

# A NATION'S SPORTSBETTING HYPOCRISY

The United States is unique in its inconsistency and hypocrisy by simultaneously allowing most kinds of gambling at the discretion of the states, but prohibiting sports gambling – except for horseracing – in every state but Nevada, though Delaware is permitted to operate sport pool wagering. Somehow, however, under the Unlawful Internet Gambling Enforcement Act (UIGEA), fantasy sports was granted a specific exemption from prohibition, largely at the insistence of professional sports leagues.

The near prohibition of sports wagering in the United States is not the result of the Christian right who, like the puritan in Thomas B Macaulay's famous quotation, "hated bear baiting, not because it gave pain to the bear, but because it gave pleasure to the spectators."

Nor is it the result of Nevada attempting to maintain a sports wagering monopoly. Rather, it is the result of the Professional and Amateur Sports Protection Act (PASPA), 28 USC §§ 3701 et seq. (sometimes referred to as the 'Bradley Bill'), which banned state-sanctioned sports wagering. PASPA exempted sports wagering only in the four states that already had a sports 'wagering scheme' between 1976 and August 1990: Delaware, Oregon, Montana and Nevada. Alone among the states, New Jersey was granted a one-year window after passage of PASPA to pass sportsbetting legislation, but did not do so.

## Professional sports leagues and political influence

PASPA exempted sports wagering only in the four states. In failing to pursue sportsbetting, the New Jersey Legislature was undoubtedly influenced by opposition from the professional sports leagues and then United States Senator Bradley, a former basketball star for the New York Knicks, who warned that legal betting would destroy the integrity of sports and send the wrong message to children, and that sanctioning it would "turn athletes into roulette chips". State Senator Richard Codey (D-West Orange), who also strongly opposed the idea, suggested that sportsbetting would lure college players

into "shaving points before they shaved their beards". (George Amick, 'Against Odds, Politicians Push Sports Betting', NJ.com\ times, February 27, 2012.)

Nevada had about \$2.87 billion wagered on sports in 2011, and obtained about \$9 million in tax revenue. But rather than eliminating sportsbetting elsewhere, PASPA has had the perverse effect of rendering about 99 percent of all United States sportsbetting illegal, to the vast enrichment of illegal bookmakers and organised crime. Advocates of New Jersey legalisation correctly concluded that intra-state sportsbetting could not only raise considerable tax revenue (estimated at \$120 million annually), but could also attract sportsbetting customers from other states to New Jersey, which has now fallen behind Pennsylvania in gross gaming revenue.

## New Jersey's attempt to level the playing field

In exempting – i.e. 'grandfathering' – four states from the sportsbetting ban, PASPA discriminates against the other 46, including New Jersey. Unhappy with such discrimination, New Jersey is attempting to legalise sports wagering at both the federal and state levels. First, Congressional bills have been introduced by representatives from New Jersey which would allow New Jersey or all states to have the option of legalising sportsbetting. Second, New Jersey has enacted state legislation that would legalise intra-state sports wagering, but that legislation will not be implemented until the state receives federal approval, which will necessitate litigation against the United States Justice Department in federal court.

## Congressional bills

On January 23, 2012, two New Jersey Congressmen, Representatives Frank Pallone, Jr. (D-N.J.) and Frank LoBiondo (R-N.J.), introduced and co-sponsored separate bills that would legalise New Jersey sports wagering. Pallone's measure, HR 3809, would "amend title 28 of the United States Code to exclude the State of New

Jersey from the prohibition on professional and amateur sports gambling to the extent approved by the legislature of the State."

LoBiondo's bill, HR 3797, would allow *any* state to authorise sportsbetting if the state approved such activity by January 1, 2016, by amending "chapter 178 of title 28 of the United States Code to permit, during a four-year period, states to enact statutes that exempt from the operation of such chapter, lotteries, sweepstakes, and other betting, gambling or wagering schemes involving professional and amateur sports."

In a joint statement, the Congressmen said "their measures represent different, but equally effective pathways of bringing sports gaming, and its associated revenue potentially amounting to billions to [New Jersey]."

LoBiondo further opined that legalising sportsbetting would "strengthen Atlantic City in the face of stiff competition, giving it an edge to attract visitors and critical tourism dollars." ('Sports betting puts a push in New Jersey', ReviewJournal.com, May 1, 2012.)

As between the two bills, the LoBiondo legislation would seem to be more realistic, as an exemption only for New Jersey would likely garner little Congressional support. Yet it remains highly improbable that *any* standalone Internet gambling legalisation will be approved by the present Congress. Indeed, there is a consensus that the Barton bill, which would legalise online poker but maintain the ban on online sports wagering, has the best chance of approval, but even that bill is not scheduled to be voted on by either house.

Experts agree that the only chance of legalising online poker in this Congress would be to attach it to some unrelated 'must-pass bill' during the lame duck session of Congress following the November federal elections. This is how UIGEA got passed, except that those voting on the Barton bill would include defeated and retiring members of Congress.

## State legislation and federal litigation

Recognising their small likelihood of passage, it is hoped that the Pallone and LoBiondo bills will at least have the

beneficial effect of publicising the futility of the sports wagering prohibition. More promising in achieving results will be the attempt in the near future by the New Jersey Attorney General to challenge the PASPA prohibition in federal court.

