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Why NJ May Win 3rd Circ. Sports Betting Case

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As we await the impending decision in the New Jersey sports betting case, no clear consensus has emerged as to which side will win. Those of us who were in attendance for the Third Circuit oral argument on March 17 are divided. While some observers believe that New Jersey will prevail, others (such as myself) have a hard time wrapping their arms around the prospect of a federal appeals court actually blessing New Jersey's plan to legalize sports betting through a "partial repeal" that primarily benefits state-licensed and casinos and racetracks. But my skepticism is not based on the law, but, rather, my sense that the Third Circuit may be reluctant to open the floodgates for nationwide deregulated legal sports betting (the "inevitable" consequence of any New Jersey victory) at casinos and racetracks.

Putting my cynicism aside, I believe that New Jersey may hold the upper hand based on what unfolded at the oral argument. In contrast to the district court, which was concerned with the far-reaching implications of other states following New Jersey's blueprint (and thereby potentially weakening the Professional and Amateur Sports Protection Act), the Third Circuit signaled strongly that principles of statutory interpretation would dictate the outcome. And this bodes well for New Jersey.

Natural Meaning of the Word "Authorize"

The question asked repeatedly at oral argument was: “What does ‘authorize’ mean”? It was asked no fewer than six times. Why is this one word so critically important? The answer lies in the plain language of the statute. Pursuant to PASPA, states may not “authorize” sports wagering schemes (and also may not sponsor, operate, advertise, promote or license such activities). The sports leagues take the position that New Jersey's partial repeal law is tantamount to an "authorization" of sports gambling because it allows such activity to take place only at state-licensed and state-regulated casinos and racetracks (and at former racetrack sites). New Jersey, on the other hand, maintains that its new law (which relies upon the Third Circuit's "exact contours" language in Christie I and the U.S. solicitor general's prior statement that New Jersey is free to repeal its state-law prohibitions "in whole or in part" without violating PASPA) is not an “authorization” of sports gambling because there would be no state involvement in that activity. New Jersey argues that the word “authorize” connotes some type of “affirmative” state

sanctioning of the activity, i.e., placing the state's “imprimatur” on sports betting. The Third Circuit zeroed in on this difference, with one panelist pointedly asking whether “authorize” means “to permit” or “to allow” (as the leagues maintain) or whether it must rise to the level of a state sanctioning or approval of the activity (as New Jersey argues).

Principles of statutory interpretation would appear to support New Jersey’s interpretation. The statutory term “authorize” is not defined by PASPA. When a statute itself does not define a term, courts will often construe the term in accordance with its ordinary or natural meaning. This exercise is highly favorable to New Jersey. According to Black’s Law Dictionary, the word “authorize” means “to give legal authority; to empower; or to formally approve; to sanction.” Similarly, according to the American Heritage Dictionary, to “authorize” means “to grant authority or power to. To give permission for; sanction.” The American Heritage Dictionary supplements the above definition of “authorize” with the following example of its usage: “city agency that authorizes construction projects.” Likewise, Webster's Third New International Dictionary defines “authorize” as meaning “to endorse, empower, or permit by or as if by some recognized or proper authority; to endow with effective legal power.”

These definitions suggest that the term “authorize” does not merely mean “to permit” or “to allow,” as the leagues contend. Rather, according to the natural meaning of the word “authorize,” there must be an affirmative granting of approval to engage in the conduct in question. One of the Third Circuit judges, Marjorie Rendell, appeared to embrace this construction when she remarked that “to authorize” means "to give power of official meaning, that the state is involved in the process." And Judge Julio M. Fuentes (who authored the majority opinion in Christie I) pointedly stated during an exchange with Paul Clement (the sports leagues’ attorney) that “[a] repealer is a removal of the restrictions and of all criminal laws, but it doesn't mean that the government is saying go ahead and engage in that activity.”

But the panel was also concerned about the “selective” nature of the partial repeal, suggesting that by restricting sports gambling to specific locations (e.g., casinos and racetracks) which are licensed and heavily regulated by the state, New Jersey may be “authorizing” that activity. One panelist found it “curious” that sports betting “is now being allowed only in places that have gambling licenses.” And another panelist remarked that New Jersey's partial repeal law does more than just simply remove existing prohibitions: it “affirmatively permits” sports gambling at racetracks, casinos and former racetrack sites.

