SPORT BETTING AFTER *MURPHY v. NCAA*

By Scott Scherer

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Anyone reading this publication likely knows that in *Murphy v. NCAA,*[1] the United States Supreme Court (Supreme Court) held that the Professional and Amateur Sports Protection Act (PASPA) is unconstitutional. Even before the decision was published, positive reviews of the Supreme Court's grant of a writ of *certiorari* and questions at oral argument (which took place in December of 2017) set off a flurry of activity as companies positioned themselves for expansion of the U.S. sports betting market. For example, Scientific Games (SGI) completed its acquisition of NYX Gaming Group (NYX). One of the primary benefits SGI touted in announcing the deal was its ability to add NYX's sports betting platform to its gaming and lottery systems.[2] In March of 2018, West Virginia's Legislature and Governor approved legislation authorizing sports betting at various venues in the State, in anticipation of a positive outcome in the *Murphy* case.

PASPA, is a federal law that prohibited expansion of sports betting beyond Nevada and four other states who had, as of the enactment of PASPA in 1992, previously had some type of sports betting or commercial casino gambling. One of those states, New Jersey, was given a limited opportunity for one year after the effective date of PASPA to "opt in" and allow sports betting at Atlantic City casinos, but did not avail itself of that opportunity when it was originally available.[3] PASPA also prohibited sports betting on Indian lands, as defined in the Indian Gaming Regulatory Act, except for tribal lands in Montana, Oregon and Delaware (the three other exempt states who had previously had some form of sports betting).[4] Delaware conducted a sports lottery prior to and after PASPA and was, therefore, one of the exempted states, but it was limited to parlay card wagers on NFL games by a previous decision of the Third Circuit Court of Appeals.[5]

So what, exactly, did the Supreme Court decide, and what are the likely impacts of the decision?

History of the Case

To understand the ramifications of the decision, one needs to understand at least a little of the history of the case.

New Jersey voters approved a state constitutional amendment granting the Legislature power to authorize sports betting in the 2011 election. In 2012, the New Jersey Legislature enacted a bill legalizing and regulating sports betting at race tracks and casinos in the state. The National Collegiate Athletic Association (NCAA), National Football League (NFL), Major League Baseball (MLB) and National Basketball Association (NBA) sued Chris Christie, then-Governor of New Jersey, and other state officials, seeking to enjoin the state from authorizing, sponsoring or licensing sports betting, on the grounds that the 2012 law violated PASPA (*Christie I*). The federal district court granted the injunction, the Third Circuit Court of Appeals affirmed the district court's decision on appeal, and the Supreme Court denied *certiorari*.

In 2014, New Jersey tried again, this time taking advantage of both (1) language in the Third Circuit's opinion in *Christie I* essentially stating that PASPA would not stop New Jersey from repealing its criminal

prohibitions on sports betting and (2) a statement made by the federal government in arguing against New Jersey's request to the Supreme Court for a grant of *certiorari* in *Christie I*. In particular, the federal government argued that "New Jersey is free to repeal those [criminal] prohibitions [on sports betting] in whole or in part."[6] Taking the federal government at its word, New Jersey repealed its criminal prohibitions on sports betting "in part," providing that sports betting was not a crime in New Jersey if wagers were both placed and accepted at race tracks or casinos in the state by persons who were at least 21 years of age.

The NCAA and major professional sports leagues sued again and once again prevailed at the district court level and in the Third Circuit, with the appellate court walking back some of its prior reasoning from *Christie I*. This time, however, the Supreme Court agreed to hear New Jersey's appeal.

