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**MARCH 2003**



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# **EXPANDING SPORTS GAMBLING – IS IT LEGAL?**

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**MARCH 2003**

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## Expanding Sports Gambling –Is It Legal?

The alleged “perfect storm” that has created so much budgetary woe in the states in 2003 has created new interest in the workings of the Professional and Amateur Sports Act of 1992 [PASPA]. This act was designed to “stop the spread of State-sponsored sports gambling”<sup>1</sup> and to “prohibit sports gambling conducted by or authorized under the law of any State or other governmental entity.”<sup>2</sup> The basic notion of the legislation was to impose a moratorium on additional sports wagering opportunities in the states. However, as the states struggle in 2003 to find additional revenue opportunities, PASPA is coming more into play. States are suggesting approaches that are running directly head-on into PASPA.

PASPA, in large measure was a Congressional response to many states in the early 1990’s suggesting the notion of sports lotteries.<sup>3</sup> The point of the federal legislation was to put a freeze on additional sports wagering while grandfathering in existing sports wagering opportunities.

Senator Bradley, one of the bill’s sponsors stated, “Sports betting threatens the integrity and public confidence in professional and amateur team sports, converting sports from wholesome athletic entertainment into a vehicle for gambling. Sports gambling raises people’s suspicions about point shaving and game-fixing.”<sup>4</sup>

Senator Deconcini, another sponsor of the bill stated that it is “meant to prohibit States from changing the nature of baseball, football, hockey and basketball from wholesome entertainment for the entire family to a game played for the purpose of gambling.”<sup>5</sup>

The PASPA has not been amended since it was passed in 1992. The legislation makes it unlawful for a governmental entity to “sponsor, operate, advertise, promote, license or authorize by law or compact” any wagering scheme based “on one or more competitive games in which amateur or professional athletes participate.”<sup>6</sup>

Similarly, persons may not “sponsor, operate, advertise or promote pursuant to the law or compact of a governmental entity” wagering on “one or more competitive games in which amateur or professional athletes participate.”<sup>7</sup>

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<sup>1</sup> Senate Report 102-248, Committee on the Judiciary, November 26, 1991; See 1992 U.S. Code Congressional and Administrative News, 3553

<sup>2</sup> Id.

<sup>3</sup> See Bill Bradley, “The Professional and Amateur Sports Protection Act - Policy Concerns Behind Senate Bill 474,” 2 *Seton Hall J. Sports Law* 5, 8 Footnote 12 (1992).

<sup>4</sup> 138 Cong. Rec. S.17435 (October 7, 1992).

<sup>5</sup> Id.

<sup>6</sup> 28 USC §3702.

<sup>7</sup> Id.

While the wording of the ban on sports gambling is worded very broadly, its reach is limited by four exceptions in 28 USC §3704.

The first exception is for sports lotteries previously conducted by a State. PASPA does not apply to a lottery, sweepstakes, or wagering scheme in a state to the extent that the scheme was conducted by that State at any time between July 1, 1976 and August 31, 1990.<sup>8</sup> This basically applied to two states. Oregon has maintained a lottery on professional football for years, and the state of Delaware in 1976 offered a sports lottery on football. The Delaware lottery was discontinued, but its validity was largely upheld in the case of National Football League v. Governor of Delaware.<sup>9</sup>

The second exception was for states that had allowed sports wagering. PASPA does not apply to a betting operation in a State where the scheme was authorized by statute as of October 2, 1991 and where the scheme was actually conducted in the State between September 1, 1989 and October 2, 1991.<sup>10</sup> This provision was largely designed to grandfather in sports wagering in Nevada. While Nevada maybe the one state where significant legal sports gambling takes place, there are a number of states, which authorize limited forms of sports gambling. Several of these states authorize limited Calcutta forms of wagering where the bettors bid on particular contestants and the pool is distributed – minus a small takeout to the organizers of the pool – to the winning bettors. Calcutta wagering is authorized in Montana, North Dakota, and Wyoming.

The third exception was for Atlantic City. New Jersey was given a year in which it could legalize sports wagering in Atlantic City. The efforts by the casinos to obtain sports wagering in Atlantic City were unsuccessful,<sup>11</sup> and this section is now of no practical use.

The final exception is for parimutuel animal racing and jai-alai games. All parimutuel wagering on animal racing and jai alai is excepted from PASPA. States that did not authorize parimutuel animal racing prior to the passage of PASPA are free to add this type of wagering.

PASPA is designed to be enforced by a suit by the United States attorney general or by a professional or amateur sports organization whose game forms the basis of the alleged violation.

