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The Fallacy Behind NJ's Sports Betting Strategy

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If ever there were a sports law case that had the proverbial "nine lives," it would have to be New Jersey's ongoing quest to legalize sports betting. Following his veto of two bills that would have partially repealed the state-law prohibition against sports betting, which itself was a response to the Supreme Court's refusal to hear New Jersey's constitutional challenge to the Professional and Amateur Sports Protection Act ("PASPA"), New Jersey Governor Chris Christie last week embarked on a bold new legal strategy designed to bring sports betting to the Garden State.

First, the New Jersey attorney general issued Formal Opinion 1-2014, which concluded that casinos and racetracks would not be committing a criminal offense under New Jersey law if they were to accept wagers on professional and college sporting events (excluding those collegiate games involving New Jersey colleges or taking place in New Jersey). Second, the attorney general (joined by Gov. Christie) filed a motion with U.S. District Judge Michael A. Shipp, the federal judge who permanently enjoined New Jersey from implementing its sports wagering law in February 2013 (that decision was later upheld on appeal by the Third Circuit). The new motion seeks a "clarification" of the injunction to explicitly recognize that New Jersey is not obligated to maintain the criminal prohibitions against sports wagering on its books and, further, that the "surviving portions" of the earlier legislation (which Judge Shipp held was preempted by PASPA) already "effect[ed] a repeal of New Jersey's prohibition of sports wagering in casinos and racetracks" without the need for further action. Alternatively, the motion seeks to "modify" the injunction to reflect the Third Circuit's explicit recognition that a state "may repeal its sports wagering ban" or "keep a complete ban on sports gambling" and "decide what the exact contours of the prohibition will be."

You might be asking yourself the following question: "Didn't New Jersey just lose in federal court?" While New Jersey's efforts to "regulate" sports wagering through a statutory licensing regime were unsuccessful because Judge Shipp and, later, the Third Circuit (by a 2-1 margin) concluded that the statute was preempted by PASPA, New Jersey is zeroing in on language in the Third Circuit opinion which purports to allow it to "repeal" its state-law prohibition against sports betting without violating PASPA. The pertinent language in the Third Circuit opinion reads:

[W]e do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering. ... [U]nder PASPA, on the one hand, a state may repeal its sports betting ban, a move that will result in the

expenditure of no resources or effort by any official. On the other hand, a state may choose to keep a complete ban on sports gambling, but it is left up to each state to decide how much of a law enforcement priority it wants to make of sports gambling, or what the exact contours of the prohibition will be. We agree that these are not easy choices. And it is perhaps true (although there is no textual or other support for the idea) that Congress may have suspected that most states would choose to keep an actual prohibition on sports gambling on the books, rather than permit that activity to go on unregulated. But the fact that Congress gave states a hard or tempting choice does not mean that they were given no choice at all, or that the choices or otherwise unconstitutional.

National Collegiate Athletic Ass'n v. Christie, 730 F.3d 208, 232-33 (3d Cir. 2013)

Seizing upon this language, the New Jersey Senate and State Assembly introduced legislation in June that would have repealed the state-law prohibition against sports wagering, but only for the benefit of casinos and racetracks. Gov. Christie vetoed these bills on Aug. 8, 2014, believing them to be a blatant "end-run" around PASPA that would not have survived judicial scrutiny. Gov. Christie's motion tries a more creative approach: it argues that the state-law prohibitions against sports wagering have already been repealed by virtue of the 2012 legislation that was found to be preempted by PASPA. You might ask: "How can New Jersey still be relying on a state law that was struck down by the federal courts?" Simple. By arguing that the portion of the law providing that a casino or racetrack "may operate a sports pool" is "severable" from the portion of the law authorizing the state to "license" sports betting (the part found to be in express conflict with PASPA). Pointing to the statute's "severability clause," Gov. Christie's motion posits that "the surviving portions of the Sports Wagering Act effect a repeal of New Jersey's prohibition of sports wagering in casinos and racetracks. ..." (Gov. Christie's Motion, at p. 5)

