

THE UNUSUAL PATH TO “INEVITABLE” SPORTS BETTING LEGALIZATION



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Reality of Sports Betting Today



- \$500 Billion Wagered Annually
- Super Bowl = \$3.8 Billion
- March Madness = \$9 Billion
- Less than 1% is Legal (Nevada)
- Pervasive – Fueled by Internet
- Too prevalent to remain illegal

Legal Environment



- **Prohibited by PASPA (1992)**
 - States May Not “Sponsor, Operate, Advertise, Promote, License, or Authorize” Sports Betting”
 - Goal: Stop Spread of State-Sponsored Sports Wagering
 - Key Words = “Authorize” (Christie II)
 - “Noscitur a Sociis”
- **DOJ Initially Opposed PASPA**
 - Federalism Concerns
 - Gambling Policy Typically Left to the States
- **Exemptions:**
 - Preexisting Wagering Schemes (Nevada, etc.)
 - No Additional Games Allowed
 - New Jersey: 1-Year “Opt in,” but Failed to Act

New Jersey Pushes for Sports Betting



- **Reasons:**
 - Budget Deficits
 - Tourism, Jobs and Taxes
 - Boost Struggling Casino & Horse Racing Industries
 - Stanch Flourishing “Black Market”
- **New Jersey Law:**
 - Casinos and Racetracks Only
 - Can't Bet on NJ College Games

NCAA v. CHRISTIE (2012)



- **Leagues Sue to Block NJ Law**
 - Preempted by PASPA
 - Injury to Leagues: Integrity and Negative Perception
- **NJ Challenges Constitutionality of PASPA**
 - Anti-Commandeering (10th Amendment)
 - No Underlying Federal Regulatory Scheme
 - Equal Sovereignty (Nevada monopoly)

Leagues Win Christie I



- District Court Grants Summary Judgment
- But Split Decision by Third Circuit
 - Commandeering: Requires “affirmative action”
 - Equal Sovereignty: Voting Rights Only (No Commerce)
- Vanaskie Dissent
 - False Distinction between “Affirmative” and “Negative”
 - Affirmative Can Be Easily Recast as Prohibition
 - Conscripts States to Act as Federal “Foot Soldiers”

But Third Circuit Provides Roadmap



- **“Exact Contours” Language**
 - States Have Choice: Keep Ban or Repeal
 - Up to Each State to Decide Scope of Prohibition
 - Meaning at issue in Christie II
- **DOJ Prior Statements**
 - “Partial Repeal” Would Not Violate PASPA
- **New Jersey Enacts “Partial Repeal” Law**
 - Limited to Casinos, Racetracks & Defunct Racetracks
 - State Would Not Regulate or Tax

Leagues Sue NJ Again (Christie II)



- **Argue Partial Repeal Still Violates PASPA**
 - “All or Nothing” Only
 - “Exact Contours” Refers to Criminal Penalties
- **Bad Policy: Opens Door to Other States**
 - Would Render PASPA Meaningless
- **Indirect Regulation**
 - Casinos and Racetracks Still Regulated by NJ
 - De Facto Regulation
- **District Court Sides with Leagues**
- **Judge’s Family Ties**

Stars May Align for NJ



- **New Third Circuit Panel**
 - Rendell & Trump/No Vanaskie
 - “Noscitur a Sociis” & Defunct Racetracks (No Licensing)
- **Public Statements by Sports Commissioners**
 - Silver NY Times Op-Ed
 - Calls for Legalization and Federal Regulation
 - Manfred: “It’s a Pretty Good Idea”
- **Leagues Invest in Daily Fantasy Sports**
- **Momentum Building for Legalization**

DFS May Accelerate Legalization



- **Parallels to Sports Gambling**
 - Wager on sporting events
 - Player performance, not game outcome
- **Heightened Fan Interest**
- **Higher TV Ratings**
- **Regulated Sports Betting > Black Market**
- **League Embrace of DFS**

Embrace of DFS Poses Great Risks



- **Legality in Question**
 - UIGEA (“Chance” vs. “Skill”)
 - State Law (“Any Chance”)
 - Correlation between entry fees and prize
- **Easier to Manipulate Performance Statistics**
- **Threat of “Insider Trading”**
- **Bad Optics: Leagues Becoming Bookies?**
- **Unclean Hands?**
- **Selective Enforcement?**

Manipulative Schemes



- **Players Control Own Performance**
- **Easier to Manipulate Stats Than Wins/Losses**
- **Myriad Ways to Manipulate:**
 - Missed Free Throws
 - Garbage Time Baskets and Yardage
 - Soft Coverage
- **Difficult to Detect; No Effect on Game Outcome**
- **More prone to fraud than sports betting**
- **First scandal could topple the whole thing**

Insider Trading



- Big Money in DFS
- Easy Access to Team Employees
- Inside Information is “Gold” in DFS
 - Game Plans
 - Player usage
 - Severity of injuries
- Reason why securities markets are regulated
- Level playing field
- If sports betting regulated, so should DFS

Selective Enforcement of PASPA



- States Legalizing DFS May Violate PASPA
- PASPA Also Addresses Fantasy Sports
- Section 3702
 - “one or more performances of such athletes”
 - Fantasy sports tied to player performance
- State legalization efforts violate PASPA
- Leagues have not opposed
- Could lead to selective enforcement claim

Future of Sports Betting



- Congress (don't hold your breath!)
- Third Circuit holds key to timing
- If NJ wins, sports betting NOW!
- If NJ loses, other states may step up
 - Minnesota
 - Indiana
- Could lead to circuit split
- SCOTUS may resolve
- Recent Events Are the Catalyst