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High Court's Sports Betting Ruling Triggers Legislative Actions, Financial Proposals

In a much-anticipated opinion, the U.S. Supreme Court struck down a federal law that prohibited states from allowing or regulating betting on professional and amateur sports. The May 14 decision finding the Professional and Amateur Sports Protection Act (PASPA) unconstitutional opens the door to converting an estimated \$150 billion to as much as \$400 billion in illegal sports bets annually to legal wagers that can be tracked, taxed and regulated by states.

PASPA, enacted in 1992, affected all states except for Nevada, Oregon, Delaware and Montana. These states were given exemptions because they already had some form of state-sanctioned sports betting (Nevada having widespread state-sponsored sports betting, and Oregon, Delaware and Montana having more limited sports gambling). All other states were banned from legalizing and regulating (and by extension, taxing) sports gambling.

New Jersey has been trying to legalize sports gambling to help its struggling casinos and racetracks since residents voted in favor of it in 2011. In its first attempt in 2012, the state enacted broad legislation to allow sports wagering, but several sports leagues successfully sued the state under PASPA to overturn the law. The state then attempted a bit of an end-run in 2014, passing a "partial repeal" of laws prohibiting sports wagering at casinos and racetracks. The Big Four professional sports leagues — the National Basketball Association, National Football League, National Hockey League and Major League Baseball — and the National Collegiate

Athletic Association challenged New Jersey's attempt, asserting it also violated PASPA. Both a New Jersey federal district court and the U.S. Court of Appeals for the Third Circuit sided with the NCAA and the leagues. *Christopher J. Christie, Gov. of New Jersey v. National Collegiate Athletic Association* was consolidated with *New Jersey Thoroughbred Horsemen's Association, Inc. v. National Collegiate Athletic Association*, a similar lawsuit filed by the NCAA and the leagues against the New Jersey Thoroughbred Horsemen's Association for review by the Supreme Court.

In ruling PASPA unconstitutional, the Supreme Court agreed with the argument advanced by New Jersey and its supporters that the federal law ran afoul of the anti-commandeering clause of the Tenth Amendment, which reserves to the states all powers not delegated to the federal government.

Hedging their bets on the pending decision by the Court, The Big Four professional sports leagues had been quietly preparing, to varying degrees, for the reality that PASPA would be struck down, even as they asserted that legalized betting would threaten their business interests. At the same time, a number of states teed up legislation to regulate sports betting within their borders — and a month after the decision, two states already have sportsbooks up and running. At least one federal measure has been introduced as well.

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League Reactions

The Big Four. The NBA said in a statement that it favors a federal framework that will provide a consistent approach to sports gambling across states. At the same time, the NBA will also provide input to state legislatures that opt to move forward with their own regulations. The NFL also supports federal regulation of sports gambling to protect the integrity of the game. The league stated it plans to ask Congress to enact a core regulatory framework for legal sports betting.

Both MLB and the NHL said they would support legislation that puts the proper protections for their sports in place. The NHL added that it does not expect legalized betting to have an immediate impact on its policies and practices.

Players unions. Associations for the Big Four leagues said they will work to ensure their players' rights are adequately protected. Prior to the Supreme Court ruling, the players unions issued a joint statement that they plan to collectively address the potential impact of legalized gambling on players' privacy and publicity rights, as well as on the integrity of the games.

NCAA. The NCAA, which has been firmly against legalizing sports betting and consequently has refused to hold championship events in Nevada (where gambling has remained legal), said it would align its policies and practices on gambling with the Court ruling. It also suspended its championship host policy related to gambling on sports, but urged the establishment of strong federal standards to preserve the integrity of collegiate competition and student-athlete well-being.

eSports. The eSports world was initially quiet in the wake of the ruling, with no major eSports league immediately issuing a statement. But with an estimated \$12.9 billion in cash and in-game items expected to be gambled globally on eSports games by 2020, according to ESPN, it's a safe bet that eSports

leagues, players and fans will be closely watching the development of betting regulations.

