, or other betting scheme based on one or more competitive games in which amateur or professional athletes participate.³ The act also provides that a civil action may be brought in federal court to enjoin any violations of the PASPA by either the attorney general or a professional or amateur sports organization, if the sports organization's game is alleged to be the basis of the violation.⁴

The act contained two limited exceptions—one for existing states and one for Atlantic City. To the extent that a state conducted sports betting at any time between 1976 and 1990, it was exempt from the act. Additionally, to the extent a state had a statute in effect on Oct. 2, 1991, permitting sports betting or a sports lottery, and betting or a lottery had actually been conducted between 1989 and 1991, that betting or lottery was exempt from the PASPA. Four states fit under these exemptions: Nevada (which had full sports betting in its casinos), and Delaware, Montana, and Oregon (which had sports betting in some form through either state lotteries or bingo parlors). The second exemption provides that, if a municipality continually had casino gaming for at least the 10 years prior to the act's effective date, and legislation were adopted to permit sports betting in the casinos in that municipality within one year of the act's effective date, betting would be exempt from the PASPA's prohibition. Only one place in the United States could meet this exception—Atlantic City.

During the debate in Congress over the act, the Senate Judiciary Committee issued a report discussing the rationales supporting its enactment.⁵ The National Football League, Major League Baseball, and National Basketball Association's commissioners all testified in support of the PASPA. The committee report stated the reasons for the enactment of the act was that public confidence in the integrity of sports was undermined by gambling, and sports betting promoted gambling among young people. The committee report stated that “legalization of sports gambling would inevitably promote suspicion about controversial plays and lead fans to think ‘the fix was in’ whenever their team failed to beat the point-spread.”⁶

The report also contained the minority views of Senator Chuck Grassley. Senator Grassley criticized the act, arguing that

it was a substantial infringement of states' rights because the federal government had never regulated intrastate wagering activities. Senator Grassley also argued the fact that several states were permitted to continue to have sports betting blatantly discriminated against the remaining states without any rational basis. In addition, he stated the professional sports leagues have long been aware of extensive wagering on their games, have done nothing to prevent it, and, in fact, have taken advantage of gambling, for example through promotions revolving around the scores and results of games.⁷

But the Judiciary Committee's view carried the day, and, starting Jan. 1, 1993, New Jersey was on the clock.

The Pivotal Year—1993

In 1993, the New Jersey Senate made efforts to place a referendum on the November general election ballot that would amend the state constitution to specifically permit the Legislature to authorize sports betting. But, the resolution that would have authorized a referendum never received a vote on the Assembly floor. There are a number of different opinions about why this may have happened—influence by U.S. Senator Bradley; influence by Nevada-based interests to try to preserve Nevada casinos' monopoly; or concerns over how placing the referendum on the ballot would affect turnout in the general election and possibly impact the results of the 1993 gubernatorial race, where, ultimately, Christine Todd Whitman beat incumbent Jim Florio by only 26,000 votes.

Regardless of the reason, the clock ran out, and New Jersey was unable to place the referendum on the ballot in time to qualify for the PASPA exemption.

Once it became clear the Legislature was not going to act, New Jersey's casinos tried to go back to the provisions of the Casino Control Act and argue that no amendment or referendum at all was required to take advantage of the PASPA

exemption, because sports betting was something the Casino Control Commission could simply implement by regulation.⁸ The commission rejected the casinos' request, as did the Appellate Division.