New Jersey's Novel "Repeal" Theory is Unlikely to Succeed

Despite the optimism expressed on many fronts, New Jersey's gambit is unlikely to succeed. To begin with, New Jersey's sports wagering law (N.J.S.A. 5:12A-1 et seq.) did not expressly repeal the criminal prohibition against sports wagering in that state. The 2012 legislation does not even refer to the state-law prohibitions that would presumably cover illegal sports betting — N.J.S.A. 2C:37-2 ["Promoting Gambling"] and N.J.S.A. 2A:40-1 ["Gaming Transactions Unlawful"]. Similarly, neither of these criminal statutes exempts sports betting at casinos and racetracks nor contains any reference to the 2012 legislation. It would have required only a modicum of effort to amend one or both of these statutes to read: "Nothing in this Chapter shall be construed to prohibit bets or wagers placed upon the outcome of any professional or collegiate sporting event in accordance with the provisions of N.J.S.A. 5:12A-1 et seq." It is likewise telling that the 2012 legislation does not contain the common introductory phrase — "notwithstanding any law, rule or regulation to the contrary" — in the allegedly "surviving" portion of the statute that provides that a casino or racetrack "may operate a sports pool." This is further evidence that the legislature did not intend to repeal either of the state-law prohibitions when it enacted the sports wagering law.

While statutes can be repealed "by implication," the New Jersey Supreme Court has cautioned that "there is a strong presumption in the law against [an] implied repealer and every reasonable construction should be applied to avoid such a finding." New Jersey Ass'n of School Adm'rs v. Schundler, 211 N.J. 535, 555-56, 49 A.3d 860, 872 (2012) (citing In re Comm'r of Ins.'rs Issuance of Orders A-92-189 & A-92-212, 137 N.J. 93, 99, 644 A.2d 576, 579 (1994)). To overcome that strong presumption, a high threshold must be vaulted: "a repeal by implication requires clear and compelling evidence of legislative intent, and such intent must be free from reasonable doubt." Id.

New Jersey will not be able to overcome this presumption. Recent actions taken by New Jersey legislative officials are completely antithetical to any notion that an "implied repeal" has occurred. For example, in the Supreme Court petition filed by New Jersey Senate President Stephen Sweeney and New Jersey General Assembly Speaker Vincent Prieto in February 2014, those legislative officials conceded that "the citizens of New Jersey have not expressed support for allowing unregulated sports wagering." This is an acknowledgement by New Jersey's two highest-ranking legislative officers that, as of February 2014, the criminal prohibition against sports wagering had not been repealed. This directly contradicts the present position advanced by Gov. Christie and Attorney General John Hoffman in their motion. To be sure, at no point in the nearly two years of federal court litigation did New Jersey take the position that the criminal prohibition against sports wagering had been "repealed" by virtue of the 2012 legislation. There are no such statements in any of New Jersey's federal court filings — until now, that is.

Ironically, New Jersey points to statements made by its adversaries in the federal case to support its novel "implied repeal" argument. In Formal Opinion 1-2014, Attorney General Hoffman maintains that the Third Circuit "accepted" the position of the plaintiffs in the case, which he characterizes as having acknowledged that New Jersey repealed its prohibitions against sports wagering. (AG Opinion, at p. 2 [blending the DOJ's and leagues' briefs to read that "nothing in [PASPA] requires New Jersey to maintain or enforce its sports wagering prohibitions, and, indeed, that New Jersey's 'repeal of its state-law prohibition on the authorization of sports wagering' itself was 'in compliance with PASPA.'"). But a close reading of the appellate briefs paints a far different picture. In his brief, United States Attorney Paul Fishman actually stated that "nothing in [PASPA] requires New Jersey to maintain or enforce its sports wagering prohibitions," noting that "the Sports Leagues have not brought suit to enjoin New Jersey from repealing those pre-existing sports-gambling prohibitions," which he describes as a "hypothetical scenario."

Indeed, the Third Circuit opinion itself makes clear that any repeal of New Jersey's state-law prohibition against sports wagering would be prospective in nature. In rejecting New Jersey's argument that PASPA improperly commandeers the states to maintain their criminal prohibitions against sports wagering, the Third Circuit majority stated that "we do not read PASPA to prohibit New Jersey from repealing its ban on sports wagering." National Collegiate Athletic Ass'n v. Christie, 730 F.3d 208, 232 (3d Cir.2013). Note the use of the "future tense" rather than the "past tense." This runs counter to any argument by New Jersey that the repeal had already occurred. Although the New Jersey attorney general quotes from the federal government's answer brief before the Third Circuit, he overlooks a later Supreme Court filing made by the U.S. solicitor general which states that PASPA "does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part."