The “Associated Words Canon”

But other interpretative tools may strengthen New Jersey's hand. The most pivotal moment of the oral argument occurred when Judge Marjorie Rendell invoked the “associated words canon” during her questioning of Paul Clement, the leagues’ counsel:

THE COURT: ... here we have the words “sponsor, operate, advertise, promote, license, authorize,” you know there is a canon, associated words canon, and all of these words anticipate something more, something, something affirmative.

Should we not read “authorize” to mean something more than merely “permit”? Should we read it to say authorized by, you know, empowering, giving the state imprimatur, if you will. I get back to the issue of how do we read “authorize”? And doesn't the context in PASPA make it seem like the state has to do something by law that is a scheme as compared to just saying okay, you can do it at these places?

The “associated words canon” (also known as noscitur a sociis) is a tool of statutory construction which

provides that when a string of words are grouped together in a statute, they should bear on one another's meaning. Or, as the U.S. Supreme Court has put it, "'[a] word is known by the company it keeps' — a rule that is often wisely applied when a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." Thus, an otherwise ambiguous statutory term may be given a more precise meaning by reference to the neighboring words with which it is associated.

Under this canon, the term "authorize" would be construed in light of the other verbs which accompany it in PASPA — "sponsor," "operate," "advertise," "promote" and "license." Each of these associated words connotes some type of official involvement by the state in sports gambling. Judge Rendell hinted at this during the following exchange with Paul Clement, the former U.S. solicitor general and outside counsel for the sports leagues:

CLEMENT: ... I mean I think that in terms of context you obviously can look at the surrounding words. I think you can also look at the legislative history. I think that's still allowed in this country ...

THE COURT: But I don't think we can go beyond the language of the law and really look at that. I mean it's fair to know about it, but unless there's ambiguity in the law, you know there really isn't a need. And again I look at the other words and they require something more than — I mean they really require involvement of the state, "promoting, licensing, advertising," you know, putting its seal of approval, if you will.

Echoing this point, renowned appellate lawyer Ted Olson (representing Gov. Chris Christie) referred to the earlier Third Circuit opinion which equated the PASPA verbiage (sponsor, operate, advertise, promote, license and authorize) with a state "scheme":

OLSON: Well, I think that — I read your opinion. And I read your opinion to mean that the words, and one of you referred to the fact that it's a stream of words, it has to do with the state providing the approval, a mechanism. It's almost as if you have a license to put in the window saying this is permitted here. You said —

THE COURT: We talk about a scheme also, a scheme.

OLSON: You talked about a scheme and a regime, you talked about permit issuing, licensing, state issues license, affirmative authorization, authorization by law, state scheme, state sponsored, state sanctioned.

A look back at Christie I provides some context and insight into the court's thinking. In Christie I, the Third Circuit stated that "[a]ll that is prohibited [under PASPA] is the issuance of gambling 'license[s]' or the affirmative 'authoriz[ation] by law' of gambling schemes." Within the same paragraph, the Court reiterated that "PASPA speaks only of 'authorizing by law' a sports gambling scheme." The use of the words "only" and "scheme" is notable here. It suggests that a partial repeal of state-law prohibitions against sports gambling would not violate PASPA so long as there is no state scheme or involvement. The interplay of this key language with the interpretative tools discussed above would appear to leave New Jersey holding a strong hand following oral argument.

But Legislative History May Cut the Other Way

Although Judge Rendell downplayed the importance of PASPA's legislative history — saying it only came into play if there was an "ambiguity" in the statutory language — the Third Circuit will likely consult PASPA's background and motivating policies as part of its analysis. If the court believes that there is a latent ambiguity in the meaning of the term "authorize" (which seemed to be the case at oral

argument), then it will undoubtedly avail itself of all pertinent tools of statutory construction, including reviewing the legislative history of PASPA in addition to employing the "associated words canon" and other interpretive aids.