Until this year, much of the talk about PASPA involved the efforts of some legislators to place a total ban on wagering on amateur sports contests.<sup>12</sup> This has changed in 2003. While there is still an effort to ban wagering on amateur sports contests, the focus has shifted to efforts by the states to determine what sporting events are not

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<sup>8</sup> 28 USC §3704.(a)(1)

<sup>9</sup> 435 F. Supp. 1372 (D. Del. 1977)

<sup>10</sup> 28 USC §3704.(a)(2)

<sup>11</sup> 28 USC §3704.(a)(3) See In the Matter of the Petition of Casino Licensees for Approval of a New Game, Rulemaking and Authorization of a Test, 268 N.J. Super. 469, 633 A.2d 1050 (N.J. Sup. 1993).

<sup>12</sup> See Slavin, “The ‘Las Vegas Loophole’ and the Current Push in Congress Towards a Blanket Prohibition on Collegiate Sports Gambling,” 10 U. Miami Bus. L. Rev. 715 (2002); S. 718, 107<sup>th</sup> Congress.

covered by PASPA. Some states, in an effort to increase revenues, are working to expand the limits of the wagering not blocked by PASPA.<sup>13</sup>

There are numerous ambiguities involving PASPA, which make it difficult to resolve these issues. The principle difficulty is that it is unclear if a state allowed a particular form of wagering on a sports event before PASPA was passed whether that State may now authorize a different type of wager on that same sports event. For example, if a State allowed Calcutta wagering on professional golf pre-PASPA, could that State now allow pari-mutuel wagering or bookmaking on professional golf today?

This difficulty is also amplified by the failure of PASPA to define many of the key terms in the legislation. There is no definition of “parimutuel.” There is no definition of “racing.” There is no definition of “wagering” or “sports” or perhaps most-importantly, a “game.” If there ever are lawsuits under PASPA, these ambiguities will make any litigation especially difficult.

### Sports Betting in Delaware

The first challenge to PASPA may likely come in Delaware.<sup>14</sup> Delaware had a lottery game on professional football in 1976 but discontinued it. The sponsors of the legislation understood that they were grandfathering in the Delaware game, and it fits squarely within the terms of the exemption in 28USC §3704.(a) (1). In fact, the Senate Report on PASPA states “It has no wish to apply this new prohibition retroactively to Oregon or Delaware, which instituted sports lotteries prior to the introduction of our legislation.”<sup>15</sup>

The exemption is for wagering schemes in states “to the extent that the scheme as conducted by that State or other governmental entity at any time during the period beginning January 1, 1976 and ending August 31, 1990.”<sup>16</sup> In 1976, Delaware only conducted 14 weeks of pool card wagering on NFL games.

The exemption would basically force the State of Delaware to run the wagering game as a State lottery, but that only begins the analysis of the issue. The major issue in Delaware is what is the meaning of “to the extent that the scheme was conducted by that State” language in PASPA? Does this limit Delaware to pool card wagering on professional football? Can there be pool card wagering on other sports? More significantly, does the wagering have to be limited to pool card wagering? If betting on a point spread in football or baseball or basketball, is considered a lottery under Delaware law, will that be sufficient for the lottery to be authorized under the exemption to PASPA?

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<sup>13</sup> One effort that is certainly illegal under PASPA is the idea of the president of Capital Off-Track Betting in New York to expand OTB’s operation into general sports betting. See Cathy Woodruff, “Lobbying Heats Up for OTB Hopefuls,” Times Union, p. B1 (November 14, 2002)

<sup>14</sup> Victor Greto, “State Mulls High Stakes Gamble,” Wilmington News-Journal, p. 1A, (December 23, 2002)

<sup>15</sup> Note 1, supra.

<sup>16</sup> Note 8, supra.

This issue is likely to arise in the near future. Delaware has video lottery terminals at its three racetracks. Most of the players at these tracks come from outside the state. Now, Delaware's neighbors in Pennsylvania and Maryland are seriously considering video lotteries at their racetracks.<sup>17</sup> In order to give Delaware an advantage over these states, the state may wish to parlay its exemption from PASPA into a full-fledged sports gambling experiment.

### Parimutuel Rodeo Wagering

Another challenge may develop in Wyoming. As stated previously, Wyoming has authorized Calcutta wagering. There have been proposals to allow pari-mutuel wagering on rodeo events, and in fact H.B. 92 –which allows for pari-mutuel wagers on professional rodeo events - did pass the Wyoming House of Representatives earlier this year. There has long been Calcutta wagering on rodeo events that would qualify for the exemption in 28 USC §3704. (a)(2).<sup>18</sup> The issue is whether a new form of wagering on rodeos would qualify under the exemption that requires that the “scheme ... actually was conducted in that State.”

Additionally, Wyoming might claim that certain pari-mutuel rodeo contests were actually animal racing under the fourth exemption to PASPA. Arguably, certain rodeo events such as barrel racing and wild horse racing constitute animal races, which would have an exemption under PASPA.

