



LEGAL SPORTS BETTING IN THE UNITED STATES:

How Can it Evolve? How *Should* it Evolve?

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Introduction

Nearly a century has passed since the infamous Black Sox scandal rocked the professional sports world. That controversy focused on the fixing of the 1919 World Series by eight members of the Chicago White Sox. The players were charged with “conspiracy to defraud the public.” Although they were acquitted, all eight were barred for life from playing professional baseball.¹

Over the span of more than nine decades, little has changed in that sports betting remains illegal in nearly all states. However, in a very real sense, a broader series of seismic shifts have occurred. The United States did not have any legal gaming when that scandal occurred, and professional and amateur sports was itself a rather small industry. Today, the US is home to a \$70 billion legal casino industry and, over the course of several decades, that industry has demonstrated that it can be effectively operated by gaming companies and suppliers who have demonstrated their good character, honesty and integrity. At the same time, however, most sports betting still takes place the way it did when Woodrow Wilson was president – untaxed and unregulated. The American Gaming Association reported on the eve of Super Bowl LI that \$4.7 billion would be bet on that event, while only 3 percent of that total would be wagered legally.²

The AGA, among other organizations, seeks to overturn the 1992 Professional and Amateur Sports Protection Act (PASPA), which outlaws legal sports betting outside of a handful of states that already had some form of legalized sports betting, most notably Nevada. PASPA was summarized succinctly by Online Gambling Sites:

The Professional and Amateur Sports Protection Act is also known as the Bradley Act, named after the law’s main sponsor, former Sen. Bill Bradley of New Jersey. The goal of the bill was to stop the spread of sports betting in the United States.

This response was due not just to the expansion of sports betting, but to gambling legalization and expansion throughout the country. South Dakota, Iowa, Colorado, Illinois, Mississippi, Louisiana and Missouri all legalized casinos in the three years before Congress visited the sports betting issue.

Legal casinos were about to launch in Indiana at the time the bill became law.

¹ Fred Mitchell, “Flashback: Story of 1919 Black Sox scandal still resonates,” *Chicago Tribune*, July 5, 2015. <http://www.chicagotribune.com/sports/baseball/whitesox/ct-flashback-buck-weaver-black-sox-spt-0705-20150703-story.html>

² “Americans to Bet \$4.7 billion on Super Bowl 51,” American Gaming Association press release, January 31, 2017. <https://www.americangaming.org/newsroom/press-releases/americans-bet-47-billion-super-bowl-51>

Before South Dakota legalized casinos in 1989, only Nevada and New Jersey had legalized commercial gaming. There was a 13-year difference between when New Jersey became the second casino state and South Dakota became the third.

PASPA passed the U.S. Senate on June 2, 1992. The House of Representatives passed it on Oct. 6, 1992. President George Bush signed the bill into law on October 28, 1992. It went into effect on Jan. 1, 1993.

The language in PASPA stopped new states from legalizing sports betting.

It exempted states that already had sports betting laws on the books. Nevada, Oregon, Delaware and Montana are the states grandfathered into PASPA.

These states have exemptions because of past laws related to legal forms of sports betting. Each had a different form of legal sports betting.³

The authors of this white paper do not take a position as to whether PASPA is constitutional or should be repealed or revised. Indeed, we do not take a position on whether the legalization of sports betting should be expanded in the United States. Rather, we simply recognize the changing reality: One way or another, prohibitions on sports betting that have been in place for eons are likely to be upended in coming months, either through the US Supreme Court or through the court of public opinion.

As that reality closes in, Spectrum urges policymakers to consider certain practices that would help ensure that sports betting is structured in various states to best advance the public interest. Such practices include:

- Oversight should be vested within the authority of experienced, proven regulators who are well positioned to ensure public confidence in the integrity of sports wagering.
- States that may be considering the authorization of sports betting should view this new form of legal wagering through a rather wide prism, taking steps to ensure that it is structured to encourage the development and advancement of their existing goals and policies, which could include expanding employment, generating tourism, encouraging capital investment, encouraging non-gaming spending.

