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Betting Games

By **Douglas Minke** *Thu, Apr 26, 2012*



According to a February 6 press release from the Nevada Gaming Control Board, the state's 184 licensed sports books took nearly \$94 million in wagers on the 2012 Super Bowl between the New York Giants and the New England Patriots.

And even though commercial and tribal casino gaming continues to expand and now exists, in one form or another, in 38 of the 50 states (not including those states which offer racinos), the Nevada commercial gaming industry holds a virtual monopoly on

legal sports wagering in this country.

This fact has caused a great deal of concern in a number of state legislatures, where lawmakers continue to look for new ways to generate additional tax revenue.

For example, the state of New Jersey, which has hosted large-scale commercial gaming since 1978 and has watched its commercial gaming industry get battered by a sluggish economy and increasing gaming competition from neighboring states, is nonetheless prohibited from allowing its casinos to offer sports wagering. This prohibition is a result of a federal law known as the Professional and Amateur Sports Protection Act.

Enacted in October 1992, PASPA provides that "it shall be unlawful for a government entity to sponsor, operate, advertise, promote, license or authorize by law or compact, or a person to sponsor, operate, advertise, or promote... a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly...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, the term "government entity" explicitly includes "an entity or organization described in the Indian Gaming Regulatory Act that has governmental authority within the territorial boundaries of the United States, including on lands described in... such act." Thus, PASPA prohibits sports wagering at tribal casinos as well.

Uneven Impact

PASPA, however, has done little to stem the public demand for sports wagering. According to the American Gaming Association "Fact Sheet" on sports wagering, illegal wagers on sporting events totaled as much as \$380 billion in 2010, compared to the \$2.76 billion legally wagered in Las Vegas sports books that same year—a figure which is less than 1 percent of the total estimated sports wagers placed.

Furthermore, according to a December 2011 poll conducted by Fairleigh Dickinson University's PublicMind, our country is moving toward an overall acceptance of sports wagering. This poll, which spoke with 855 registered voters nationwide in November and December 2011, found the general public split 42 percent-42 percent on whether federal law should be changed to allow sports wagering in their home states. This even split is a

change from a March 2010 poll in which 53 percent of nationwide voters opposed legalizing sports wagering in all states, compared to 39 percent who favored such expansion.

As our country's acceptance of sports wagering seems to be moving, there is also a growing momentum to challenge the constitutionality of PASPA and/or amend it through an act of Congress. Here are some recent attempts, and what they mean for the possible expansion of sports wagering throughout the country.

New Jersey

By its terms, PASPA carves out a number of exceptions for certain state-run lotteries, certain casino sports books that were in operation prior to its enactment, parimutuel animal racing and jai-alai. These statutory exceptions effectively served as a grandfather clause for the licensed sports books in Nevada, the sports lottery previously conducted in Oregon, a sports lottery that was previously authorized under Delaware law, and certain sports pool betting previously authorized under Montana law.

Importantly, PASPA also provided a one-year window of opportunity for states that allowed the operation of commercial casino gaming for the previous 10-year period (i.e., January 1, 1983-January 1, 1993) to pass a law setting forth a sports wagering scheme to be conducted within that state's regulated casinos. Though this provision of PASPA was clearly designed with the New Jersey casinos in mind, as Atlantic City was the second-largest commercial gaming region in the country at that time, the New Jersey legislature failed to statutorily authorize a sports wagering scheme before this window closed on January 1, 1994. Since that time, New Jersey has tried, on a number of occasions, to allow for an expansion of sports wagering into its Atlantic City casinos. Prior to 2010, however, none of these efforts was ultimately successful in effecting any real change to the Atlantic City casino sports wagering status quo.

In March 2009, New Jersey state Senator Raymond Lesniak joined members of the New Jersey horse racing industry and the Interactive Media Entertainment & Gaming Association, Inc. in a federal lawsuit that sought to challenge the constitutionality of PASPA (the iMEGA lawsuit). In their complaint, the plaintiffs argued, among other things, that the Equal Protection Clause of the Constitution requires that any prohibition against sports wagering be equally applied across all 50 states, and that PASPA, as then applied, favored the four states where a form of sports wagering was allowed, over the rest of the states. The president of the New Jersey Senate, Stephen Sweeney, also later intervened in the matter as a plaintiff.