The Appellate Division found convincing a number of statements made by legislators at the time the 1976 constitutional amendment authorizing gambling in Atlantic City was proposed. For example, then-Assemblyman Steven Perskie observed that the constitutional amendment "would not authorize sports betting of any kind."⁹ Senator Joseph McGahn stated that "[t]here is nothing in this bill which would permit casinos...to have all sports betting."¹⁰ The Assembly State Government and Federal and Interstate Relations Committee statement in support of the joint resolution authorizing the constitutional amendment noted it was not the intention of the Legislature to authorize any form of gambling or betting on the outcome of any sports events or other events that take place outside the casino itself.¹¹

The court also discussed the 1990 amendment to the New Jersey Constitution that authorized the casinos to accept bets on simulcast horseraces.¹² The court noted that the introduction of various forms of legalized gambling in New Jersey has always been by constitutional amendment, and that sports betting had never been authorized by constitutional amendment. The court reasoned that there was little difference between simulcast and sports wagering, and if the definition of "gambling game" did not include simulcast, it must not include sports betting.¹³

Moreover, the Casino Control Act, as initially adopted, only authorized certain games. Ultimately, in 1992, the act was amended to permit the commission to determine what games were appropriate. However, a letter to the chairman of the Assembly Financial Institutions Committee from the bill's sponsors observed that, first, it was not the sponsors' intent to

allow the commission the authority to authorize sports betting; and second, the legislation could not do so because sports betting could only be authorized by constitutional amendment.¹⁴ The legislation was released with a statement that it was not intended to grant the commission the right to authorize sports betting.¹⁵ The court concluded that, taken together, all of these factors led to the conclusion that sports betting could only be authorized by constitutional amendment.

The Supreme Court granted certification and considered the case on an expedited basis, but affirmed the judgment of the Appellate Division.¹⁶ Time had run out for New Jersey—the PASPA now prohibited sports betting.

The Next Round—The 2009 Lawsuit

Throughout the 1990s and early 2000s, Atlantic City's casinos experienced a period of substantial business success. But the recession that began in 2008, combined with the growth of regional casinos in the Northeast, led to declines in gaming revenues for New Jersey's casinos. Some viewed sports betting as a way to enhance Atlantic City as a destination, and, along with that, enhance tourism and both gaming and non-gaming revenues again. But the PASPA stood in the way.

In 2009, the Interactive Media & Entertainment Gaming Association (iMEGA), several horsemen's groups, and Senator Raymond Lesniak filed an action against the U.S. attorney general, seeking a declaratory ruling the act was unconstitutional.¹⁷ Senate President Stephen Sweeney intervened as a plaintiff. The attorney general argued the case should be dismissed because each of the plaintiffs lacked standing. The district court agreed.¹⁸ First, the court addressed iMEGA and the horsemen's groups. Both alleged that, because the act subjects them to potential liability for promoting sports betting, it harms them.¹⁹ But, the court concluded that all these organizations

could do was advocate, and that they could not show advocacy would result in any civil liability.²⁰ Because New Jersey law did not permit sports betting, the court concluded, no enforcement action could be brought against these organizations seeking to stop them from promoting sports wagering. Nor did these organizations actually operate sports betting. Accordingly, the organizations could not show the PASPA was causing them sufficient harm to establish standing.²¹

Turning to the legislators, the court concluded the concept of institutional standing did not apply.²² Under the doctrine of institutional standing, if a legislator's vote has been completely nullified, the legislator could conceivably have standing.²³ But the court concluded the injury alleged by the legislators was too abstract, because the act did not chill the legislators' rights to seek to enact sports betting despite the act.²⁴ The court concluded the mere threat of federal preemption does not grant legislators the right to challenge the constitutionality of a federal law. Thus, the case was dismissed, without the Department of Justice ever taking a position on the constitutionality of the act.

The Amendment to the State Constitution

On Dec. 13, 2010—while the *iMEGA* litigation was pending—the Legislature agreed to a constitutional amendment that would authorize the Legislature to allow sports betting. The amendment proposed language to be added to Article IV, Section VII, paragraph 2 of the state constitution to “authorize by law wagering at casinos or gambling houses in Atlantic City and at current or former running and harness horse racetracks on the results of professional, certain college, or amateur sport or athletic events.” The amendment passed with 64 percent of the vote in the Nov. 2011 general election.