Likewise, at the June 26, 2013, oral argument before the Third Circuit, Paul Fishman (the United States Attorney for the District of New Jersey) conceded that New Jersey "could" repeal its prohibition against sports betting without violating PASPA, but stated that the reason "it hasn't been done" yet is because "it's a really, really bad idea":

MR. FISHMAN: Mr. Olson [counsel for Gov. Christie] said they can't change the law, they have to enforce the law on the books, they have to keep it illegal. None of that is true. ... It is up to the State of New Jersey to determine for itself the extent to which it will or will not enforce that law. ...

THE COURT: So New Jersey could repeal its ban on wagering on sporting events?

MR. FISHMAN: As a matter of law it could. It would be incredibly irresponsible.

THE COURT: It would not violate PASPA?

MR. FISHMAN: No. But the reason it hasn't been done for 20 years or a hundred years is not because of PASPA. It hasn't been done because it's a really, really, really bad idea. It's irresponsible, it would be bad policy to just allow gambling to go unfettered. ...

(Transcript, at pp. 66-68)

Moreover, the attorney general's opinion on this issue cannot be reconciled with the recent New Jersey legislative efforts to partially "repeal" the ban on sports wagering. On June 23, 2014, the New Jersey Senate and State Assembly introduced identical bills (S2250/ A3476) that sought to "decriminalize" sports wagering at casinos and racetracks. Each bill contained a "statement of intent" acknowledging that the intent of the proposed legislation was to conform current law to statements made by the U.S. solicitor general in a filing with the Supreme Court that "PASPA does not even obligate New Jersey to leave in place the state-law prohibitions against sports gambling that it had chosen to adopt prior to PASPA's enactment. To the contrary, New Jersey is free to repeal those prohibitions in whole or in part." And this week brought the announcement by New Jersey State Senator Ray Lesniak, D-Union, that he will soon introduce a bill that would "repeal" all prohibitions concerning sports wagering "at casinos or gambling houses in Atlantic City and at current running and harness horse racetracks in this State." This begs the question: If the prohibition against sports wagering had already been repealed by the 2012 legislation, then why even bother with the new legislation? These recent actions completely belie New Jersey's present position.

Is the New Jersey Sports Wagering Law "Severable"?

I also question whether any portion of the 2012 legislation "survived" the federal court determination that the New Jersey sports wagering law was preempted by PASPA. This is a key hurdle for New Jersey to clear because it cannot claim that an "implied repeal" occurred without first demonstrating that the portion of the 2012 legislation purporting to repeal the prohibition against sports wagering can be "severed" from the portions of the law that were invalidated. Under the doctrine of "severability," a court can excise the invalid portions of a statute while leaving the remainder intact. This issue does not appear to have been addressed by either the district court or Third Circuit. But nothing in the two judicial opinions suggests that only "portions" of the 2012 legislation were invalidated. To the contrary, both opinions suggest that the entire law was stricken. See National Collegiate Athletic Ass'n v. Christie, 926 F. Supp. 2d 551, 577 (D.N.J. 2013) (determining that "New Jersey's Sports Wagering Law is preempted" and stating that "the enactment of the Sports Wagering Law is in violation of the Supremacy Clause."); National Collegiate Athletic Ass'n v. Christie, 730 F.3d 208, 215 (3d Cir. 2013) ("New Jersey's sports wagering law conflicts with PASPA, and, under our Constitution, must yield. We will affirm the district court's judgment.").

For such an important threshold question, New Jersey's motion gives short shrift to the "severability" analysis, relegating it to a footnote. Therefore, I will attempt to explain the legal analysis that Judge Shipp will likely undertake in ascertaining whether the portions of New Jersey sports wagering law providing that a casino or racetrack "may operate a sports pool" (the so-called "implied repeal") can be severed from the "licensing" regime of that law.