The U.S. government filed a motion to dismiss the iMEGA lawsuit in August 2010, and on March 7, 2011, Judge Garrett Brown, Jr. of the U.S. District Court for the District of New Jersey granted the government's motion to dismiss. In his memorandum opinion, Brown dismissed the case, holding that the various plaintiffs did not have standing to challenge the constitutionality of PASPA. Specifically, with regard to state senators Lesniak and Sweeney's lack of standing, the court held:

"Although the state legislature would have a vested institutional interest in defending a state law against a constitutional attack when the executive branch declines to defend it, this court cannot say that state legislators have the same institutional interest in challenging a federal statute, absent some interest in defending a particular state law. Here, Senators Sweeney and Lesniak are not defending a state law, but are prospectively

trying to bypass PASPA's preemptive force. To the extent that PASPA diminishes state authority over sports gambling, it injures state sovereignty, not legislative sovereignty... Because the state has not intervened in this suit, plaintiffs lack standing..."

Though the judge's opinion is clear as far as the then-current standing of the parties, it does suggest that the situation could very well be different if a state were defending an enacted law against a constitutional attack.

To this end, on December 13, 2010, the New Jersey legislature passed Senate Concurrent Resolution (SCR) 132, a measure that placed a referendum on the November 8, 2011 general election ballot that asked the New Jersey electorate to authorize the legislature to allow sports wagering at the Atlantic City casinos and at the state's horse racetracks. The New Jersey Sports Betting Amendment, Public Question 1 read as follows:

"Shall the amendment to Article IV, Section VII, paragraph 2 of the Constitution of the State of New Jersey, agreed to by the Legislature, providing that it shall be lawful for the Legislature 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, be approved?"

The Interpretative Statement to Public Question No. 1 provided that "a Yes vote on this question would allow the legislature, when permitted by federal law, to legalize the placing of bets on certain sports events at casinos, racetracks and former racetracks..."

Public Question 1 was passed by a margin of 64 percent-36 percent, and shortly thereafter, an Assembly bill was introduced in the New Jersey legislature. The measure permits sports wagering at casinos and racetracks —though the bill prohibits wagers from being placed on any professional or collegiate sporting event which takes place in New Jersey, or any game in which a New Jersey college team participates, regardless of where the game takes place.

The bill was quickly passed by both houses of the New Jersey legislature on January 9, and Governor Chris Christie signed the measure into law on January 17. It is clear, however, that the bill will not be effective until PASPA is either declared unconstitutional or is amended to allow for sports wagering to occur in New Jersey.

As New Jersey now has a sports wagering law on the books, and a law which was the result of a voter referendum no less, many expect New Jersey Attorney General Jeffrey S. Chelsea to file a lawsuit challenging the constitutionality of PASPA in federal court in the near future. As Lesniak stated back in March 2011 following the dismissal of the iMEGA lawsuit, "In his decision to dismiss, Judge Brown left the door open for future efforts to overturn the unconstitutional ban in the courts. If voters in the Garden State approve a referendum which will be on the ballot this November to give New Jersey the authority to establish sports book at our ailing casinos and racetracks, we will essentially set up a constitutional crisis, in which the will of the people, expressed at the ballot box, will come into conflict with a flawed and ultimately unconstitutional federal law. I believe that when that happens, the courts will have to rule in our favor."¹

As of the date of this article's submission, however, no such lawsuit had been filed.

A Congressional Fix?

In addition to potential legal action challenging PASPA, there are also two bills that have been recently introduced in Congress that seek to amend PASPA. On January 23, 2012, House Resolution 3797, titled the "Sports Gaming Opportunity Act of 2012," was introduced by Rep. Frank LoBiondo (R-N.J.). H.R. 3797 would amend PASPA to allow any state to establish a sports wagering scheme by applicable statute so long as that scheme was (a) enacted on or after January 1, 2012 and (b) is effective not later than January 1, 2016. H.R. 3797 was initially referred to the House Committee on the Judiciary and thereafter, on January 25, was referred to the Subcommittee on Courts, Commercial and Administrative Law. The bill has not yet moved out of this subcommittee.

A second bill seeking to amend PASPA, titled the "New Jersey Betting and Equal Treatment Act of 2012" (H.R. 3809), was introduced by Rep. Frank Pallone (D-N.J.) on January 23. This measure, however, would only allow a PASPA exemption for a sports wagering scheme approved by the New Jersey legislature that is operated "exclusively in the state of New Jersey." Like H.R. 3797, this bill has also been referred through the House Committee on the Judiciary to the Subcommittee on Courts, Commercial and Administrative Law, where it has not yet moved.