An earlier lawsuit challenging the constitutionality of PASPA in federal court was dismissed on March 11, 2011, for reasons other than its merits. The Court ruled that the plaintiffs had suffered no injury in fact (i.e. lacked standing); neither New Jersey nor its Attorney General were plaintiffs, and at that time there had been no voter referendum approving sportsbetting, which is a condition precedent of state legislation. (*Interactive Media Entertainment & Gaming Association, Inc. et al. (iMEGA) v. Holder et al., (D.N.J.)*, 2011 U.S. Dist. LEXIS 23383).

### Sportsbetting referendum passed two-to-one by New Jersey voters

Following the iMEGA decision, a non-binding sportsbetting referendum was approved in November 2011 almost two-to-one by New Jersey voters. Subsequently, a sports gambling legalisation bill was approved overwhelmingly by the New Jersey Legislature, and was signed into law by Governor Chris Christie in January 2012. In summary, that law provides:

“Wagers on a sports event could be placed in-person in a sports wagering lounge located at a casino or racetrack ... Persons placing wagers must be at least 21 years of age. The bill also provides that any person with a compulsive gambling problem whose name appears on any self-exclusion list in this State would be excluded from entering the sports wagering lounge and from placing a wager, subject to all of the limitations and penalties imposed under current law.” (NJ Stat. § 5:12-A [2012].)

The following legislative comments are typical of those supporting passing of the bill:

“This is the beginning of the end for the unfair, discriminatory and unwise federal ban on sportsbetting,” said Senator Raymond Lesniak, an Elizabeth Democrat who has been the measure’s most vocal proponent. “It has failed to curb the public’s desire to bet on sporting events. Indeed,

betting on sports has increased exponentially since the ban passed Congress.”

Deputy Assembly Speaker John Burzichelli, a southern New Jersey Democrat, said the law is designed to reclaim money currently flowing to illegal bookies and offshore gambling websites.

“Let’s face it – sports gaming is already taking place, but the only people taking advantage of it are the bookies and criminal enterprises... This opens the door for New Jersey to implement well-regulated sports gaming.” (‘Christie Signed NJ Sports Betting into Law’ – CBS News, January 18, 2012.)

### New Jersey to take its fight to the courts

It is expected that in the near future, the New Jersey Attorney General will file a complaint seeking a declaratory judgment or similar measure requesting that a federal judge uphold the New Jersey law and declare PASPA unconstitutional.

Paradoxically, the plaintiffs might rely on a September 27, 1991 letter from the very same Justice Department to Senator Joe Biden criticising the proposed PASPA bill largely because, historically, revenue raising was a state matter and PASPA might interfere with constitutional issues of federalism. The letter contended that: (1) PASPA is unconstitutional because it violates states’ rights in that intra-state gambling is a state and not a federal matter; (2) PASPA was arbitrary and capricious; and (3) PASPA, because it allowed only four states to have sports wagering, violated the equal protection clause and also the substantive and procedural due process clause of the 14th Amendment.

It is probable that pro-sportsbetting groups will file ‘friend of the court’ (*amicus curiae*) briefs supporting the lawsuit, and that professional sports leagues will file briefs in opposition. The tenacity and legal ability of professional sports associations cannot be underestimated. In *OFF Comm. Baseball et al. v. Markell*, 579 F3d 293 (3d Cir. 2009), *cert. den.*, 2010 U.S. LEXIS 3712, they convinced a federal appellate court that a 2009 Delaware law authorising straight sportsbetting was in violation of PASPA, since PASPA made an exception only for those games that were actually conducted prior to the enactment of PASPA.

California is also interested in legalising sportsbetting. In April 2012, SB 1390 unanimously (13-0) cleared a state senate governmental committee:

“Sports wagering would be allowed at horse tracks, card rooms, Indian casinos and dozens of poker halls throughout the state if the bill is passed and the federal government’s ban on sports wagering is overturned. California will be among the first state to cash in if New Jersey is successful in its expected court challenge to PASPA.” (‘Industry notes: California sports betting bill advances’, April 30, 2012).

Thus, New Jersey might be the catalyst to overturn the unworkable and perhaps unconstitutional PASPA.

One side effect of state sports wagering regulation would be the reduction of potential game-fixing. There is consensus that “Nevada sportsbooks have been instrumental in uncovering game-fixing scandals when irregular betting patterns raised suspensions. Nevada sportsbooks share a mutual interest with law enforcement and the sports leagues in combating game fixing because they are the financial victims of game-fixers.” (Adam Hosner-Henner, “*Preventing Gaming Fixing: Sports Books as Information Markets*,” 14(1) *Gaming Law Rev.* 31 (2010)).

New Jersey regulation will also reduce game-fixing since the state has one of the strictest gaming regulatory bodies in the US. It could also result in huge revenues from a wagering tax. The only loser, as with the abolition of prohibition, would be organised crime.

**Professor Joseph Kelly** is a professor of business law at the State University of New York College at Buffalo.



**Frank Catania, Sr.** is President of Catania Gaming Consultants, Inc. (CGC), where Professor Kelly is also an associate.