Shortly thereafter, the Legislature amended the Casino Control Act to authorize sports betting.²⁵ The legislation

allowed the Division of Gaming Enforcement to approve a casino licensee's application to operate sports betting, and to allow the division and the New Jersey Racing Commission to jointly approve a racetrack's application to operate sports betting.²⁶ Wagers cannot be accepted on any college sporting event taking place in New Jersey, or on any New Jersey college team's game, regardless of venue.²⁷

On Oct. 15, 2012, the Division of Gaming Enforcement adopted regulations to govern the operation of sports betting.²⁸

The Leagues Sue to Block Sports Betting

On Aug. 7, 2012, the four major sports leagues and the NCAA filed an action in district court seeking to enjoin the implementation of sports betting, alleging it would violate the PASPA.²⁹ On Aug. 10, the leagues filed a motion for summary judgment. They argued the act unequivocally prohibits sports betting, the New Jersey statutes unequivocally permit sports betting, and the state statute must yield to federal law. The leagues argued that none of the act's exceptions apply, particularly because New Jersey considered and did not approve the 1993 joint resolution that would have taken advantage of the PASPA opt-in window.

Preemptively striking against what it believed would be the likely arguments by the state, the leagues argued the act does not violate the commerce clause or equal protection clause of the U.S. Constitution. The leagues argued the proper standard is whether a rational basis exists for Congress to have concluded the regulated activity in question affects interstate commerce. The leagues argued intrastate gambling is a commercial activity that substantially affects interstate commerce. They also discussed the legislative history of the act. Moreover, the leagues argued there is no requirement that, when Congress acts under the commerce clause, it act uniformly with respect to different

states.

On Sept. 7, the state filed its motion to dismiss, claiming the leagues lack standing to enforce the PASPA. The state argued the leagues' claim that the harm they will suffer is suspicion that games have been influenced by factors other than honest competition, which, in turn, will harm the leagues' reputation and goodwill. The state argued, however, that this vague claim of injury does not satisfy the injury-in-fact requirement of Article III standing. The state characterized the leagues' argument as “not just conjectural, but deeply implausible,” citing the estimated \$380 billion wagered annually on sporting events through illegal and offshore channels. The state argued the leagues have not alleged any facts that this preexisting industry has harmed their reputation or goodwill. As a result, there is no reason to believe sports wagering in New Jersey will cause any harm to the leagues—and certainly not immediate, irreparable harm.

The state also argued the leagues have failed to establish that any injury would be fairly traceable to sports betting. The state argued the “relatively modest increase” caused by New Jersey joining the market would not cause any increase in the leagues' alleged reputational injury. Moreover, the state argued, to the extent the leagues' standing argument hinges on the temptation for someone to fix a game or shave points, those injuries would be most directly caused by the leagues' own players, not the state officials who regulate sports betting—and who would be a victim of any such scam.

On Nov. 21, the state filed its brief on the merits, arguing the act violates the commerce clause, the due process clause, the equal protection clause, and the 10th Amendment. Focusing on the 10th Amendment, the state argued the amendment prohibits the federal government from commandeering the legislative processes of a state, and the PASPA, by prohibiting the authorization of sports betting by a Legislature, commandeers

the legislative process. The state also argued that, by diverting legal sports wagering revenues from New Jersey to Nevada, New Jersey is required to bear the financial burden of implementing a federal regulatory program.

With respect to the commerce clause, the state argued the fact that certain states may permit sports betting constitutes unconstitutional discrimination. The state argued the principles behind the commerce clause are uniformity in regulation, and that the act does the opposite. This discrimination is so significant that the PASPA violates even the relatively low rational basis standard imposed under the equal protection clause and due process clause.

Because the constitutionality of a federal statute is implicated in the case, the attorney general had the right to intervene and defend the act's constitutionality, which he has done, making arguments similar to those made by the leagues.