Finally, proponents of rodeo pari-mutuel wagering might contend that the rodeo is not even a competitive game under the PASPA provision banning sports wagering on competitive games. Their argument might be that the intent of the legislation was to ban wagering on team sports and not on individual skill contests.

### Betting Exchanges

Perhaps the most intriguing problem under PASPA comes from North Dakota. That state in a statute proposed to authorize a betting exchange for wagers on horse racing.<sup>19</sup> A betting exchange was defined to be “a form of wagering in which an individual ... has the opportunity to bet on a wager for or against a horse at a price the individual accepts or offers, one on one, against another individual.”<sup>20</sup> The proprietor of the betting exchange would be allowed to retain up to 5% of the bet. On the next day, the legislation was amended to remove the betting exchange language.<sup>21</sup>

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<sup>17</sup> Don Steinberg and Matthew P. Blanchard, “Slots of Gold,” Philadelphia Inquirer, p. A01 (February 9, 2003).

<sup>18</sup> See Note 4, *supra*, Remarks of Senator Wallop at S. 17436.

<sup>19</sup> Matt Hegarty, “Betting Exchange Bill Could Ruffle Feathers,” Daily Racing Form, (February 20, 2003).

<sup>20</sup> North Dakota SB 2285 (2003), as amended on February 19, 2003, Senate Journal p. 543.

<sup>21</sup> North Dakota Senate Journal 579, February 20, 2003. Matt Hegarty, “No Bet Exchange for Now,” Daily Racing Form, (February 21, 2003).

The simulcast exchange would have been set up in a manner similar to the successful Betfair operation in the United Kingdom, which receives a fee for matching up bettors who wish to bet against each other. There is nothing in the North Dakota constitution, which would make exchange wagering illegal.<sup>22</sup> The one anti-gambling provision in North Dakota only bans lotteries. The problem, however, is whether exchange betting is legal under PASPA.

The one exemption for horse racing in PASPA is an exemption for “parimutuel animal racing.” It would commonly be understood that parimutuel wagering would involve all participant–bettors being involved in the same pool and not head-to-head betting. The other exemption for pre-existing wagering schemes in PASPA does not apply to parimutuel animal racing.<sup>23</sup> A fairly strong facial argument can be made that exchange betting on horse racing has no exemption from PASPA and would be illegal.

Yet, there are arguments for the validity of exchange betting. Since parimutuel is undefined in PASPA, it might be possible to give the term a far broader definition than was given in the prior paragraph. If parimutuel simply involves a pool where the winning bettors get paid an appropriate amount minus a fee for management, which has no interest in the individual wagers, then the exchange betting could conceivably be considered parimutuel. For example, parimutuel has been defined to mean a pool “in which each bettor lays a fixed sum on the contestant he selects, and those contestants who choose the winner divide the entire stake, less percentage of the person who furnished the pool tickets, literally mutual bets.”<sup>24</sup>

In the case of Greater Loretta Improvement Asso. v. State,<sup>25</sup> the Florida Supreme Court looked at a wide variety of definition of “parimutuel.” Webster’s Third New International Dictionary defined the term as “a system of betting ... in which those who bet on the winner share the total stakes minus a small per cent for the management.”<sup>26</sup>

Funk and Wagnall’s defines parimutuel to be “a pool in betting in which each bettor lays a fixed sum on the contestant that he selects, and those who choose the winner divide the entire stake less the percentage of the person who furnishes the pool-tickets.”<sup>27</sup>

Again, under these broad dictionary definitions, it would be plausible to find that an exchange betting system where the operator of the pool was not a bettor – but just received a management fee – to be a parimutuel system. The winners in the exchange pool win everything minus the management fee. That may be all that is required of a parimutuel system. While many might believe that a head to head wager cannot be parimutuel, some of the definitions of parimutuel are broad enough to encompass head-to-head pools.

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<sup>22</sup> N.D. Constitution, Art. 11, §25.

<sup>23</sup> See note 10, supra.

<sup>24</sup> Weiss v. Schachter, 275 Ill. App. 26-29 (First District 1934)

<sup>25</sup> 234 So. 2d 665 (Sup Ct. Florida 1970)

<sup>26</sup> Id. at 671.

<sup>27</sup> Id.

Moreover, there is some support in the Senate Report on PASPA that all betting on horse racing should not be affected by PASPA. The Senate Report states that “it specifically excludes dog and horse racing and jai-alai from the bills prohibitions.”<sup>28</sup>

Additionally, there is the question of whether a horse race is a “competitive game” under PASPA. Senator Deconcini during the course of the debate on the bill was asked whether parimutuel bicycle racing which had recently been enacted in New Mexico was illegal under PASPA.<sup>29</sup> His response was:

The bill prohibits State-sponsored betting ‘on one or more competitive games in which amateur or professional athletes participate, or are intended to participate.’ It is my interpretation of this prohibition that it would not apply to parimutuel bicycle racing because it does not constitute a ‘game.’ At the time this bill was introduced, I argued against the need to specifically exclude horse racing for the same reason. However, because of the importance of horse racing to the economies of a number of States and our intention for this bill not to apply to horse racing, language was included to clarify that the bill did not apply to such racing.