When a federal court is called upon to invalidate a state statute, the severability of the constitutional portions of the statute is governed by state law. New Jersey courts employ a "commonsense approach" to severability, holding that an invalid provision is severable if that is in keeping with the legislative intent; legislative intent is ascertained by looking to the broad purpose of the statute, the degree to which the valid and invalid provisions are intertwined with one another, and the extent to which the statute remains comprehensive and logical after the invalid provisions are excised. See New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587, 597-98 (3d Cir. 1985)

At first glance, each of these factors points decidedly away from severability. The "broad purpose" of the New Jersey sports wagering law was to enact a "licensing regime" that would shift illegal economic activity into legal channels where it could be monitored, regulated and appropriately taxed. During the public hearings, legislators also expressed a desire "to stanch the sports-related black market flourishing within New Jersey's borders." Christie, 730 F.3d at 217. The provision allowing casinos and racetracks to "operate a sports pool" (the so-called "implied repeal") is inextricably intertwined with the requirement that such activities be licensed and regulated. Indeed, the sentence which states that casinos and racetracks "may operate a sports pool" (contained in N.J.S.A 5:12A-2(a)) also expressly conditions such entitlement "upon the approval" of the New Jersey Division of Gaming Enforcement (for casinos) and the New Jersey Racing Commission (for racetracks) and further requires such activities to be undertaken "in accordance with the provisions of this act and applicable regulations promulgated pursuant to this act." Virtually the entirety of the act addresses issues relating to "licensing and regulation." The licensing and regulatory aspects of the law are so dominant that once they are excised (since they were held to be in conflict with PASPA), the remainder of the statute would be largely an empty shell devoid of any logical structure.

Assessment and Conclusion

Given these highly inconvenient facts, New Jersey faces an uphill battle to convince Judge Shipp to clarify the existing injunction to align with the attorney general's view that the state-law prohibition against sports wagering was repealed by the 2012 legislation and that the "surviving" portions of the 2012 legislation exempt casinos and racetracks from civil or criminal liability. The best that New Jersey can realistically hope for is that the injunction will be "modified" to incorporate the Third Circuit's explicit recognition that a state "may repeal its sports wagering ban" or "keep a complete ban on sports gambling" and "decide what the exact contours of the prohibition will be."

But that might be a pyrrhic victory at best. Let's assume that the injunction is modified to incorporate the "wiggle room" afforded by the Third Circuit majority opinion. What would a future "repeal" actually look like? If it's anything like the June legislative measure (which released only casinos and racetracks from the law's clutches), it might not be worth the effort. The selective exclusion of casinos and racetracks might still run afoul of PASPA, which provides in Section 3702(1) that a governmental entity may not authorize or promote a sports-based wagering scheme even "indirectly." The recent proposed legislation — removing only racetracks and casinos from the criminal prohibition — certainly appears to be an "indirect" authorization of sports betting, and will likely be challenged by the leagues and the DOJ

if and when it is signed into law. The problem with such a partial repeal is that it does not seek to repeal the prohibition against sports betting in toto; rather it releases only New Jersey's casinos and racetracks from the law's clutches (and subjects everyone else to the prohibition). Such a repeal too closely mimics the prior law.

And that is precisely why Gov. Christie vetoed the proposed repeal. In his Aug. 1 letter to the New Jersey Senate, Gov. Christie disparaged the June legislative measure as "a novel attempt to circumvent the Third Circuit's ruling" and "an attempt to sidestep federal law." "Ignoring federal law, rather than working to reform federal standards," the governor added, "is counter to our democratic traditions and inconsistent with the Constitutional values I have sworn to defend and protect." Clearly, Gov. Christie was troubled by the "carve-out" of casinos and racetracks in the recent legislative measure and believed (wisely) that it would not pass muster with the federal courts. The June measure — releasing only New Jersey's casinos and racetracks from the criminal prohibition against sports wagering — struck many observers, including me, as a "back-door" authorization of sports betting.

Previewing last week's court filing, the closing paragraph of the governor's letter reassures state legislators that he "remain[s] open to legally sound ways to let the State's casinos and racetracks offer sports wagering." It is debatable whether the governor's latest gambit is "legally sound." Just as the June legislative measure was likely headed for defeat in the federal courts (if it had been signed into law), so too is the governor's novel but risky legal strategy. Both avenues seek to exempt only casinos and racetracks from the criminal prohibition, a carve-out that may be viewed as an "indirect" authorization of sports betting. Is such a gambit really worth the time, knowing the likely result? Perhaps a more legally sustainable repeal strategy would be to exclude only certain geographic areas (e.g., Atlantic County) from the prohibition. The optics of such a maneuver would certainly be superior to an exemption that specifically and exclusively benefits only two classes — casinos and racetracks. Perhaps that is elevating form over substance. But without a more reasoned approach to the "repeal" issue (and one that remains faithful to the Third Circuit opinion), we may be a long way from placing that Super Bowl bet in New Jersey.

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