

Alert | Gaming



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The *Murphy* Decision: Professional and Amateur Sports Protection Act Found Unconstitutional

On May 14, 2018, the U.S. Supreme Court issued an opinion in *Murphy v. NCAA* finding the Professional and Amateur Sports Protection Act (PASPA) unconstitutional for violating the Court’s anti-commandeering jurisprudence inherent in the Tenth Amendment. As a result of the ruling, states are no longer prohibited from authorizing and regulating sports wagering systems on a state-by-state basis in a manner similar to existing domestic gambling markets. This GT Alert is the first of a series which will discuss the *Murphy* decision and its potential impact on various practices and industries.

As outlined by the Court, PASPA previously made it unlawful for a state or its political subdivisions “to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based . . . on” competitive sporting events (28 U. S. C. §3702(1)) and for “an individual to sponsor, operate, advertise, or promote” those same gambling schemes if done “pursuant to the law or compact of a governmental entity” (§3702(2)). The majority found it significant that PASPA did not make sports gambling itself a federal crime; rather, it allowed the Attorney General, as well as professional and amateur sports organizations themselves, to bring civil actions to enjoin possible violations of the law (§3702(3)).

Justice Alito, writing for the majority and joined by Chief Justice Roberts, and Justices Kennedy, Thomas, Kagan, and Gorsuch, reasoned that the prohibition on state, rather than individual, action found in §3702(1) fell outside the authority granted to the federal government pursuant to the Tenth Amendment. In light of this deficiency, the majority reasoned that §3702(2) must also fail in order to avoid a scenario in which the citizens of a state are prohibited from participating in an activity expressly authorized by said

state. Justice Thomas concurred with the majority opinion in its entirety but wrote separately to raise concerns over the Court's willingness to invalidate §3702(2). Justice Breyer concurred in part and dissented in part, finding Justice Thomas's concerns valid enough to dissent with the majority's conclusion regarding §3702(2). Justice Breyer would have granted New Jersey the Pyrrhic victory they feared – finding the state prohibition unconstitutional while preserving the individual prohibition. The dissent authored by Justice Ginsburg and joined by Justice Sotomayor and, in part, Justice Breyer, disagreed that either §3702(1) or §3702(2) violated the anti-commandeering jurisprudence of the Court.

What Does This Mean?

The ruling has been widely reported and the impacts have been discussed both knowledgeably and otherwise. What has been lost in some of the reporting is that any wager that was illegal prior to the ruling remains illegal today. Generally, the states must first take legislative action and then adopt the appropriate regulations in order for sports wagering to become a reality. Four states, New Jersey, Pennsylvania, Mississippi, and West Virginia, all recently passed bills to legalize sports betting in anticipation of this decision, and will be the first jurisdictions to benefit from the ruling. We anticipate that these four states will conclude a regulatory process that may legalize sports betting in those states within 60 to 90 days. Similar bills are pending in various other states and we anticipate quick action on many of those bills in the months ahead. Still other states may take the position that the laws of their states already permit sports wagering. Complicating the landscape further is the fact that the federal government may revisit PASPA or other federal legislation in the wake of the ruling, specifically as there remain several other federal laws which may be impacted by state sponsored sports wagering (such as the Wire Act and the Illegal Gambling Business Act).

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