

NEW JERSEY THE KEY TO THE FUTURE OF SPORTSBETTING

Griffin Finan, Associate at Iffrah PLLC, reports on US District Judge, Michael Shipp's opinion in the closely watched New Jersey sportsbetting case that found New Jersey's new sportsbetting law to be invalid as it conflicts with federal law.

New Jersey Governor Chris Christie, a lawyer and a former US Attorney for the District of New Jersey himself, has vowed to appeal the decision to the US Court of Appeals for the Third Circuit and has stated that he believes New Jersey will "ultimately prevail." This appeal is critical for the gaming industry because it will shape the future of sportsbetting in America.

The Professional and Amateur Sports Betting Act of 1992 (PASPA), the federal law that will be at issue in the appeal, prohibits any state from offering sportsbetting unless that state had a sportsbetting scheme in place between 1976 and 1990. Under the law, Delaware, Oregon and Montana were granted limited sportsbetting schemes, and Nevada was the only state authorized to offer single-game sportsbetting. In 2011, New Jersey voters approved a referendum by a two-to-one margin to amend the state constitution to allow sportsbetting in the state's casinos and racetracks. The state legislature then passed a bill legalizing sportsbetting in the state and it was signed into law by Governor Christie. The New Jersey law would permit wagering on all major professional and collegiate sporting events, except collegiate sporting events involving New Jersey colleges, and all sporting events, professional or collegiate, taking place in the state.

In August 2012, after New Jersey announced its intention to go forward with the sportsbetting law, the four major professional sports leagues and the National Collegiate Athletic Association (NCAA) sued the state, arguing that the sportsbetting law conflicted with federal law.

In December 2012, the court heard oral arguments on the leagues' standing to bring the suit and found that they did have standing. After that ruling, the US Department of Justice (DoJ) announced its intention to intervene and join the sports leagues and the NCAA as plaintiffs in the case. The DoJ filed a brief on February 1 defending the constitutionality of PASPA.

Judge Shipp heard oral arguments on February 14, 2013, on the constitutionality of PASPA. The arguments focused on three main constitutional issues:

- Congress' power to regulate sportsbetting under the Commerce Clause and the applicability of the uniformity and equal sovereignty principles under the Commerce Clause;
- due process and equal protection issues under the Fifth Amendment;
- contention that the law violates the anti-commandeering principle that prohibits the federal government imposing duties on state legislators or executive officials to carry out federal initiative.

The court held that PASPA was a rational expression of Congress' powers under the Commerce Clause. The court looked at the Congressional history of PASPA and found that there was a sufficient rational basis for the law.

The court also found that PASPA did not violate the Fifth Amendment protections of the due process clause and equal protection principles. The court found that New Jersey could not assert a due process claim because as a governmental entity and not a "person," it cannot invoke the due process clause. The court found that the equal protection challenge failed because Congress had a rational basis in passing PASPA.

After a very lengthy analysis, the court found that PASPA did not violate the anti-commandeering principle because it "neither *compels* nor *commandeers* New Jersey to take any action." One point of contention during oral arguments was whether the anti-commandeering principle applies only when a state is required to engage in affirmative activity. The court agreed with the leagues on this point, noting that the difference between forcing a state to affirmatively do something and being prohibited from doing something "is not merely academic or insubstantial."

New Jersey argued that under PASPA, Congress determined that a federal solution was required, but it passed the implementation and enforcement burden on to the states. PASPA was enforced with the legislative mandate to stop "state sponsored" sportsbetting and forces New Jersey to



prohibit sportsbetting, which New Jersey argues creates a burden. If Congress wanted to pass a law that prohibited sportsbetting it could do so, but it cannot make states bear the burden of enforcing the law, which PASPA does. New Jersey has argued that there are costs associated with enforcing any law and PASPA has passed all financial burdens on to the state.

New Jersey also argued that PASPA thus forces New Jersey to maintain a regime where sportsbetting is prohibited despite its residents voting in favor of it by large margins, its legislature passing a bill to legalize it, and its Governor signing the bill into law. Thus, as a result of a federal law, New Jersey is being forced to maintain a law that its legislators do not feel is in the best interests of the state.

The court's opinion also made it clear that it does not believe PASPA violates any Tenth Amendment principles. The state has argued that Nevada was essentially granted a monopoly on single-game sportsbetting through PASPA which was a challenge to its state sovereignty. The court did not agree that PASPA usurps state sovereignty and noted, "The fact that gambling might be considered an area subject to the States'

traditional police powers does not change this conclusion."

The court found that PASPA's grandfathering clause that allows a few states to offer sportsbetting comports with the Commerce Clause. The court pointed to the legislative findings of PASPA that "Congress has determined that the substantial reliance interests of the grandfathered states merit preservation and protection," and therefore, the grandfather clause contained in PASPA passed the rational basis review.

It is not surprising that the district court declined to find a 20-year-old federal law unconstitutional. District courts very rarely make such rulings, and the opinion even stated that "judicial intervention is generally unwarranted no matter how unwise a court considers a policy decision of the legislative branch." However, on appeal, a law is more likely to get overturned on constitutional issues.