The two goals are intertwined, and the examples of best practices can be found in the same state: Nevada. Nevada Gaming Control Board Chairman A.G. Burnett, speaking earlier this year to the National Council of Legislators from Gaming States (NCLGS), noted that his state exercises regulatory oversight over licensed gaming operators and suppliers, but not players or sports leagues.⁴ Burnett made it clear that regulators must maintain faith that professional

³ Online Gambling Sites, "Professional And Amateur Sports Protection Act – PASPA." <https://www.onlinegamblingsites.com/law/paspa/> (accessed August 13, 2017)

⁴ A.G. Burnett, Chairman, Nevada Gaming Control Board, in panel discussion at National Council of Legislators from Gaming States Summer Meeting, June 11, 2017, Denver CO.

leagues, as well as organizations such as the International Olympic Committee, have a vested interest in the honesty and fairness of their competition. Indeed, if any organization failed to meet that standard, Nevada – like other states – would retain the right to prohibit wagering on that organization’s or league’s activities.

Nevada has also demonstrated that sports betting – like other forms of legalized gambling in that state – exists to benefit its licensed operators, and Nevada is committed to encouraging capital investment, tourism and ancillary revenues, such as non-gaming spending. That is also a model that other states should consider. With that in mind, the expansion of legal sports betting should mirror the policy goals that Spectrum Gaming Group encouraged with its July white paper on the expansion of online gaming. In keeping with the precepts outlined in that report, the authors of this report believe:⁵

- Public policy can be best advanced by ensuring, to whatever degree is practical and politically possible, that land-based casinos be the primary operators and/or beneficiaries of legal sports wagering.
- Legal sports betting will help capture a different demographic than the traditional land-based casino customer base, including a new cohort of younger adults who can be effectively encouraged to visit land-based casinos.
- Legal sports betting will, for the most part, not cannibalize land-based spending. Indeed, the evidence indicates that existing land-based customers who also wager online will ultimately increase their land-based spend.

We reiterate two key principles that suggest why sports betting should be channeled through land-based operators:

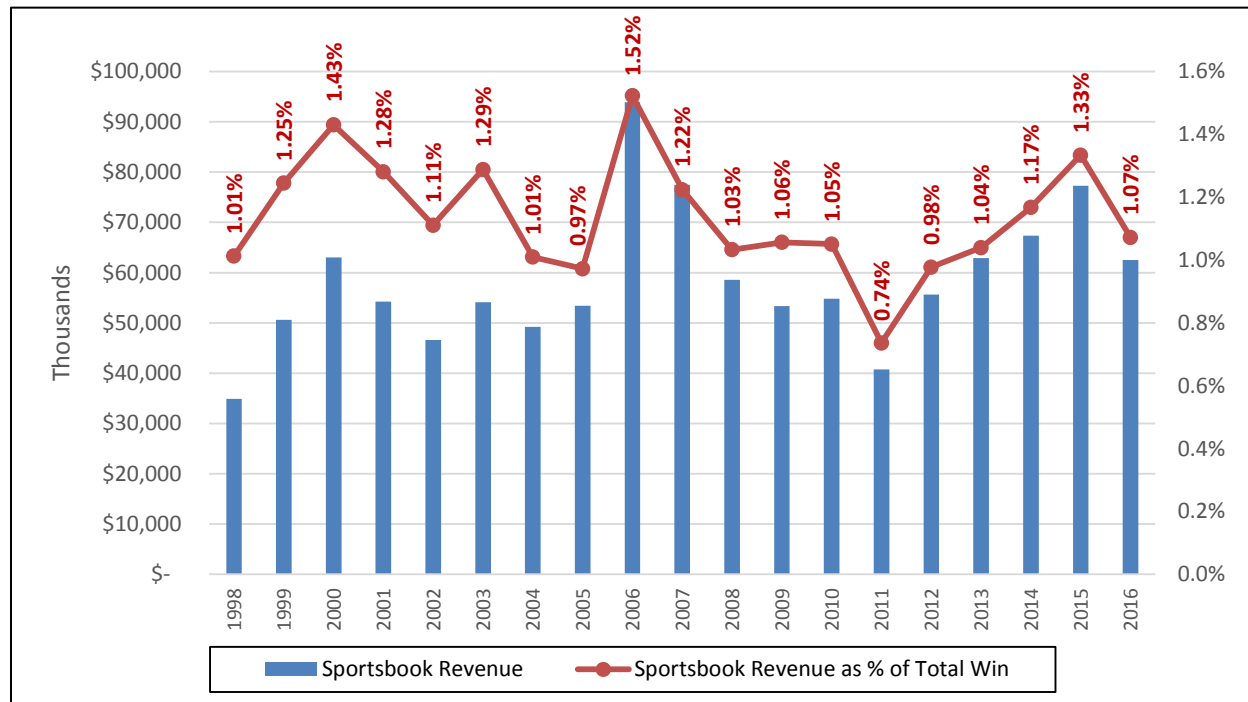
- People are hard-wired to enjoy games of chance and to take reasonable risk, regardless of the decade in which they were born.
- People are also hard-wired to enjoy social settings, and to seek entertainment experiences with other adults.