Fantasy sports. The two industry behemoths, DraftKings and FanDuel, have both been preparing to make gambling a reality in fantasy sports in the U.S. Within 10 days of the Court's decision, Dublin-based bookmaker Paddy Power Betfair announced that it had acquired a 61 percent share in FanDuel. Rival DraftKings said it has been preparing since 2017 to launch a mobile sports betting platform to claim a share of the billions in illegal bets that Americans place through offshore, black market bookies each year, and has been working with state regulators to apply for operating licenses in states that have already passed legislation authorizing sports betting in anticipation of the amendment or repeal of PASPA. The fantasy sports platform also announced a partnership with Resorts Atlantic City to create a virtual sportsbook (both online and via mobile app) to the New Jersey casino's offerings. This offering aligns with pre-existing legislation allowing for online gambling in New Jersey, although DraftKings has not yet been licensed as a gaming entity in the U.S. According to state law, Resorts Atlantic City will also be required to build and open an in-person sports betting lounge in order to operate its virtual sportsbook.

State and Federal Efforts

While five states had some form of new legislation passed and ready to go — Connecticut, Mississippi, New Jersey, Pennsylvania and West Virginia — only two states are ready and able to offer sports betting.

Delaware was the first state to open legal sportsbooks, with Governor John Carney placing the first bet at Dover Downs on June 5. Gamblers can now place sports wagers at three casinos — Delaware Park, Harrington Raceway and Casino, and Dover Downs. Delaware was "first out of the gate" on sports betting because state gaming officials determined that the existing law did not need to be changed in order

for racetracks and casinos to offer sports wagering. “Parlay” betting on the NFL (wagering on the outcomes of at least three games) has been legal in Delaware for some time, giving Delaware the distinction of being the only state in the eastern half of the country that allowed sports betting of any kind.

Like Delaware, many New Jersey racetracks and casinos have much of the necessary infrastructure in place to begin to take sports bets, but plans to immediately open sports wagering were put on hold when state lawmakers determined that changes to the existing laws were required after the Supreme Court’s decision.

New Jersey’s new sports gambling provisions, signed into law June 11 by Governor Phil Murphy, permits racetracks and casinos to offer in-person and online sports wagering, subject to licensing and restrictions. For example, sportsbooks cannot take bets on college sports contests taking place in New Jersey, or on any event involving a New Jersey team, no matter the location. Certain individuals — athletes, coaches, referees, managers, athletic trainers and anyone with access to certain exclusive or nonpublic information on an event, among others — cannot place sports bets.

Individuals who own 10 percent or more of a sports team are not permitted to own a racetrack or casino in the state that accepts wagers on any game in the league in which their team plays. Originally prohibiting team owners from operating a New Jersey sportsbook at all, the provision was changed because, as originally written, it would have prevented the Golden Nugget casino — owned by Tilman J. Fertitta, who also owns the Houston Rockets — from operating a sportsbook. Now the Golden Nugget can offer sports betting, just not betting on NBA games.

Licensing, staffing and training are also factors that are reportedly delaying the opening of sportsbooks in New Jersey (and other states). Monmouth Park racetrack, which had announced that it would be the first to open sportsbooks at the end of May, began taking sports bets June 14. Gov. Murphy placed the first bets: \$20 each on

the Devils to win the Stanley Cup and Germany to win the World Cup. Monmouth had the day before received the required license from the New Jersey Racing Commission, which handles licensing for racetracks. The Meadowlands Racetrack, which announced a partnership with Betfair US for live and online sports betting, is reportedly readying space, and staffing and training employees, to be able to offer sports betting in the next several weeks.

New Jersey’s casinos are licensed and regulated by New Jersey’s Division of Gaming Enforcement, which follows a licensing process that is similar to, but separate from, the Racing Commission’s. Like the racetracks, they are reportedly at varying stages of readiness to accept sports betting. The Borgata Hotel Casino, owned by MGM Resorts International, opened a temporary sportsbook within hours of Monmouth Park, switching a few windows in its racebook to sports wagering, and plans to build a permanent facility, although the timing is unknown. The Golden Nugget Atlantic City hotel, in partnership with Churchill Downs Inc., operator of the famed Kentucky racetrack, is aiming for early 2019.

Both licensed racetracks and casinos in New Jersey can apply to offer online sports betting 30 days from the law’s effective date.