The legislative history of PASPA cuts both ways. While the express legislative purpose behind PASPA was to "stop the spread of state-sponsored sports betting," Congress was also concerned with maintaining the integrity of, and public confidence, in professional and amateur sporting events, which federal officials believed would be threatened by the widespread legalization of sports gambling. But the leagues' attorney, Paul Clement, wisely refrained from playing that card during oral argument, in all likelihood because one of his clients (the National Basketball Association) has evolved in its thinking and now believes that the legalization of sports betting (through the adoption of a federal framework) would actually serve to promote the integrity of sporting events.

Instead, Clement pointed to language in Senate Report 102-48 expressing concern about the prospect of sports gambling "spreading" to racetracks and casinos, and specifically mentioning Florida as one of the states that was contemplating approving some form of sports gambling for its racetracks as part of legislation "reauthorizing" Florida's pari-mutuel wagering statute (when it was originally set to expire in the early 1990s):

CLEMENT: [I]f you look at the Senate report, there are three things that it's crystal clear Congress is concerned about. They're concerned about states having state lotteries that involve sports gambling. They are concerned with racetracks that already have venues for state authorized gambling having sports gambling. If you look at the Senate report it's very specific.

At the time Florida is going through the process of renewing the licenses of its racetracks. And Congress is worried that they're going to get involved in sports gambling as a way — this is 20 years ago, or 20-plus years ago, but the horse tracks were already in a little bit of financial trouble, and there was concern that they're going to try to add sports gambling as the next solution. And Congress was very concerned about that.

[Congress was also] concerned about ... what they called in the Senate report "casino style" sports gambling, and they were specifically focused on the New Jersey situation. ... Now, I think what that shows you is that Congress was particularly concerned with the idea that sports gambling would take place in the venues that states had selected as the being the venues for state authorized gambling.

But there are several flaws with Clement's decision to highlight only select portions of the Senate report.

For one, it makes no mention of the primary legislative intent behind PASPA: to stop the spread of state-sponsored sports betting and to maintain the integrity of sporting events. If the Third Circuit is going to consider PASPA's legislative history, then it must consider the entire Senate report, and not just select portions thereof.

Second, whatever concern that Congress may have had about casinos and racetracks offering sports gambling was solely in the context of state-sponsored gambling "schemes." Along those lines, the Senate report noted that "[i]n the broader sports gambling area, States are considering a wide variety of State-sponsored gambling schemes," specifically mentioning both the Florida racetrack situation and "casino-style" sports gambling. But New Jersey's partial repeal law (which would entail no state oversight of sports gambling) would not seem to fit the rubric of a state-sponsored "scheme." Thus, the legislative history would not appear to be as one-sided as Clement suggests.

The "Rule of Lenity"

Although not raised during oral argument or in the parties' written submissions, there is yet another canon of statutory interpretation that could tip the scales in favor of New Jersey — the "rule of lenity." The rule of lenity holds that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." This is the judicial equivalent of the baseball maxim "the tie goes to the runner." Courts will apply the rule of lenity when, after all the tools of interpretation have been applied, a reasonable doubt as to statutory interpretation persists.

The rule of lenity is premised on two ideas. First, a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is crossed. A second goal of the rule of lenity is to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors and the courts. Or, as the Supreme Court put it, "legislatures and not courts should define criminal activity."

But the rule of lenity is not automatically applied merely because there is some ambiguity in the statute under review. In order for the rule to apply, there must be a "grievous ambiguity or uncertainty in the language and structure of the statute." Lenity is reserved for those situations in which reasonable doubt persists about a statute's intended scope "even after resort to the language, structure, legislative history, and motivating policies of the statute in question." It will be invoked only if, after seizing everything from which aid can be derived, the court can make no more than a "guess" as to what Congress intended. In other words, the rule of lenity is an interpretive tool of "last resort."

The "rule of lenity" could come into play here as the Third Circuit wrestles with the critical question of just how far a repeal must go in order to not violate PASPA. There are no clear answers. And oral argument only added to the confusion, with the leagues retreating from their earlier position and conceding that something less than a "complete repeal" might be allowed under PASPA. But both the leagues and the U.S. Department of Justice struggled to pinpoint the line of demarcation.

