

Sports Betting Case To Be Decided By The US Supreme Court

What This Could Mean To The Gaming Industry In The US

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In June, 2017, the United States Supreme Court announced it would consider New Jersey's appeal of the U.S. Third Circuit Court of Appeals' decision in *Christie v. NCAA, et al.* This was a surprise to many in the gaming legal community because the Supreme Court accepts less than one percent of petitions seeking review and the question to be decided is not the subject of a dispute between federal circuit courts. Moreover, the acting U.S. Solicitor General formally recommended that the Supreme Court decline to hear the case.

At issue is New Jersey's 2014 law which repealed the State's sports betting prohibitions, but only to the extent applicable to Atlantic City casinos and New Jersey horse racetracks. Thus, the law allowed unregulated sports betting at such locations. In a 9 to 3 decision rendered by the full Court, the Court of Appeals enjoined implementation of the law, holding that it was tantamount to state "authorization" of sports gambling at the specified locations and therefore violated the Professional and Amateur Sports Protection Act ("PASPA"). PASPA is the federal law that makes it unlawful for states to operate, promote, license or authorize

gambling (including lotteries) based on sports events, and it also prohibits any legal entity from conducting sports betting pursuant to state law. Briefs are expected to be submitted by the end of this year, and a decision is anticipated by the end of June, 2018.

The legal question to be decided is whether PASPA "commandeers" states to maintain state-law prohibitions on sports betting in violation of the 10th Amendment to the U.S. Constitution (which reserves to the states or the people the powers not given to the federal government) and the Supreme Court's related decision in *New York v. United States*. That decision stated that it is unconstitutional for Congress to "directly... compel the States to require or prohibit [certain] acts."

The Supreme Court's decision has the potential to change the gaming landscape in the United States. A decision favoring New Jersey could (1) provide a road-map for other states to follow in order to permit bricks-and-mortar sports betting, or (2) remove entirely the federal prohibition on state-authorized bricks-and-mortar sports betting. Either possible favorable result for New Jersey would allow states to decide for themselves whether bricks-and-mortar sports betting should be allowed within their boundaries. Of course, a third possible result exists which is unfavorable to New Jersey. The Court could hold PASPA to be constitutional and not in violation of the 10th Amendment's anti-commandeering principle as applied to New Jersey's 2014 law.

The potential market for sports gambling in the United States is huge. In 2016, legal sports wagers in Nevada totaled approximately \$4.5 billion. However, this is a small fraction of the estimated illegal sports betting market in the U.S. In March, 2017, the American Gaming Association ("AGA")

Christie v. NCAA, et al., 832 F.3d 389, 396-397 (3rd Cir. 2016), cert. granted, 2017 U.S. LEXIS 4279 (2017) and consolidated with *New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA, et al.*, U.S. Sup. Ct. Nos. 16-476 and 16-477. Respondents are the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League and Major League Baseball.

"Discipline in Special Education," by Allan G. Osborne, Jr., and Charles J. Russo (Corwin 2009), p. 5. N.J. 2014 P.L. c. 62, § 1.

28 U.S.C. §§ 3701 - 3704.

Christie v. NCAA, et al. and *New Jersey Thoroughbred Horsemen's Association, Inc. v. NCAA, et al.*, U.S. Sup. Ct. Nos. 16-476 and 16-477 (consolidated).

stated that “Americans wager roughly \$154 billion a year on sports illegally due to the [PASPA].” By contrast, annual U.S. lottery sales total less than half that amount – \$73.8 billion in 2015 (which for most jurisdictions ended June 30, 2015).

As noted, PASPA does not prohibit sports gambling. Rather, it prevents states from sponsoring, operating, advertising, licensing or authorizing sports gambling (including lotteries based on sports events). Although PASPA carves out exceptions for sports betting schemes conducted during certain periods prior to the enactment of the law (subject to certain conditions), only Nevada enjoys a carve-out with respect to single event betting (i.e., “spread” or “moneyline” betting). Delaware, Oregon and Montana enjoy carve outs with respect to certain sports-related lottery games.

