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LITIGATION SERVICES — SPORTS LAW *Analysis*

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Third Circuit Rejects New Jersey's Effort to Sanction Sports Wagering

By Scott T. Miccio and Nancy Winkelman

Tony Soprano's business is safe, for now — the Third Circuit recently invalidated New Jersey's attempt to legalize sports wagering because it violated a federal law that prohibits most states from licensing such activities. In *NCAA v. Christie*, the Court rebuffed New Jersey's challenge to the constitutionality of the federal Professional and Amateur Sports Protection Act (PASPA), holding that the act is a valid exercise of Congress' commerce powers. No. 13-1713, 2013 U.S. App. LEXIS 19167 (3d Cir. Sept. 17, 2013).

In 1992, Congress passed PASPA. That statute prohibits states and private persons from sponsoring amateur and professional sports wagering schemes. 28 U.S.C. § 3701, *et seq*. (1992). The expressed purpose of the act was to stop the spread of state-sponsored sports wagering. The law contained a grandfather clause that permitted Nevada to continue to license sports wagering and gave New Jersey the option to permit sports wagering in Atlantic City, had it chosen to do so, within one year of PASPA's enactment. The New Jersey Legislature declined to exercise this option. The law also allowed states to continue to permit sports wagering to the extent they allowed it when PASPA was passed. *See, e.g., Office of the Comm'r of Baseball v. Markell*, 579 F.3d 293 (3d Cir. 2009). For instance, PASPA prohibits Delaware from authorizing single-game betting, but allows the state to sanction multi-game parlay wagers because the state allowed such wagers at the time Congress passed PASPA.

Almost two decades later, as New Jersey watched wagering revenues dwindle, the legislature approved a referendum to amend the state's constitution to authorize sports wagering. Voters approved the ballot initiative by a wide margin. The legislature attempted to exercise the voters' choice by adopting the "Sports Wagering Law." N.J. Stat. Ann. § 5:12A-1, *et seq*. (2011). The law authorizes licensed casinos and racetracks to operate sports wagering lounges. The NCAA and the four major sports leagues filed suit in federal court in August 2012 to invalidate the state law as a violation of PASPA. *NCAA v. Christie*, No. 12-4947, 2013 U.S. Dist. LEXIS 27782 (D.N.J. Feb. 28, 2013). The leagues prevailed and an appeal shortly followed.

The countervailing public policy concerns at issue in the debate are plain. On the one hand, some estimate that New Jersey would stand to earn $100 million in revenue the first year the law is in effect. On the other hand, the sports leagues are concerned that expanding the availability of sports wagering would undermine the integrity of their leagues and would turn fans into bettors. As was made clear from the Third Circuit's opinion, there are significant constitutional issues involved; it was on this basis that the Court of Appeals decided the case.

First, the Court concluded that the leagues had standing to challenge the New Jersey law because the leagues were the object of the action at issue and could possibly suffer reputational harm if wagering were to be expanded. *NCAA*, U.S. App. LEXIS 19167 at *16-17. Further, it held that the federal law (PASPA) was a valid exercise of Congress' commerce powers.

The Court then turned to the crux of the state's argument — that the federal law unconstitutionally "commandeers" states by directly compelling states to enact and enforce federal policy. New Jersey argued that Congress may not "conscript[] the states into doing the work of federal officials." *Id*. at *40. Essentially, New Jersey argued that PASPA is unconstitutional because it forces states to implement federal law, which breaches the Constitution's basic notions of sovereignty. The Court of Appeals majority opinion framed this argument as a simple Supremacy Clause issue and stated that the "Supreme Court's anti-commandeering jurisprudence has never entertained this position, let alone accepted it." *Id*.

The Third Circuit has never struck down a federal statute based on the "anti-commandeering" doctrine and the Supreme Court has only done so sparingly. The Supreme Court first utilized the phrase in *Hodel v. Va. Surface Mining & Reclamation Ass'n*, where the Court noted that any

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federal law that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program" contravenes our dual system of government. 452 U.S. 264, 288 (1981). It has invalidated laws under this doctrine in only two instances.

In *New York v. United States*, the Court held that Congress commandeered the legislative process by compelling states to arrange for the disposal of radioactive waste. 505 U.S. 144, 149–54 (1992). Later, in *Printz v. United States*, the Court concluded that Congress may not compel states to conduct mandatory background checks on prospective gun purchasers because the federal government may "neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 521 U.S. 898, 935 (1997).

Applying that test to New Jersey's challenge to PASPA, the Third Circuit held that "PASPA does not *require* or coerce the states to lift a finger — they are not required to pass laws, to take title to anything, to conduct background checks, to expend funds, or to in any way enforce federal law." *NCAA*, U.S. App. LEXIS 19167 at *52 (emphasis added). In other words, the Court concluded, PASPA is constitutional because it *prohibits* the states from taking certain actions rather than *commanding* state action.

In a dissenting opinion, Judge Vanaskie acknowledged that states have prevailed previously under the anti-commandeering doctrine only in cases where Congress had required the states to enact legislation. However, the dissent took the position that the general principle underlying the anti-commandeering doctrine is that Congress constitutionally "lacks the power directly to compel the States to require *or prohibit those acts*." *Id*. at *88 (Vanaskie, J., dissenting).

If New Jersey chooses to appeal to the Supreme Court, the anti-commandeering argument may be its best chance to succeed. A victory for New Jersey in the case would not merely impact its own ability to sanction sports wagering, but would open up the door for other states to do the same.

Alternatively, the state may attempt to persuade Congress to amend PASPA to allow for sanctioned sports wagering in the state. New Jersey Representatives Frank Pallone and Frank Lobiando have introduced legislation to amend the statute, but the bills have yet to be heard by a committee. ◆

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