What the Supreme Court Did and Did Not Decide

The Supreme Court, with the majority opinion written by Justice Alito, held that PASPA violated the "anticommandeering principle" enshrined in the U.S. Constitution because PASPA "unequivocally dictates what a state legislature may and may not do."[7] The Court stated that the Constitution grants Congress "not plenary legislative power but only certain enumerated powers" and that "all other legislative power is reserved for the States, as the Tenth Amendment confirms."[8] Therefore, the "anticommandeering principle" recognizes the structural limitations on Congress' authority, with one of the primary limitations being that Congress cannot "commandeer" a state government to administer or enforce federal legislation.[9]

The Court went on to explain three of the primary purposes served by the anticommandeering rule. "First, the rule serves as one of the Constitution's structural protections of liberty" by balancing power between the state and federal governments.[10] "Second, the anticommandeering rule promotes political accountability" by making sure that voters know who to credit or blame for a particular law (in this case a prohibition on sports betting).[11] "Third, the anticommandeering principle prevents Congress from shifting the costs of regulation to the States," forcing Congress to weight the benefits of its policy choices against their costs.[12]

The majority opinion, however, distinguished the anticommandeering principle from the Supremacy Clause, holding that "every form of preemption [under the Supremacy Clause] is based on a federal law that regulates the conduct of private actors, not the States."[13] Recognizing that a portion of PASPA did regulate private actors, the Court went on to consider whether that provision was severable from the portion that "unequivocally dictates what a state legislature may and may not do." Finding that striking the one provision while leaving the other intact would result in "a scheme sharply different from what Congress contemplated when PASPA was enacted,"[14] the Court ruled that the provisions were not severable and struck down all of PASPA.[15] In particular, the Court was struck by the fact that, if the provisions were severable, (1) private actors could engage in sports betting, but state lotteries could not, and (2) private actors would be prohibited from engaging in sports betting only if it was permitted by state law, but would be allowed to engage in sports betting if prohibited by state law, results that were at odds with all of the other federal gambling legislation.[16]

Ultimately, the Court concluded that "Congress can regulate sports gambling directly, but if it chooses not to do so, each State is free to act on its own."[17] The majority's conclusion is important, because it leaves the door open for Congress to prohibit sports betting or to regulate sports betting and to otherwise preempt state action. While it is unlikely that Congress will act any time soon, as we discuss

the future of sports betting in the U.S., it is important to bear in mind that the *Murphy* decision does not preclude federal regulation or prohibition.

State Actions Post-Murphy

Murphy was published on May 14, 2018. New Jersey enacted new legislation providing for licensing and regulation of sports betting on June 11 and accepted its first legal sports bets at Monmouth Park and the Borgata on June 14, 2018. In just over two weeks of legal sports betting, New Jersey sports betting handle was approximately $16.4 million, with $1 million of that total placed on future bets that had not yet been decided at the time of the revenue report, with net win of approximately $1.2 million, a hold of approximately 7.8%.

Delaware was even faster, becoming the first state outside Nevada to allow full sports wagering (as opposed to sports-themed lottery games) on June 5, 2018. Players wagered approximately $7 million in less than three weeks, from June 5 to June 24, with the state winning approximately $1 million, a hold percentage of approximately 14%.

As noted above, West Virginia enacted legislation authorizing sports betting even before *Murphy* was decided. The West Virginia Lottery Commission enacted regulations at an emergency meeting on June 21, 2018, with a goal of having legal sports wagering up and operating before the start of football season.

The same day, the Mississippi Gaming Commission unanimously adopted sports betting regulations pursuant to existing gaming and fantasy sports legislation. The regulations took effect on July 21, 2018, allowing Mississippi casino operators to begin offering sports betting as soon as licenses are obtained and the necessary software and equipment are approved. As of this writing, final approvals are still pending, but are anticipated prior to the start of football season.

Pennsylvania also enacted legislation prior to announcement of the *Murphy* decision. In fact, like Mississippi, Pennsylvania passed its legislation in 2017, as part of an omnibus gambling bill. On May 30, 2018, the Pennsylvania Gaming Control Board adopted temporary regulations and invited comments and applications ahead of the adoption of permanent regulations. As of this writing, the permanent regulations had not been enacted and no one in Pennsylvania had obtained a certificate to begin accepting sports wagers.

On June 22, 2018, Rhode Island became the seventh state to legalize full sports wagering. It also became the state that gets the largest cut, 51%. Sports betting, like other gaming in Rhode Island will be run under the auspices of the state's lottery. It's lottery provider, IGT, will receive 32% of the win and the casino (the "retailer" in lottery parlance) will receive only 17%.