The Supreme Court has never ruled on PASPA, but there have been three prior challenges to the statute, one of which was appealed to the Third Circuit. However, none of the prior challenges have addressed the merits of the constitutionality of PASPA.

In 2007, in *Flagler v. US Attorney for Dist. Of NJ*, a federal court dismissed a suit brought by a *pro se* litigant claiming that PASPA violates the Tenth Amendment. The court dismissed the complaint, without addressing the merits of the suit, holding that the plaintiff lacked standing because the plaintiff could not show any harm and offered the court "no explanation of how a right to gamble on professional and amateur sports would be or could be a 'legally protected interest.'"

In 2009, in *Interactive Media Entertainment & Gaming Ass'n, Inc. v. Holder*, the Interactive Media Entertainment & Gaming Association (iMEGA), three groups representing the state's horseracing industry, New Jersey State Senator Raymond Lesniak (who also sponsored the state's sports wagering bill at issue in the present case), and President of the New Jersey Senate, Stephen Sweeney, filed suit in federal court seeking a declaratory judgment that PASPA was unconstitutional. Governor Christie was given the opportunity to intervene as a party in the case, but declined. The federal district court dismissed the complaint, holding that the plaintiffs

lacked standing to bring the suit because they failed to allege an injury from the law. The court noted that even if the plaintiffs had alleged a sufficiently concrete injury, New Jersey law at the time prohibited sports gambling, so a finding that PASPA was unconstitutional would not redress the plaintiffs' asserted injury.

In *Office of the Commissioner of Baseball v. Markell*, the four major professional sports leagues and the NCAA filed suit to stop Delaware from moving forward with legislation to authorize sportsbetting in the state, including single-game betting. Delaware was one of the states that had a partial exemption under the grandfathering provision of PASPA because it offered parlay betting involving NFL games before PASPA was enacted.

The court held that parlay betting on at least three NFL games is the only betting scheme that Delaware was authorized to conduct and any expansion beyond parlay betting was beyond the scope of the exemption and invalid under PASPA. The court held that the PASPA exemption only applied "to the extent that the scheme was conducted by that State" as of the effective date of the statute. Schemes that were contemplated or authorized by the state did not fall under the exception – only schemes that were actually conducted.

New Jersey will thus present the Third Circuit with its first opportunity to directly address the constitutionality of PASPA on appeal. The prior decisions from *Flagler* and *iMEGA* will have no impact on this appeal because they were from a district court and dealt with issues that are not involved in this case.

In the opinion from the district court in this case, it was noted that although the

court was not presented with a direct constitutional challenge in *Markell*, it found that PASPA was "not... ambiguous." The court also noted that the Third Circuit in *Markell* found the argument that a state's sovereignty requires it to be permitted to implement a betting scheme of the state's choosing "unpersuasive."

The key issue on appeal could be the anti-commandeering principle and how it should be applied to the state under PASPA. The *Markell* decision did not directly address the anti-commandeering issue and there is very little precedent for the Third Circuit to rely on in this case. The issue will hinge on the question of whether a state needs to take an affirmative step for the anti-commandeering principle to apply. New Jersey is prohibited from taking an affirmative step – i.e., enacting its state gambling law – and this, it argues, is commandeering. The district court was not persuaded by this argument and pointed to many laws that were overturned because they required a state to take some affirmative action, but New Jersey will likely work hard to convince the court that the prohibition from taking action is commandeering.

The grandfathering clause of PASPA could also be an important issue, but the *Markell* decision found Delaware's argument that the grandfathering clause challenged its state sovereignty to be unpersuasive. At oral argument, attorneys for New Jersey emphasized that the states' voters, legislators and Governor all want to enact this law, but are prohibited by a federal law that they argue is a direct challenge to its sovereignty. The state's attorneys also pointed out that the grandfathering clause has essentially created a permanent monopoly on single-game sportsbetting for Nevada because

it was the only state to have single-game betting exempted under PASPA. At oral arguments and in court papers, neither side could point to a law that operated in the way that PASPA does because of the grandfathering clause, so there is very little precedent for the court to work with.

Whatever decision is reached by the Third Circuit, and potentially the Supreme Court, on the constitutionality of PASPA will have far reaching consequences. If PASPA is found unconstitutional, then the primary hurdle for states to implement sportsbetting will be removed. Given the need to generate revenue, states will be forced to consider sports gambling because of its ability to create a new industry and the tax revenues that come with it. Minnesota and California have introduced their own bills in the past year to legalize sports gambling in the state and other states are sure to follow.

If PASPA is found unconstitutional, it will not allow for inter-state online sportsbetting because that is still prohibited under the Wire Act.

The appeals process in the Third Circuit could take as long as a year and the ruling could potentially be appealed to the Supreme Court, but at some point in the not so distant future, we will have a ruling in a case that will define the future of sportsbetting in America.

Griffin Finan is an associate at Ibrah PLLC, a boutique litigation firm located in Washington DC. Griffin focuses his practice on iGaming, sportsbetting, and fantasy sports.

