

## How Sports Bet Ruling Affects Players' Collective Bargaining

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On May 14, 2018, the U.S. Supreme Court in *Murphy v. National Collegiate Athletic Association*, by a 6-3 vote, struck down the Professional and Amateur Sports Protection Act as a violation of the Constitution's anti-commandeering doctrine, i.e., the principle that the federal government cannot direct state officers, including state legislatures, to take or not to take particular actions.[1] This ruling opens the door for states to pass laws legalizing betting on sports across the country — an action that multiple states have indicated that they will do.[2]

Although the financial impact of this decision remains to be seen, in the near term, it is incumbent upon players' associations to not only monitor how state legislatures and Congress react to the decision, but to also proactively engage with both federal and state legislatures. Failure to do so will likely leave players' associations (and the players that comprise them) in an unfavorable position vis-a-vis their respective leagues. For example, in recent years, major sports leagues have lobbied state legislatures to include so-called integrity fees in any legislation that legalizes sports betting. While such fees would almost certainly result in more money for the leagues, it is not clear — in light of the structure of current collective bargaining agreements — that the players' associations would see any of this money.

Thus, in the longer term, players' associations must work to ensure that the terms of their respective CBAs maximize the players' share of any new fees that are levied and any additional profits that are realized as a result of legalized sports betting.



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## Overview of Murphy v. NCAA

PASPA, which was passed in 1992, was intended, in part, to "safeguard the integrity of sports."<sup>[3]</sup> Specifically, PASPA made it "unlawful" for states (and subdivisions thereof) to "'sponsor, operate, advertise, promote, license, or authorize by a law or compact ... a lottery, sweepstakes, or other betting, gambling or wagering scheme based ... on' competitive sporting events" (the "Anti-Authorization and Anti-Licensing Provision").<sup>[4]</sup>



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PASPA did not, however, create a federal crime of "sports gambling," and it exempted from its restrictions sports gambling regimes that were already in place, e.g., sports betting in casinos in Nevada.<sup>[5]</sup> Further, PASPA gave the state of New Jersey one year to adopt a law allowing sports gambling in Atlantic City.<sup>[6]</sup> New Jersey failed to do so. Instead, New Jersey finally passed such a law in 2012. In response to the passage of the law, the National Collegiate Athletic Association, the National Basketball Association, the National Football League, the National Hockey League and Major League Baseball brought suit, alleging that New Jersey's law violated PASPA.<sup>[7]</sup> Then, in 2014 — in response to arguments that were made in the pending court proceeding — the state of New Jersey reframed its law as a repeal of a prior ban on sports betting as opposed to an authorization of sports betting.<sup>[8]</sup> This newly revised law was once again challenged as being violative of PASPA.<sup>[9]</sup>



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In *Murphy*, the Supreme Court did not address whether New Jersey's reframed law violated PASPA because the court concluded that PASPA's Anti-Authorization and Anti-Licensing Provision itself violated the Constitution. Specifically, the court held that by "unequivocally dictat[ing] what a state legislature may and may not do," the Anti-Authorization and Anti-Licensing Provision violates the anti-commandeering doctrine of the Constitution.<sup>[10]</sup> As the court explained, the anti-commandeering doctrine is "the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States."<sup>[11]</sup> Pursuant to the anti-commandeering doctrine, "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power to directly compel the States to require or prohibit those acts."<sup>[12]</sup>

After striking down the Anti-Authorization and Anti-Licensing Provision, the *Murphy* court considered whether that provision was severable such that remainder of PASPA could be saved.<sup>[13]</sup> The court ultimately held that was not possible and struck down PASPA in its entirety — thereby leaving the door open for other states to pass laws authorizing sports betting.<sup>[14]</sup>

## Approach of the Professional Sports Leagues

Presumably to take advantage of a potential new source of revenue, many states (even prior to the *Murphy* decision) passed legislation to permit sports gambling in the event that PASPA was struck down.<sup>[15]</sup> Still other states are currently racing to pass such legislation.<sup>[16]</sup> Although it is hard to measure the size of the eventual windfall to states from sports betting — as current estimates of the illegal sports betting industry range from \$67 billion to \$200 billion per year — the possibility of a sizable windfall means that players' associations have the opportunity to take a proactive role in shaping such legislation. Players' associations should advocate that state legislators pass rights-based fees rather than the integrity fees for which sports leagues like the NBA and the MLB have advocated. <sup>[17]</sup>