When asked by Judge Fuentes how far a repeal must go, Clement vaguely answered "pretty far," suggesting that "the dividing line is maybe around 50 percent." Determining whether a partial repeal of a criminal law constitutes an "authorization" of the activity and then pinpointing the dividing line is no easy task, even after employing canons of statutory construction and reviewing the legislative history of the statute. The Third Circuit may well conclude that this is an area of "grievous ambiguity or uncertainty," and invoke the rule of lenity in favor of New Jersey. I do not expect this to happen, particularly since it was not raised by the parties or by the Court. But it remains a possibility.

Absence of Word "Regulate" From PASPA May Help New Jersey's Chances

During the oral argument, Judge Fuentes (the author of the Third Circuit's majority opinion in Christie I) expressed concern that New Jersey's partial repeal law would have the effect of allowing completely unregulated sports betting to take place at state gambling venues. He suggested that this would be anathema to PASPA's goal of preserving the integrity of sporting events. Judge Fuentes' concerns go to the very heart of why I believe New Jersey may be on the losing side (yet again) despite having what I consider to be the better of the legal arguments under a pure statutory interpretation analysis. The following exchange between Judge Fuentes and Olson demonstrates this tension:

THE COURT: I'm really impressed in how this whole thing is going to unfold, because I was very impressed, in reading your brief, with the number of regulations that the state is repealing, including oversight by the state and Casino Control Commission, the Division of Gaming Enforcement. They will all, according to the state, have no role whatsoever in sports betting.

OLSON: Correct. And that's —

THE COURT: Well, I'm a little concerned about that, because the function of those [regulatory bodies] is to preserve integrity in the process and now the state is saying they're out of this. So this is essentially a laissez-faire. Sports betting is going to take place in the casino with no oversight whatsoever.

OLSON: That's right. As I said, like a ping-pong table game or a debate tournament.

THE COURT: I guess it's not for us to say that's good or bad. ... If it were, I would have a response to that.

But then Judge Rendell (who was not part of the Christie I panel) weighed in and suggested that it might still be possible to read PASPA as not prohibiting the states from "regulating" sports betting. She noted that PASPA is "so specific" and that there are six verbs contained within PASPA identifying the activities states may not engage in (e.g., sponsor, operate, advertise, promote, license or authorize), and noting that "regulate" is not one of them. She then posited that "some modicum" of state regulation could be "appropriate." Consider the following exchange:

THE COURT: Do you read PASPA as saying that, assuming the law were repealed in toto and operations came up all across the state, of sports gambling, do you read PASPA to prohibit the state from regulating, imposing any kind of regulations on the sports gaming?

OLSON: Well, that's what our opponents are essentially saying now.

THE COURT: But I'm asking you, is that how you read it? . . .

OLSON: ... If the state is engaged, to address your exact question, in regulating the activity, that might involve the imprimatur of ... regulation and control.

THE COURT: But which verb under PASPA would regulation fall under? It's not sponsoring, it's not operating, its not advertising; promoting; licensing; or authorizing. It's regulating. Would that be permissible? ...

OLSON: Well, I think it is a different question ...

THE COURT: PASPA is so specific. There are six specific activities that you cannot engage in, but regulating is not part of that.

OLSON: That's right.

THE COURT: So I'm just wondering, maybe thinking out loud, that maybe some modicum of regulation is appropriate if you were right in the first instance.

This could be a real "game-changer" for New Jersey. If, as Judge Rendell suggested, states could repeal

sports betting prohibitions but still be allowed to “regulate” the activity (so long as they do not sponsor, operate, advertise, promote, license or authorize it), this might be the type of compromise that avoids the “wild west” scenario feared by Judge Fuentes. It would allow the Third Circuit to interpret PASPA in a manner that is favorable to New Jersey (and in accordance with the above-described canons of statutory construction) without having to worry about the negative consequences associated with unregulated sports betting.