Our study of online gaming makes clear that new forms of gaming also serve as potential magnets for new demographics, including younger, affluent adults who receive – and become amenable to – marketing messages from gaming operators, who reward these new prospects with offers to enjoy and partake in both gaming and non-gaming activities and amenities.

⁵ “Online Gaming from a Land-based Perspective,” Spectrum Gaming Group, June 2017, pages 2-3.
<http://www.spectrumgaming.com/whitepaper/>

The same principle would clearly hold true for legal sports betting: When viewed as a marketing opportunity, as well as a revenue stream, sports betting holds out the opportunity to generate land-based visits, thus spurring the potential for increased employment, capital and – most significantly – multiple fiscal revenue streams. This is evident on the Las Vegas Strip, where operators view sports betting as a driver of other revenues while the activity itself has traditionally generated only slightly more than 1 percent of the Strip’s total gross gaming revenue, as shown in the following chart:

Figure 1: Las Vegas Strip sports betting revenue and percentage of overall win, 1998-2016



Source: Nevada Gaming Control Board, Spectrum Gaming Group. Largest Strip properties only (\$72M+ in annual GGR).

Indeed, legislators and others who will be charged with authorizing sports betting, and who seek to optimize its public benefit, must consider those multiple streams when calculating the economic impact of sports betting.

Three potential mistakes that policymakers should avoid when establishing sports betting rules are:

1. **Calculating the fiscal and economic impact by simply measuring the increased wagering on sports betting, and multiplying that estimate by the projected tax rate.** Rather, consider the broader scenario in which sports bettors become patrons of land-based casinos, thus fueling multiple revenue streams.
2. **Authorizing sports betting without tie-ins to land-based casinos.** Free-standing sites would certainly generate significant taxable revenue, but would not

generate the incremental land-based visits that would optimize public policy benefits. At the same time, because free-standing sites would not have the same ability to offer attractive complimentarys, ranging from room nights to meals and entertainment, sites linked to land-based facilities would be more competitive.

3. **Failing to ensure that sports-betting operators adhere to the highest standards of licensure and operating controls.** This ties in to the notion of having land-based casinos as operators. Such operators have already earned public trust and regulatory approvals in areas ranging from anti-money-laundering controls to responsible gaming, and that trust would prove to be a major asset to help ensure the success of legal sports betting.

Symbiotic Relationship: Sports Betting and Sports Programming

Sports betting and sports broadcasting have long enjoyed a symbiotic relationship, and that partnership benefits both sports betting operators and sports content providers. This mutually beneficial nature of this relationship will only strengthen as sports content provided by all media platforms evolves.