The Leagues Have Standing

Although not reaching the merits, on Dec. 21, 2012, the district court found the leagues have standing to challenge the PASPA. The court noted that the injury necessary to establish standing must be only an "identifiable trifle." Based on that standard, the court concluded the potential negative effect on perception of the integrity of the leagues' games and their relationship with their fans was sufficient enough to constitute an injury. The court concluded that this "perception based in reality" is sufficient to establish the "trifle" necessary for standing. The court found unpersuasive the state's argument that the leagues sanction fantasy sports, noting that fantasy sports are not considered gambling under other federal statutes regulating gambling.

The District Court Upholds the PASPA's Constitutionality

On Feb. 28, 2013, the district court found the PASPA is constitutional.³⁰ The

court rejected challenges brought by the state based on the commerce clause, the 10th Amendment, the due process clause, and the equal protection clause. The court's holding centered around the legal conclusion that Congress needed only a rational basis for the PASPA to enact it, and a review of the act showed Congress had that rational basis. The court also concluded that the 10th Amendment is not violated where Congress prohibits activity rather than "commandeering" a state to take action. As a result, the court concluded that New Jersey's efforts to implement sports betting violate the PASPA. The court determined the appropriate remedy is a permanent injunction prohibiting New Jersey from going forward with implementation and regulation of sports betting at casinos and racetracks.

Where Do We Go From Here?

Based on the history of the efforts to implement sports betting, the novelty of the constitutional issues raised, and the amount of money at stake, there is little doubt that the final word on sports betting in New Jersey will come from a higher court. Even with continuing litigation, however, there have been several discussions in Congress about legislation that would either give New Jersey another shot at a PASPA exception or repeal the act entirely. This battle could go on for years to come. ☺

Endnotes

1. N.J. Const., Art. IV, Sect. VII, clause 2(D).
2. 28 U.S.C. § 3701 *et seq.*
3. 28 U.S.C. § 3702.
4. 28 U.S.C. § 3703.
5. Senate Report No. 102-248 (Nov. 26, 1991), reprinted at 1992 U.S.C.C.A.N. 3553.
6. *Id.*
7. *Id.*
8. *In the Matter of the Petition of Casino Licensees for Approval of a New Game,*

Rulemaking and Authorization of a Test, 268 N.J. Super. 469, 470-71 (App. Div. 1993).

9. *Id.* at 473.
10. *Id.*
11. Senate Statement to ACR 126, May 19, 1976.
12. N.J. Const. Art. IV, Sect. VII, clause 2(E).
13. *In re Petition of Casino Licensees*, 268 N.J. Super. at 474-75.
14. *Id.* at 475.
15. *Id.*
16. *In re Petition of Casino Licensees*, 138 N.J. 1 (1993).
17. *Interactive Media Entertainment & Gaming Assn. Inc. v. Holder*, No. 09-1301 (D.N.J.).
18. *Interactive Media Entertainment & Gaming Assn. Inc. v. Holder*, No. 09-1301, 2011 U.S. Dist. Lexis 23383 (D.N.J. March 7, 2011)(unpublished op.).
19. *Id.* at *12.
20. *Id.*
21. *Id.* at *14-15.
22. *Id.* at *18.
23. *Id.* at *19-20, *citing Coleman v. Miller*, 307 U.S. 433 (1933). In *Coleman*, the Supreme Court concluded that legislators who have sufficient votes to defeat (or enact) a legislative act have institutional standing if the legislation goes into effect (or does not), because their votes will be completely nullified.
24. *Id.* at 22.
25. N.J.S.A. 5:12A-1 *et seq.*
26. N.J.S.A. 5:12A-2.
27. N.J.S.A. 5:12A-1.
28. N.J.A.C. 13:69N-1.1 *et seq.*
29. *NCAA v. Christie*, No. 12-cv-4947 (D.N.J.).
30. *NCAA v. Christie*, No. 12-cv-4947, slip op. (D.N.J. Feb. 28, 2013).

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