At the very least, this reveals Judge Rendell to be an “outside the box” thinker. As noted earlier, Judge Rendell was also the panelist who invoked the “associated words canon” during oral argument. Her comments from the bench strongly suggest that she might be inclined to rule in favor of New Jersey (or is at least looking for a reason to do so). But she will need at least one more judge to join her (there are three judges on the panel), and her statement concerning the ability of states to “regulate” sports gambling without violating PASPA may be just the vehicle to accomplish that.

The Long-Range Implications of the Third Circuit's Decision

The Third Circuit's decision — regardless of the result — will have far-reaching consequences for the U.S. sports industry (and New Jersey's gaming industry). If New Jersey prevails, sports betting could become a reality at the state's licensed casinos and racetracks in time for the beginning of the 2015 NFL season. But as the decision date stretches into July, that may prove to be a long shot (even with a New Jersey victory) because the leagues and the U.S. Department of Justice would have 45 days to file a petition for rehearing en banc. (Rehearing en banc is a mechanism available to the losing side to seek review of the decision by the entire court, rather than just the three-judge panel that decided the appeal).

Normally, the deadline for seeking rehearing is 14 days from the date of the decision. But since the federal government is a party, the leagues would have 45 days to file a petition for rehearing. That means we are looking at a late August deadline, assuming that there is a panel decision by mid-July. Thus, for Monmouth Park Racetrack to be able to offer sports betting by week 1 of the 2015 NFL season (Sept. 10), an appellate decision plus a denial of rehearing would have to occur no later than Sept. 3, 2015, since the injunction entered by the lower court would not be lifted until seven days has passed from the denial of rehearing. With each passing "nondecision" day, the prospect of Monmouth Park Racetrack launching sports betting in time for week 1 of the 2015 NFL season is in jeopardy, but I'm sure that the track operators will settle for any date in 2015 (or even 2016).

The impact of a New Jersey victory would extend far beyond the state’s borders. One immediate aftershock of such an upset (I now give New Jersey a 40 percent of chance of prevailing, increased slightly after oral argument) is that neighboring states (such as Pennsylvania and Delaware, which are part of the Third Circuit territory) would likely follow New Jersey's “court-blessed” blueprint and enact their own version of a partial repeal law in reliance on the Third Circuit's decision. Looking beyond the Third Circuit's jurisdictional territory, we could see as many as 10 other states passing similar partial repeal laws within a matter of months following a New Jersey victory. Several states — most notably, Minnesota, Indiana and South Carolina, to name just a few — are not even waiting. The legislatures of those states have already proposed bills legalizing single-game sports wagering (but not the partial repeal version favored by New Jersey). While these bills are only in a preliminary stage at this juncture, expect them to be fast-tracked if New Jersey wins.

Further, a victory by New Jersey will undoubtedly — and perhaps quickly — lead to new federal legislation that would expand legalized sports betting beyond Nevada. This is because New Jersey’s version of legal sports betting would be “unregulated” (meaning no governmental oversight). While NBA

Commissioner Adam Silver has come out in favor of legal sports betting, he maintains that it needs to be "regulated" in order to preserve the integrity of the league's games. A New Jersey victory would open the door to "unregulated" sports betting, a prospect that the NBA, the other sports leagues and Congress are desperate to avoid. But the leagues and Congress have offered no definitive timetable for federal legislative reform, or any guarantees. Most observers believe that there is little chance of any congressional action before 2017 (especially with a presidential election next year). A New Jersey victory would likely change all that, and accelerate the timetable for federal legalization to 2016 (or perhaps this year). Thus, the Third Circuit's decision will likely determine the "timing" of when sports wagering becomes legal in the United States

But even if New Jersey were to lose the appeal, the eventual Third Circuit opinion will likely include language that provides New Jersey officials with some guidance for future legislative efforts. One possibility that was suggested at oral argument is the idea of a partial repeal based upon geographic boundaries rather than favoring specific industries. The court hinted that such a regime might not violate PASPA, and I would not be surprised if that were the eventual solution reached by the panel (although courts are not typically in the business of issuing advisory opinions).
New Jersey would then be poised to follow such a "roadmap" and propose new legislation right away. Thus, regardless of the result, New Jersey may be inching closer to achieving its goal of legal sports betting.

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