By structuring its 2014 law as a “repeal,” New Jersey was following guidance provided by the Third Circuit in a 2013 case, in which the Court construed PASPA to prohibit only the “affirmative ‘authorization by law’ of gambling schemes,” and not repeals of states’ existing sports betting prohibitions. However, after New Jersey enacted the 2014 law repealing its sports betting prohibitions at Atlantic City casinos and State horseracing tracks, the Court changed its mind and interpreted PASPA as making it unlawful for New Jersey to repeal its sports betting prohibitions when limited to specific geographic venues. The Court essentially held that it was constitutional for federal law to dictate the extent to which states must maintain their prohibitions on sports betting.

Accordingly, if the U.S. Supreme Court upholds PASPA, but holds that New Jersey’s repeal of its sports gambling prohibitions does not constitute an “authorization” of sports gambling (and thus does not violate

PASPA), then other states could follow New Jersey’s example and repeal their sports betting laws to the extent applicable at certain venues – e.g., otherwise regulated gaming venues. Still, however, this would not be ideal for states, since it would be unclear how much general regulation (e.g., consumer protection and other regulation not specific to sports betting) could be made applicable and not run afoul of PASPA. Many of those watching this case believe that Congress will intervene to repeal or amend PASPA if the Supreme Court renders this narrow decision.

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Alternatively, if the Court strikes down PASPA entirely, this will open the door for States – if they choose – to pass laws authorizing and regulating sports betting, although some state constitutions may first need to be amended on account of restrictions limiting their legislatures’ power to enact laws authorizing gambling. Already at least 15 states, including New Jersey, Delaware and Connecticut, have enacted sports betting

laws in anticipation of a Supreme Court decision striking down PASPA.

In addition, state lotteries may need to examine their state common law to determine whether they are able to conduct sports betting should the PASPA be struck down. Courts in many states have declared that the elements of a “lottery” are (1) “consideration,” paid for an opportunity to win a (2) “prize” awarded by (3) “chance,” and existing precedent suggests that, in single game sports betting, chance predominates over skill. Nevertheless, courts and attorney general opinions in some states have opined that not all games with “consideration,” “prize” and “chance” are “lottery” games within the meaning of the constitutional or statutory provisions establishing the state lottery.

Finally, the federal Wire Act is not at issue in *Christie v. NCAA*, and therefore its prohibitions on the use of the internet (and other systems using wires) for the transmission in interstate or foreign commerce of sports wagers, or information assisting in sports wagers, will not be affected by the Supreme Court’s decision. Therefore, even if the Supreme Court strikes down PASPA in its entirety, the federal ban applicable to interstate online sports betting will remain intact. Accordingly, while states could implement intrastate mobile wagering if PASPA is struck down (it is currently conducted in Nevada), states could not implement online sports betting that processed sports bets from out-of-state bettors or where the bets were processed out-of-state.

This case bears watching, and states and state lotteries may want to consider preparing for a possible Supreme Court decision striking down the federal sports betting ban. ■

New York v. United States, 505 U.S. 144, 166 (1992).
UNLV Center for Gaming Research “Sports Betting Win, 1984-2016,” at http://gaming.unlv.edu/reports/NV_sportsbetting.pdf (last accessed August 10, 2017).
See footnote 8.
NASPL Frequently Asked Questions at <http://www.naspl.org/faq> (last accessed August 11, 2017).
28 U.S.C. § 3702
28 U.S.C. § 3704
NCAA v. Christie, 730 F.3d 208 (3rd Cir 2013), cert. denied 134 S.Ct. 2866 (2014).

“More States Expected to Prepare for Sports Betting,” by Chris Sieroty, Gambling Compliance, August 10, 2017, at https://gamblingcompliance.com/premium-content/insights_analysis/more-states-expected-prepare-sports-betting (subscription required, last accessed August 10, 2017).
See *NFL v. Delaware*, 435 F. Supp. 1372 (D.Del. 1977).
18 U.S.C. §§ 1081, 1084.