Specifically, for the past two years, the NBA and the MLB have lobbied states to pass a 1 percent "integrity fee," which would provide the leagues with a 1 percent per year commission on the total bets wagered on their respective leagues. As Dan Spillane, the NBA's senior vice president and assistant general counsel, testified before the New York Senate, the leagues believe that this 1 percent fee is warranted: (1) to ensure the integrity of their league and (2) to compensate the leagues for both providing the foundation for sports betting while also bearing the risk of a loss of commercial interest due to any perceived loss of integrity.[18]

Unsurprisingly, this 1 percent fee has been a hard sell as state legislatures are focused on maximizing the potential revenues for their own states. So far, none of the states have passed or even introduced legislation that incorporates a 1 percent fee that would be given to the leagues.[19] Indeed, the closest is a proposal currently pending in the New York state legislature that would give the leagues a .25 percent fee "for expenses incurred for integrity operations" such as "integrity monitoring expenses, expenses incurred related to integrity investigations, public relations expenses associated with integrity issues, and any other eligible expenses." [20]

An "integrity fee" has some merit, as the leagues will have to incur substantial costs revamping their compliance programs and internal regulations to address potential integrity related rules. Additionally, the leagues may also have to incur more costs investigating allegations related to sports betting.

### **Impact on the Players' Associations**

Even if states were to adopt a 1 percent integrity fee or something similar, it is not clear that any portion of such a fee would be shared with the players. For example, neither the NBA's CBA with its players nor the NFL's CBA with its players suggests that the money received from integrity fees would automatically be shared with players. To the contrary, both documents contain revenue splitting provisions that appear to be favorable to the leagues.[21]

Specifically, Article VII of the NBA's CBA identifies "Basketball Related Income" (BRI) that is to be split between players and owners. While the BRI includes "all proceeds, net of Taxes, less reasonable and customary expenses ... from gambling on NBA games or any aspect of NBA games," it deducts "reasonable and customary expenses" from the BRI.[22] The NBA could therefore argue that the new costs of safeguarding the integrity of the game should be deducted as an expense from the BRI shared with the players.

Likewise, the NFL's 2011 CBA uses the broadly defined term "All Revenue," which includes "the aggregate revenues received or to be received on an accrual basis, for or with respect to a League Year during the term of this Agreement, by the NFL and all NFL Clubs (and their designees), from all sources, whether known or unknown, derived from, relating to or arising out of the performance of players in NFL football games." [23] Thus, even if this broad definition were interpreted to encompass revenue received from sports betting, the NFL could argue that integrity fees are intended to cover integrity-related expenses incurred as a result of increased sports gambling stemming from the new sports betting laws.

### **What Players' Associations Must Do**

In light of such far-reaching revenue splitting provisions, players' associations, in the near term, must actively engage with state legislatures that are considering legalizing sports gambling. Specifically, they should encourage state legislatures to consider alternatives to integrity fees. One relatively simple

option is a rights-based fee. Unlike an integrity fee — which, as explained above, is intended to help the leagues guard against losses that they may incur as a result of the perception that their games are being improperly influenced by sports gambling activities — a rights-based fee would not be tied to the public perception of the game or to any costs or expenses that the leagues might incur. Instead, it is a fee that the leagues would receive in exchange for providing individuals/entities with the "right" to bet on their respective games.

A rights-based approach to fees is not a new concept. In fact, Australia has had such arrangements in place for several years.[24] Further, convincing state legislatures to include rights-based fees likely would not be more difficult than lobbying for integrity fees, and, in fact, may only require the reframing of already existing legislation. A rights-based fee would acknowledge that the leagues have a right to be paid for organizing sports events.

Players' associations must also keep track of attempts to pass federal legislation. The Murphy decision leaves the possibility open for a new federal bill that would supersede states' current efforts to permit sports betting. In fact, on the day of the Murphy decision, Sen. Orrin Hatch, R-Utah, who was one of the authors of PASPA, announced plans to introduce a new sports betting bill.[25] Further, the NBA and the NFL have both publicly stated that they prefer the consistency afforded by a national approach to regulation over the more ad hoc nature of a state-by-state approach.[26] Moreover, a single bill passed by Congress and signed by the president would enable the leagues to secure the 1 percent integrity fee likely without running afoul of the anti-commandeering doctrine.

While lobbying state and federal legislatures to pass alternatives to integrity fees is necessary (in light of the broad revenue splitting provisions currently found in certain CBAs), the inclusion of such alternative fees is not sufficient to guarantee that players will receive a fair share of the benefits of legalized sports betting. Indeed, it is possible that the leagues will contend that other provisions in the CBAs with their respective players' associations limit the amount of money that players can receive through alternative fees. The long-term solution therefore lies in negotiating favorable revenue splitting and fee splitting terms in the underlying CBAs.