Not all sports wagering legislation has been successful, however, even post-*Murphy*. New York's Legislature could not reach agreement on sports betting legislation before its session ended in June. A law allowing limited sports betting is on the books, having been passed in 2013, and the New York State Gaming Commission has been working on regulations, but it is unclear as of this writing if New York will move forward on a limited basis or wait for new legislation to be considered in its 2019 legislative session.

Other states that have been actively working on sports betting legislation include Connecticut, Illinois, Kentucky, Michigan, Indiana, Massachusetts, Maryland, Minnesota, Kansas, Iowa, Louisiana, Oklahoma,

South Carolina, and California. All of these states either completed their 2018 legislative sessions without action on sports betting legislation or are proposing constitutional amendments or referenda to let voters decide on sports betting. Connecticut's Governor has suggested that he may call the Legislature back into special session to consider a sports wagering bill, but otherwise, legalization in these states will be in 2019 or beyond.

Native American Casinos

In addition, a number of Native American Tribes have also expressed interest in offering sports betting at their casinos, including the Mississippi Choctaw Tribe, which is likely to be up and running by the time this article is published. Tribes located in jurisdictions with legal commercial sports wagering may already have the right to offer sports wagering depending upon the language included in their compacts with those jurisdictions and their tribal gaming ordinances.[18] Even where an existing compact does not contain language authorizing sports betting, either explicitly, or more likely, by reference to gambling activities generally permitted in the particular state, states that allow commercial sports betting will likely have an obligation to negotiate amendments to the compacts covering sports betting.[19]

Hot Button Issues

Murphy has certainly generated significant new business for gaming industry and sports league lobbyists. A number of controversial issues have emerged as significant battle grounds for the industry and, in one case, the leagues.

Integrity Fees

The primary issue for the sports leagues has been their request for so-called "integrity fees" or, as at least one league commissioner referred to them, royalties. The leagues have argued that they need the fees to establish comprehensive monitoring programs to ensure the integrity of games and to protect their intellectual property right in the content they create.

The leagues are asking for 1% of handle, potentially 20% of an operator's revenue, before taxes, although New York's unsuccessful legislation included an "integrity fee" that was 0.25% of handle. The leagues have also requested limits on certain types of wagers and a requirement that all wagers be determined using only "official" league-supplied data. The result of such a requirement would give the leagues an effective monopoly over the data used.[20]

As of this writing, none of the enacted legislation contains the primary provisions sought by the leagues.

Mobile Wagering

The extent to which mobile wagering will be permitted has also emerged as an issue in sports wagering legislation with some states requiring wagers to be placed in person (Mississippi and Rhode Island) and the others allowing for mobile wagering options, subject to various restrictions.

Tax Rates

Tax rates vary dramatically between jurisdictions with Nevada, Mississippi, West Virginia, and New Jersey at the lower end, while Delaware, Pennsylvania, and Rhode Island are at the upper end of the scale. In Delaware and Rhode Island, sports betting is technically run by the state lotteries, which argue

that they share revenue with operators and retailers on sports betting revenues, just as they do with any other lottery revenues.

The sports betting industry argues that high tax rates, integrity fees, and other impediments to legal sports betting will hurt consumers and drive more of them to the illegal markets. Since one of the primary arguments in favor of legalization is to capture a significant share of the illegal sports betting market, estimated to exceed $150 billion in handle annually,[21] the industry argues that high tax rates and similar impediments undermine the public policy supporting legal sports wagering.

Where Do We Go From Here?

As with casinos, barring a major scandal, legal sports betting is likely to spread across the country, until there are only a few states where such wagers remain illegal. A major scandal, however, would halt the spread of legal sports wagering in its tracks and could be the type of outside force necessary to get Congress to act, either to prohibit sports betting directly, as the majority in *Murphy* suggested would be permissible, or to regulate sports betting more strictly (and impose its own additional taxes).