This bill is meant to prohibit States from changing the nature of baseball, hockey, and basketball from wholesome entertainment for the entire family to a game played for the purpose of gambling. Clearly, this is not meant to apply to a sport such as Keirin racing.”<sup>30</sup>

Nonetheless, Representative Brooks, a sponsor of the bill in the House, did not accept Senator Deconcini’s language. Congressman Brooks stated after the bill was signed:

There are no implied exceptions not stated in section 3704. There are no competitive sporting events -- that is, in which any real-world athlete or team of athletes is competing against any other real-world athlete or team of athletes -- that are not games within the meaning of section 3702. And there are no lotteries, sweepstakes, or other betting, gambling, or wagering schemes based on any such game or games, or on any athlete's performance in such games, that do not fall within the prohibition of that section.<sup>31</sup>

Senator Deconcini seemed to accept some of Representative Brooks’ criticism. In remarks made on the same day as Representative Brooks, he stated:

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<sup>28</sup> Note 1, *supra*.

<sup>29</sup> The Attorney General in New Mexico ruled in 2001 that parimutuel bike racing was not authorized under PASPA. See “AG Says New Mexico May Not Authorize Bicycle Race Betting,” *Associated Press*, (September 25, 2001)

<sup>30</sup> Note 4, *supra*.

<sup>31</sup> 138 Cong Rec E 3318, (October 29, 1992).

I am pleased to report that the President signed S. 474, the professional and amateur sports protection act, which Congress passed prior to adjournment. During final consideration of the bill, I entered into colloquies with several of my colleagues who were concerned about the applicability of s. 474's prohibition to Wyoming's Calcutta pools, and to parimutuel bicycle racing in New Mexico. At that time, we discussed whether it was the intent of the bill to cover such types of gambling operations. After having had a chance to further review these states' laws, it seems clear that New Mexico's parimutuel bicycle racing and Wyoming's Calcutta wagering are exempt because they fall within s. 474's grandfather provision, section 3704. This clarification should resolve any questions regarding the applicability of the bill to the gambling activities in Wyoming and New Mexico described above.<sup>32</sup>

Thus, while Senator Deconcini did not renounce his former views, he did seem to adjust his views so that they were in considerable accord with the views of Congressman Brooks. Nonetheless, based on his initial remarks and the language of the bill, it could be argued that horse racing is not a competitive game subject to PASPA. Additionally, the Brooks and Deconcini remarks were made after the Congress passed the legislation and after President Bush signed the bill. In this case, their value in interpreting the bill may be of limited significance.

The betting exchange provision puts American horse racing in an awkward position. In one sense, these bets are highly desirable. They are the types of new wagers that horse racing needs to increase interest in the sport. These bets have been remarkably successful in the United Kingdom and could flourish in the United States.<sup>33</sup>

On the other hand, head-to-head bets on one horse raise numerous regulatory challenges. They raise the potential for some horsemen not to try in races in order to wins bets. Due to their low effective takeout, betting exchanges make it difficult to supply sufficient revenue to racing. While a traditional parimutuel bet might return 8% to purses, taxes, and breeding funds, the North Dakota bet appeared to return a minimal amount to racing. If people change their betting habits and support the low-takeout exchange bet options, there is some potential for decreases in purse levels.

Most importantly, many states have a constitutional requirement that bets on horse racing must be parimutuel. Assuming that these states take the position that head to head exchange bets are not parimutuel, then what happens when a bettor in New York<sup>34</sup> tries to bet into an exchange pool in North Dakota? Are such bets illegal under the Interstate Horse Racing Act? Can New York State pursue the exchange-betting provider

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<sup>32</sup> 138 Cong Rec S. 18332, (October 29, 1992).

<sup>33</sup> "World's Leading Online Betting Corporation Poised to Open Office," [China Post](#), (February 17, 2003).

<sup>34</sup> Pari-mutuel wagering is required in New York under Article 1, Section 9 of the Constitution.

in North Dakota for offering bets that are arguably penal violations in New York?<sup>35</sup> The exchange-betting scenario is likely to arise in the future in American racing, and there will be full employment for lawyers as soon as such legislation is passed. Each sports league office is likely to file an amicus brief as soon as the litigation commences.

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<sup>35</sup> A wager that is not specifically authorized by law in New York from which a person – other than a player - profits will constitute the crime of promoting gambling in the second degree under §225.05 of the Penal Law.