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# NCAA v. Christie: Administrative Law Point May Determine Future of Sports Betting

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Equine & Gaming at Dinsmore

Some of the biggest names in the legal profession wrestled with points of constitutional law on February 14 in NCAA v. Christie, the case that some have called “the fight for the future of American sports gambling.”

But the outcome of the case may turn on how Judge Michael A. Shipp pins down the NCAA’s, NFL’s and other sports leagues’ position on a point of administrative law.

The big issue at stake in the case is whether the 1992 Professional and Amateur Sports Protection Act (“PASPA”), which limits single-game sports betting to Nevada, is constitutional. The sports leagues, as well as the United States Attorney on behalf of the Department of Justice (“DOJ”), contended in oral argument that Congress’ basis for enacting PASPA—stopping the growth and spread of legal and regulated sports betting—was a rational exercise of the Commerce Clause.

Ted Olson, New Jersey Governor Chris Christie’s lawyer, disagreed and argued that Congress’ prohibiting New Jersey from regulating sports betting “commandeered” the New Jersey legislature’s power in violation of the Commerce Clause and the Tenth Amendment.

Gaming attorney Christopher L. Soriano of DuaneMorris was present at the oral argument and summarized a critical point in the argument on his firm’s blog.

“The sports leagues argued, that with respect to commandeering, PASPA does not require a state to legislate or carry out a federal regulatory program,” Soriano wrote. “The leagues argued that PASPA does not prohibit sports betting, nor does it require a state to even have laws on its books that prohibit sports betting. According to the leagues, the only thing PASPA prohibits is state regulation of sports betting.”

It is a well-established principle of administrative law that government regulation of business activity is intended to encourage the activity that is subject to the regulation.

For example, in City of Cleveland v. Ameriquest Mortgage Securities, Inc., Cleveland blamed regulated subprime lenders for the creation of a public nuisance in the form of an epidemic of foreclosures in the city. According to the United States District Court for the Northern District of Ohio,

Cleveland claimed that “subprime lending was categorically inappropriate for Cleveland due to its ‘unique’ economic situation, characterized by a high poverty rate, a sluggish economy, limited employment opportunities, and stable but not booming property values.”

In dismissing Cleveland’s public nuisance claim against the subprime lenders, the court held that regulation “encourages” the regulated business activity and under a long line of cases, “a showing that the challenged conduct is subject to regulation and was performed in conformance therewith insulates such conduct from suit as a public nuisance.”

In their argument, the sports leagues and the DOJ contended that in enacting PASPA, Congress intended to stop the growth and spread of sports betting by stopping New Jersey from encouraging sports betting through regulation. In other words, in enacting PASPA as a scheme of interstate commerce regulation, Congress intended to discourage states from encouraging sports betting by federally prohibiting state regulation of sports betting.

But the leagues’ and the DOJ’s argument may conflict with the decision in New York v. United States in which the Supreme Court noted that “the allocation of power in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.”

The sports leagues’ and the DOJ’s argument that Congress can prohibit New Jersey from using bona fide regulation to encourage sports betting appeared to flummox Judge Shipp during the oral argument.

According to Mr. Soria’s coverage of the oral argument on Twitter, after more than three hours of argument and a short recess, Judge Shipp returned to the bench and asked but one question of the sports leagues and the DOJ.

Are the Department of the Justice and the leagues asserting that there is a regulatory scheme in place? In response, U.S. Attorney Fishman said that nobody was arguing that PASPA created its own regulatory scheme that pre-empted New Jersey’s freshly enacted sports betting regulation.

The outcome of Judge Shipp’s wrestling match with the implications of the U.S. Attorney’s answer to his question likely will determine how this case is decided at the district court level.

If the federal court concludes that Congress acted rationally to discourage states such as New Jersey from using state regulation to encourage the growth and spread of sports betting, then the sports leagues and the DOJ likely will prevail.

But if Judge Shipp concludes that PASPA does not regulate interstate commerce directly in the form of sports betting, but rather regulates New Jersey’s regulation of interstate commerce, then Governor Christie and his legal team may pull off one of the biggest upsets in sports history.

However, no matter how this case is decided, the issue of sports betting outside Nevada may not go away. Even if the leagues and the DOJ prevail, Congress could still take up the issue and amend or repeal PASPA, particularly if the sports leagues ever decide in the future to relax their opposition to sports betting outside Nevada and license the right to offer sports betting subject to hold harmless agreements.

For that reason, all casinos, race tracks and other gaming businesses should be familiarizing

themselves with the legal nuances of the regulation of sports betting and preparing for the day when they might be able to offer sports betting to their customers as a legal and regulated product.



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