The spread of legal sports wagering has attracted new entrants to the market, including fantasy sports operators, Draft Kings and FanDuel (now owned by Paddy Power Betfair). While most of the operators have some experience in regulated markets, many are new to regulated markets in the United States. It will be incumbent upon all operators, especially those who are new to the U.S. market, to ensure that they are in compliance with both federal and state laws in order to avoid the type of scandal that could derail or significantly slow the growth of the industry.

As with the spread of casino gambling, Native American Tribes are likely to play a significant role in the spread of sports betting, since smaller, nimbler tribal councils can frequently move more quickly than larger, slower state legislatures, especially on controversial issues.

Sports are an important part of the U.S. culture and psyche and arguments that sports betting will somehow sully all-American pastimes carry significant weight in state capitols, making it even more critical for the industry to demonstrate the benefits of state-sanctioned, well-regulated, legal sports betting.

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During his time as a member of the Nevada Gaming Control Board, he served as vice-chair and chair of the International Association of Gaming Regulators. He has also served in the Gaming Division of the Nevada Attorney General's Office, as a member of the Nevada Legislature, a member of the Nevada Commission on Ethics, and as General Counsel and then Chief of Staff for Governor Kenny C. Guinn.

He currently serves as a member of Nevada's Gaming Policy Committee and as a member of the Executive Committee of the Gaming Law Section of the Nevada State Bar.

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[1] 584 U.S. ___ (2018). The case was previously known as *Christie v. NCAA et al.*, after the former Governor of New Jersey, who was in office when the case began.
[2] *See* https://www.sginteractive.com/news/news-detail/scientific-games-completes-acquisition-of-nyx-gaming-group. While the deal was in the works before oral argument in *Murphy*, there is no doubt that the potential for expanded sports betting in the United States fueled excitement about the deal when it closed in January of 2018.
[3] 28 U.S.C. § 3704(a)(3).
[4] 28 U.S.C. § 3704(b).
[5] *See OFC COMM of Baseball v. Markell*, 579 F.3d 293 (3rd Cir. 2009).
[6] *See* Brief for United States in Opposition in *Christie v. National Collegiate Athletic Ass'n,* O.T. 2013, No. 13-967 etc., p. 11.
[7] 584 U.S. at ___ (slip opinion at 18).
[8] *Id. at* ___ (slip opinion at 15).
[9] *Id. at* ___ (slip opinion at 17).
[10] *Id.*
[11] *Id.*
[12] *Id. at* ___ (slip opinion at 18).
[13] *Id. at* ___ (slip opinion at 24).
[14] *Id. at* ___ (slip op. at 26).
[15] The Court also found that the provision prohibiting advertising of sports betting was severable, holding that forbidding advertising of an activity that is legal under both federal and state law "is something that Congress has rarely done" and citing *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 176 (1999) for the proposition that the First Amendment protects the right of a radio or television station in a State with a lottery to run advertisements of that lottery. 584 U.S. at ___ (slip op. at 29-30).
[16] *Id. at* ___ (slip op. at 28). While brief, and arguably *dicta*, the Court's statement that the Wire Act, 18 U.S.C. § 1084, applies "only if the underlying gambling is illegal under state law," may be helpful when interpreting the Wire Act as more states legalize sports betting post-*Murphy*.
[17] *Id.* at ___ (slip op. at 31). In a separate concurrence, however, Justice Thomas questions whether Congress would have authority to regulate sports betting that takes place wholly within a single state. *See* 584 U.S. at ___ (concurring opinion of Justice Thomas at 1).
[18] *See* 25 U.S.C. § 2710 (d)(1) (Indian Gaming Regulatory Act).
[19] 25 U.S.C. § 2710 (d)(3).
[20] *See, e.g.*, https://www.legalsportsreport.com/18812/connecticut-hearing-on-sports-betting/.
[21] *See, e.g.*, https://www.americangaming.org/research/reports/law-enforcement-summit-illegal-sports-betting-after-action-report; https://www.legalsportsreport.com/10643/2016-illegal-us-sports-betting/.