Despite the introduction of these bills, congressional action to amend PASPA may be a tall order. According to David O. Stewart, counsel to Ropes & Gray, LLP in the firm's Washington, D.C. office, "getting a bill through Congress to amend PASPA will likely prove difficult, due in no small part to the power of the lobby of the professional sports leagues, led by the National Football League." Furthermore, the passage of either bill will likely have to go through Senate Majority Leader Harry Reid (D-Nevada), who has historically been protective of Nevada's gaming interests.

Expect Strong

The professional sports leagues, including the National Football League, the National Basketball Association, Major League Baseball and the National Hockey League, as well as the National Collegiate Athletic Association, have historically resisted all forms of sports wagering expansion, arguing that it would affect the integrity of their respective sports. These groups have flexed their collective muscle on a number of occasions in prior attempts to expand sports wagering, including past efforts in both New Jersey and Delaware (one of the PASPA "grandfathered" states).

When it became clear that New Jersey was going to miss the one-year window to implement a sports wagering scheme and thereby fit into one of PASPA's enumerated exceptions in 1993, the Atlantic City casino operators filed a petition with the New Jersey Casino Control Commission seeking a determination that the state's constitutional provision authorizing casino gaming, and the regulatory legislation enacted pursuant to it, already authorized the casinos to offer sports wagering. Following the commission's determination that it did not have the authority to authorize the Atlantic City casinos to offer sports wagering, the casino operators appealed this decision to the Superior Court of New Jersey. The NFL, NBA, NHL and MLB quickly intervened in the appeal and voiced their strong objections to this attempt to expand sports wagering in the face of PASPA. The CCC's determination was affirmed by the court.

Furthermore, in 2002, a Delaware General Assembly committee was tasked with looking into reestablishing the

sports lottery that had briefly been offered in Delaware back in 1976. This committee took testimony from the NFL and accepted a strongly worded joint statement in opposition from the NFL, NBA, MLB and NHL. This 2002 effort to reestablish the Delaware sports lottery was also quickly defeated.

Thereafter, in 2009, and in response to Delaware's passage of legislation purporting to allow the state lottery to expand the rather narrow sports lottery it had offered in 1976 to allow for single-game and parlay sports wagering, the NFL, NBA, MLB, NHL and NCAA filed an immediate federal lawsuit and request for permanent injunction. The Third Circuit Court of Appeals ultimately held that "because single-game betting was not 'conducted' by Delaware between 1976 and 1990, such betting is beyond the scope of the exception... of PASPA and thus prohibited under the statute's plain language." Delaware was allowed, however, to institute a parlay lottery game which involves at least three NFL games, because this was the wagering scheme conducted in Delaware back in 1976. As such, though the Delaware sports lottery has been reestablished, the professional sports leagues ensured that it remained limited.

The above examples make clear that no matter the state involved or the type of expansion proposed, sports wagering proponents can expect a well-funded and determined battle from the professional sports leagues and the NCAA, with the stated goal being to protect the integrity of their respective sports.

Nonetheless, given the estimated size and scope of illegal sports wagering activity already occurring, perhaps the expansion of sports wagering to other jurisdictions outside of Nevada can further regulatory protection over this activity—something that might actually aid the sports leagues in their quest to ensure the integrity of their games.

"Further regulation in more jurisdictions would add transparency to something that is already occurring, on a large scale, throughout the country," said David S. Schugar, principal partner at RMC Gaming Management. "Ultimately, expansion of sports wagering options could very well allow additional gaming operators and regulators to offer even more of a safe and fair wagering environment to the public, reduce underage gaming concerns, and also actually provide more protection to the integrity of sporting contests."

It remains to be seen whether the state of New Jersey will file a lawsuit challenging the constitutionality of PASPA (and if filed, whether such a suit will be ultimately successful) or whether bills proposing to amend PASPA can even make it out of committee, let alone be signed into law by the president. But it is clear that this issue will be one to watch in the near future, because if either of these parallel and somewhat related paths to challenging PASPA is successful, there will be a number of state legislatures champing at the proverbial bit—especially those in states where a regulated commercial casino industry is already operating—to implement sports wagering as a means to drive additional gaming-related tax revenue.

Author's Note: A detailed summary of the history and development of the Professional and Amateur Sports Protection Act can be found in the article titled "Why Doesn't Every Casino Have a Sports Book?" which appeared in the July 2008 edition of Global Gaming Business.

[Features,](#)