After Delaware and New Jersey, the time line for sportsbooks to open in other states is less clear.

The Washington Post has also reported that Connecticut, Illinois, New York, Massachusetts and Rhode Island could have some form of sports betting up and running in three months. Additional states that have introduced bills to authorize some form of sports betting include Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Oklahoma and South Carolina. In all, 32 states may offer legal sports betting by 2023, according to a report from Eilers & Krejcik Gaming.

Many stakeholders support federal oversight of sports gambling to avoid inconsistent regulation from state to state. New Jersey Congressman Frank

Pallone introduced the Gaming Accountability and Modernization Enhancement (GAME) Act last year to repeal PASPA and offer a possible legal framework for states, which could serve as a starting point for future federal proposals.

At least one other federal law — the Interstate Wire Act of 1961 — will continue to impact the newly liberated sports betting landscape, and specifically online sportsbooks. Long before the internet was ever conceived of, the Wire Act was an attempt to break the control organized crime had on bookmaking. The act subjects to criminal fines and imprisonment anyone “engaged in the business of betting or wagering [to] knowingly use[] a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers.”

For decades, the act was interpreted to prohibit interstate gambling of any kind by “wire communication” (i.e., telephone and internet), until in 2011, when the Office of Legal Counsel of the Department of Justice determined, in a memorandum opinion, that the act only applied to betting related to a “sporting event or contest.” At least one federal court of appeals — the Fifth Circuit — has also held that the Wire Act only applies to sports betting.

While this interpretation may have liberated online gambling such as internet poker and other casino games, the Wire Act still expressly covers sports betting. So while states are now moving ahead under the Supreme Court’s decision to permit and regulate sports betting, the Wire Act, as written, still places restrictions on certain interstate transactions. The act does include two exclusions. The first is for news reporting of sports contests, and the second is transmission of “information” (but not actual bets) used to assist in the placing of bets on sporting events from

one state (or country) where that betting is legal to another where the betting is also legal. How that safe harbor might impact states as they ramp up efforts to allow and regulate sports gambling is not known.

Tribal gaming laws will also be an issue. The National Indian Gaming Commission stated it will work to ensure tribes’ interests are protected in any negotiations to amend gaming agreements with states, in keeping with the Indian Gaming Regulatory Act, which governs gaming on tribal land in nearly 30 states and bars state taxation of tribes.

Financial Considerations

With so much money at stake, sports and other organizations are angling for their share.

Integrity fees. Both the NBA and MLB are pushing for a 1 percent “integrity fee” to be paid to the leagues based on the amounts wagered. They also want input on the types of betting offered, as well as data rights, according to ESPN. This quest has been met with ire from multiple lawmakers (notably in the New Jersey State Senate), as well as casino officials, who point out that it contradicts the leagues’ positions from their earlier legal battles. NHL Commissioner Gary Bettman is also pushing for a similar fee, although he has said that it should compensate for use of the league’s intellectual property rather than “player integrity.”

Tax issues. Taxation of sports gambling operators could vary significantly from state to state, and ultimately have an impact on where wagering on sports flourishes and where it doesn’t. Nevada levies a 6.75 percent tax on the gross adjusted revenue from sports gaming. Bills introduced by other states propose higher tax rates, from New York’s measure proposing an 8.5 percent tax on sports betting gross revenue to Pennsylvania’s new law that imposes a 36 percent tax on sports betting operators’ daily gross sports betting revenue. The newly enacted New Jersey law includes an 8.5 percent state tax on gross revenue from wagering at casinos and racetracks, and a 13 percent state tax on gross revenue from online sports betting.

The disparate tax rates could pose problems as states move forward with legislation and partnerships with sports gambling operators and sports organizations. With several states in position to implement sports betting this year, it remains to be seen how and when federal regulatory efforts will develop, and what impact potentially competing measures will have on the sports wagering industry. The American Gaming Association (AGA) is currently vying for Congress to make further reductions to the federal excise tax and prioritize greater state and tribal autonomy with regard to sports gambling taxation. Although the tax has been amended several times since its passing in 1951 in order to discourage illegal gambling, the AGA now argues that it greatly cripples what is now the growing sports wager industry.

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