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[1] 138 S. Ct. 1461 (2018); 28 U.S.C. § 3701 et seq.

[2] In fact, on June 5, 2018, Delaware became the first new state to offer sports betting since the Supreme Court's decision. See Reuters Staff, Delaware to begin sports wagering on Tuesday, Reuters, May 31, 2018, at <https://www.reuters.com/article/us-sports-gambling/delaware-to-begin-sports-wagering-on-tuesday-idUSKCN1IW367>.

[3] Murphy, 138 S. Ct. at 1470 (internal citation omitted).

[4] Id. (quoting 28 U.S.C. § 3702(1)).

[5] Id. at 1470-71.

[6] Id. at 1471.

[7] Id.

[8] Id. at 1472.

[9] Id.

[10] Id. at 1478, 1482.

[11] Id. at 1475.

[12] Id. at 1477 (quoting *New York v. United States*, 505 U.S. 144, 166 (1992)).

[13] Id. at 1482.

[14] Id. at 1484 ("[W]e hold that no provision of PASPA is severable from the provision directly at issue in these cases").

[15] See, e.g., H.B. 271 (Pa. 2017) (passed in 2017).

[16] See, e.g., S. 7900-A (NY. 2018) (pending legislation).

[17] Jay Zagorsky, a macro economist estimates the illegal sports betting industry is \$67 billion. Jay L. Zagorsky, Market for illegal sports betting in US is not really a \$150 billion business, *Chicago Tribune*, May 14, 2018, at <http://www.chicagotribune.com/sns-market-for-illegal-sports-betting-in-us-is-not-really-a-150-billion-business-96618-20180514-story.html>. In a report to the board of governors of NBA, Lawrence Pedowitz of Wachtell, Lipton, Rosen, & Katz provided that the estimated revenue from sports betting was \$325 to \$400 billion. Lawrence B. Pedowitz, Report to the Board of Governors of the National Basketball Association, Oct. 1, 2008, at 101, at <https://www.nba.com/media/PedowitzReport.pdf>.

[18] National Basketball Association's Statement to New York State Senate Standing Committee on Racing, Gaming and Wagering (testimony Dan Spillane) (available at [https://www.nysenate.gov/sites/default/files/1.24.18\\_testimony\\_of\\_national\\_basketball\\_association.pdf](https://www.nysenate.gov/sites/default/files/1.24.18_testimony_of_national_basketball_association.pdf)).

[19] The current version of the New York sports betting law includes a .25 percent "Integrity Fee" for the leagues, while the law passed in Pennsylvania included no fee for the leagues. S. 7900-A (Ny. 2018) (pending legislation); H.B. 271 (Pa. 2017) (passed in 2017).

[20] See S. 7900-A(8)(B) (Ny. 2018) (pending legislation).

[21] National Basketball Association and the National Basketball Players Association (2017) (available at <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>); National Football League and National Football Player's Association's (2011) (available at <https://nflabor.files.wordpress.com/2010/01/collective->

bargaining-agreement-2011-2020.pdf).

[22] National Basketball Association and the National Basketball Players Association (2017) (available at <http://3c90sm37lsaecdwtr32v9qof.wpengine.netdna-cdn.com/wp-content/uploads/2016/02/2017-NBA-NBPA-Collective-Bargaining-Agreement.pdf>).

[23] National Football League and National Football Player's Association's (2011) (available at <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf>).

[24] Jennifer Podesta and Anna Thomas, Betting restrictions and online wagering in Australia, Australian Gambling Research Centre, 41-42  
at [https://www.dss.gov.au/sites/default/files/documents/11\\_2017/final\\_report\\_-\\_betting\\_restrictions\\_report.pdf](https://www.dss.gov.au/sites/default/files/documents/11_2017/final_report_-_betting_restrictions_report.pdf).

[25] Orrin G. Hatch, Sports Betting Is Inevitable—Let's Make Sure It's Done Right, Sports Illustrated, May 23, 2018, at <https://www.si.com/more-sports/2018/05/23/sports-betting-senator-orrin-hatch-legislation>.

[26] Adam Silver, Legalize and Regulate Sports Better, NY Times, Nov. 13, 2014, at <https://www.nytimes.com/2014/11/14/opinion/nba-commissioner-adam-silver-legalize-sports-betting.html>.