

ALL BETS ARE OFF (OR ON): SCOTUS STRIKES DOWN FEDERAL BAN ON SPORTS BETTING

After a six-year journey through the federal court system, the U.S. Supreme Court issued its ruling in the landmark case of *Murphy v. National Collegiate Athletic Association*, allowing states to legalize sports betting.

The Court held, in a 6-3 decision written by Justice Samuel Alito, that the Professional and Amateur Sports Protection Act (PASPA), which made it unlawful for a state to “authorize” sports gambling schemes, was an unconstitutional “commandeering” of state laws and regulations by the federal government. In practice, the ruling will allow any state that so chooses to move forward with the creation and enforcement of a legislative or regulatory scheme that allows individuals to bet on sporting events within its borders.

PROFESSIONAL AND AMATEUR SPORTS PROTECTION ACT

PASPA, enacted by Congress in 1992:

- 1) made it “unlawful for a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact” (28 U.S.C. Section 3702(1)) any sports betting scheme; and
- 2) made it “unlawful for a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,” (28 U.S.C. Section 3702(2)) any sports betting scheme, with exceptions for the four states that already permitted sports gambling: Nevada, Delaware, Montana, and Oregon.

THE BOTTOM LINE

The Supreme Court held 6-3 that federal law prohibiting states from enacting sports betting schemes was an unconstitutional “commandeering” of state law issues by the federal government. In striking down the prohibition, the Court paved the way for states to decide for themselves whether and how to allow sports betting. Those seeking to get into the business of sports betting, and those seeking to advertise, market, and promote these activities, will need to:

- >> identify each state’s progress in establishing sports betting regulations;
- >> advocate for change and monitor developments at both the state and federal level; and
- >> exercise caution until clear guidance is provided by the states and federal government.

THE NEW JERSEY CHALLENGE

Seeking to provide a flagging Atlantic City with a financial boost, New Jersey enacted legislation in 2012, and after it was quickly challenged, new legislation in 2014, to allow sports betting in the state. The National Collegiate Athletic Association (NCAA) and major sports leagues opposed New Jersey’s laws on the grounds that they violated the “governmental entity” restriction in PASPA.

In ruling in favor of New Jersey, the Court turned to an analysis of the basic foundations of the American system of federalism. While Congress is entitled to make laws that are enforced at the federal level, Congress may not “simply commandeer the

legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.” In essence, Congress can enact federal law which must be enforced by the federal government, but cannot require states to enact specific laws, or compel states to enforce federal laws.

The exact wording of PASPA’s 3702(1) provision prohibited states from enacting state-level laws that allowed any sports betting scheme, and therefore violated this anti-commandeering requirement. The Court noted that Congress could have created a direct federal ban on sports betting, but instead phrased it as a ban on states creating legal sports betting regimes. The NCAA

>> continues on next page

and other respondents argued that PASPA's section 3702(2) did just this (by making it unlawful for "any person" to engage in sports betting that is authorized by state law), and many feared that the Court would invalidate 3702(1) while upholding 3702(2). Yet the Court held that, should Section 3702(1) be rendered unconstitutional, the rest of the PASPA statute must be stricken as well because it cannot stand on its own in a coherent manner. If a state has the ability to make sports betting legal, then an individual acting "pursuant to [that] law" is not acting unlawfully.

CHANGING VIEWS ON SPORTS GAMBLING

While the decision will not open the floodgates for any American to immediately place a bet on tonight's game, it represents a sea change in the nation's views on sports betting. Most states still have laws in place that significantly restrict gambling of any kind, including sports gambling. But, several states besides New Jersey, including Connecticut, Pennsylvania, West Virginia, and Mississippi, have recently passed bills in the pre-emptive hope that this case would strike down PASPA and allow them to quickly move ahead with implementing a sports gambling regime.

Following the decision, New Jersey is likely on track to allow sports betting in a few weeks or months, and other states are close behind. Numerous other state legislatures have introduced, but not passed, similar

statutes. It may take a year or more for these states to fully allow sports betting within their borders. As with the repeal of prohibition, though, it now becomes a matter of when, not if, sports gambling will spread beyond Nevada, Delaware, Montana, and Oregon.

Even many of the sports entities that defended PASPA against New Jersey's claims have signaled an openness, even eagerness, to expand sports betting. The NCAA remains vehemently opposed to the legalization of sports betting, and many professional leagues issued press releases focused on maintaining the integrity of sporting events. At the same time, the National Basketball Association (NBA) and Major League Baseball (MLB) have both floated the idea of taking a percentage of all revenue generated by gambling on their sports as an "integrity fee." NBA and National Hockey League (NHL) owners have applauded the decision as potentially doubling the value of their franchises. With so much money at stake, it will be difficult to put this genie back in the bottle.

THE ROAD AHEAD

The invalidation of PASPA's 3702(2) creates many opportunities for marketers and others seeking to capitalize on the legalization of sports gambling. However, marketers and their agencies should keep in mind the restriction on advertising or promoting an illegal activity. Therefore, until a particular state legalizes sports betting, no advertising related to these

activities should take place. Moreover, unless the federal government responds with new nationalization, the framework for sports gambling will likely be a patchwork of inconsistent and, in many cases, conflicting laws. For example, only Delaware, Nevada, New Jersey, and Pennsylvania allow online gambling. Some states may limit sports gambling to traditional casinos, while others may enable mobile betting. Some may limit gambling to games only, while others may permit any number of prop and exotic bets. Traditional gambling powerhouses will likely face off against industry upstarts seeking to disrupt an industry on the precipice of transformation. As this landscape transforms, any promotional campaigns regarding sports betting will need to carefully navigate these restrictions.

FOR MORE INFORMATION

James L. Johnston
Partner
212.468.4867
jjohnston@dglaw.com

Josh Gordon
Associate
212.468.4834
jgordon@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com

© 2018 Davis & Gilbert LLP