

PASPA

ORAL ARGUMENTS

Lively oral arguments were held last month in the US Court of Appeals for the Third Circuit in a high stakes case that could determine the future of sportsbetting in the United States, writes **Griffin Finan**, Associate at Ifrah PLLC.

At issue in the case is the federal Professional and Amateur Sports Protection Act of 1992 (PASPA), which prohibits any state from offering sportsbetting unless that state had a sportsbetting scheme in place between 1976 and 1990. New Jersey voters passed a referendum by wide margins to amend the state constitution to authorize sportsbetting and the state legislature passed a bill that authorized casinos to offer sportsbetting; New Jersey Governor, Chris Christie, then signed into law a bill authorizing sportsbetting in the state. In August 2012, the four major professional sports leagues and the National Collegiate Athletic Association (NCAA) filed suit arguing that the state's sports gambling law was a violation of federal law.

The following December, Judge Michael Shipp of the US District Court for the District of New Jersey held oral arguments to determine whether the sports leagues had standing to bring the lawsuit, and determined that they did. The US Department of Justice (DoJ) later intervened in the case to defend the constitutionality of the statute. Oral arguments were held in February 2013 on the constitutionality of PASPA and Judge Shipp held that the New Jersey sportsbetting law was invalid as conflicting with PASPA, which he found to be a valid exercise of Congressional power.

In March, New Jersey filed an appeal with the Third Circuit, appealing both the

standing and constitutionality rulings by the district court. New Jersey filed a motion to expedite the appeal, which the court granted to the extent that it still allowed sufficient time for the DoJ and the sports leagues to respond to New Jersey's brief.

On June 25, the day before oral arguments in the Third Circuit, the United States Supreme Court released its decision in *Shelby County v. Holder*, which struck down a provision of the Voting Rights Act as unconstitutional, which provided a formula for determining which states are subject to the provisions of the Act. In ruling on the Voting Rights Act, the Supreme Court issued an opinion that shed light on the principle of equal sovereignty that New Jersey has argued is a strong basis for striking down PASPA.

Counsel for New Jersey, the DoJ, and the sports leagues all sent letters to the court later in the day briefly stating their opinions on the effect that the *Shelby County* opinion has on the case. In the briefs filed by both sides in the Third Circuit in the weeks before oral arguments, equal sovereignty was an issue raised, but not emphasized. In New Jersey's opening brief in the Third Circuit, it was the last issue that they discussed and may not have been an issue that New Jersey focused on during oral arguments had the *Shelby County* decision not been released the day before.

Former United States Solicitor General, Ted Olson, who is representing New Jersey in the case, sent a letter to the court stating that the

Court's reasoning in *Shelby County* "compell[s] the conclusion that PASPA's discrimination in favor of Nevada is likewise unconstitutional." Previously, the sports leagues and DoJ had argued that the equal sovereignty principle is limited to new states joining the union.

The sports leagues and DoJ letters to the court argued that the *Shelby County* opinion is distinguishable. The letter from the sports leagues emphasized that PASPA was enacted as part of Congress' broad powers to regulate inter-state commerce and nothing in the *Shelby County* decision can be seen as limiting Congress' power under the Commerce Clause. The DoJ letter emphasized that *Shelby County* does not prohibit Congress from distinguishing among states, nor does it establish a heightened standard of review for such laws.

Interestingly, the dissenting opinion in *Shelby County* specifically recognized PASPA as a statute that treats states disparately and that its validity may now be in question under the equal sovereignty principle outlined in the court's opinion. The letter from the sports leagues specifically addressed the dissenting opinion by stating that the majority opinion rejected the reasoning in the dissent that the equal sovereignty principle has a broader application. The sports leagues also argued that if there was any merit to New Jersey's argument, the only appropriate result would be to invalidate PASPA's preferences, not invalidate the general prohibition that New Jersey is seeking to overturn. If the court accepted that assertion, this would lead to a nationwide prohibition on state sponsored sportsbetting, including in Nevada. The

sports leagues also asserted that the court in *Shelby County* rejected the idea that the decision has broader implications beyond statutes enacted under the Commerce Clause. The letter from the DoJ to the court does not specifically address the dissenting opinion.

In its brief to the Third Circuit, New Jersey focused on the issues of the leagues standing to bring the suit and the application of the anti-commandeering principle to PASPA. Article III of the United States Constitution requires that a plaintiff show that they will suffer a concrete and particularized injury as a result of the defendant's actions, in this case an injury suffered by the sports leagues resulting from New Jersey legalizing sportsbetting. Estimates cited in court papers are that the illegal sports wagering market is as large as \$500 billion, and in Nevada, the only state to offer a full selection of legal sportsbetting options, sports wagering accounted for approximately \$3 billion in revenue last year. The Third Circuit will need to determine if the leagues are truly suffering harm from regulation of sportsbetting in an additional state, in a market where illegal sportsbetting is so prevalent.

Both sides argued and were peppered by questions from the judges on the anti-commandeering principle, which applies when the federal government requires a state to enact or implement a federal regulatory program. The sports leagues and the DoJ have argued that PASPA is not commandeering because it does not require New Jersey to take any affirmative steps, whereas New Jersey has argued that PASPA is commandeering because it “dictates the

content of state law no less than is required for the passage of a new law.” During oral arguments, there was extensive discussion of the two prior Supreme Court cases that invalidated a law because it was a violation of the anti-commandeering principle and in both those cases, the state was required to take an affirmative step to comply with the federal law. The court's ruling likely hinges on whether it holds that for the anti-commandeering principle to be applicable, the federal government needs to require the states to take affirmative steps.

There have been three prior challenges in federal court to PASPA, none of which have reached the United States Supreme Court. None of the prior challenges have directly addressed the constitutionality of PASPA, which the Third Circuit has been asked to do here. The two sides disagree on what precedent has been set by the Third Circuit on standing issues related to PASPA. In 2009, the Third Circuit ruled in *Office of the Commissioner of Baseball v. Markell*, that Delaware's plan to expand its sportsbetting offerings violated PASPA. Standing was not discussed in the opinion in *Markell*, though it was relied on heavily by the district court in its opinion, and lawyers for the leagues argued that this was because the standing of the leagues was so obvious that the court did not need to address it. The weight that the *Markell* decision has on the court will be crucial in its standing analysis in this case. Interestingly, Judge Julio Fuentes who was on the three judge panel that ruled on the *Markell* case, was also a member of the panel that will decide this case.

The ruling from the Third Circuit in this case will have far-reaching implications. A decision in New Jersey's favor would remove the primary hurdle preventing states from offering sportsbetting within their borders. California and Minnesota both introduced bills this year to legalize sportsbetting and if PASPA is overturned, other states will certainly consider authorizing sportsbetting as well.

There is no definitive timetable for a decision in the case, but it may take several months before an opinion is issued. Regardless of the decision reached by the Third Circuit, the losing party will have the option of seeking a rehearing en banc in the Third Circuit or filing for a writ of certiorari to the United States Supreme Court. Both of these options are at the discretion of those courts, meaning it is possible that the Third Circuit's opinion in this case will be definitive. However, given the significant constitutional issues raised in this case, it is more likely that a review will be granted. The appellate panel left no clear impression during oral arguments about which way they are leaning in their decision and, ultimately, it may take a Supreme Court ruling before there is a definitive answer on PASPA.

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