This partnership evolved over time, starting with a rather hostile relationship. As Spectrum noted in its June 2017 white paper on online gaming, in the 1920s and 1930s professional sports (then dominated by baseball) viewed broadcasting as a threat to its primary revenue stream: live ticket sales. In their book *Baseball* authors Geoffrey C. Ward and Ken Burns quote pioneer broadcaster Red Barber: “When radio came along and began to broadcast some baseball games, some of the entrenched conservative owners said, ‘Wait a minute. Why give away something that you’re trying to sell for your living, to try and keep your enterprise afloat? And especially on days of threatening weather when people would say, ‘Well, it looks like it may rain. I’ll just listen to the radio. I won’t go.’ They did not realize at the time the beneficial effect of radio, that it would be making families of fans.”⁶

How times have changed. Sports bettors and sports betting operators have recognized the benefits of sports broadcasting since the early 1970s, long after radio was supplanted by television as the dominant medium. “It is implicit that betting – social or serious – is a factor in high TV ratings that yield an ever-expanding cornucopia of riches for the NFL,” Larry Merchant wrote in his 1973 classic book, *The National Football Lottery*.⁷ He further noted, “Bookies provide further proof. They report that an average televised game that doesn’t feature the home team attracts as much or more betting attention as a non-televised game of the home

⁶ Geoffrey C. Ward and Ken Burns, *Baseball*, Alfred A. Knopf Publishers, 1994, p. 236.

⁷ Larry Merchant, *The National Football Lottery*, Holt, Rinehart and Winston, 1973.

team, and two or three times as much as game of above-average interest that isn't televised.”⁸ In the 1998 publication *Sports Book Management: A Guide for the Legal Bookmaker*, industry veteran Mike Knapp said, “We conducted a study and found that games on TV have a handle four times greater than non-televised games.”⁹

While this research shows how sports programming drives sports betting, more recent studies clearly show the opposite effect is also true: Sports betting drives successful sports content providers by attracting a more attentive audience. In 2016, A.C. Nielsen conducted a study for the American Gaming Association and found that viewership for NFL regular season games could rise from 40 million to 57 million if sports-betting is legalized beyond Nevada.¹⁰ The study also found that sports bettors watch 19 more NFL games in the regular season than non-bettors.¹¹ And while sports-bettors made up only 25 percent of the total NFL audience, those bettors accounted for 47 percent of all regular season NFL minutes watched. Nielsen further found that if betting is legalized beyond Nevada, the percentage of bettors that make up the viewing audience is expected to increase to 36 percent and is expected to consume 56 percent of the minutes.¹²

We have reviewed Nielsen’s summary of its methodology. It is not clear if its estimates take into account the possibility of wagering on mobile devices. If the Nielsen survey did not, the actual results could prove to be significantly greater, as the use of mobile devices in sports wagering – as demonstrated in Europe – will quickly become a popular and prolific form of online wagering.

There are two reasons why sports bettors consume more sports broadcasting than non-bettors. The first, and most important, is that sports-betting creates costless product differentiation. For example, take note of the following hypothetical: A non-bettor who is watching the Super Bowl champion New England Patriots handily defeat the Cleveland Browns is watching one game. However, the bettor who is also watching *and* holding an already placed +14.5 point spread bet on the Browns is watching a completely different game. While Cleveland is likely to lose the actual game itself, the Browns may still cover the point spread by hypothetically losing 21-10. If so, the bettor who predicted a closer score and placed the wager of the Browns getting the 14.5 points would win the amount he or she bet. This differentiated,

⁸ Ibid.

⁹ Roxy Roxborough and Mike Rhoden, *Sports Book Management: A Guide for the Legal Bookmaker*, 1998.

¹⁰ American Gaming Association press release, “New Report: NFL TV Partners, Advertisers Primed to Prosper from Legalized Sports Betting,” September 15, 2016. <https://www.americangaming.org/newsroom/press-releases/new-report-nfl-tv-partners-advertisers-primed-prosper-legalized-sports>

¹¹ Ibid.

¹² Ibid.

“alternative game” is statistically more likely to not be decided until the final quarter and/or possession, and therefore the vested bettor is more likely to watch the game in its entirety to find out the fate of his or her wager. What is significant is that neither the sports content provider nor the sports properties providing the game from which the wager is derived incur any additional costs associated with producing and providing this alternative game.

The second reason sports bettors consume more sports content than non-bettors is sports betting transforms a passive viewing experience into an active participation experience. Quite simply, as a result of the wager a sports bettor is monetarily vested in the game in a more tangible way than the non-bettor.

Transforming passive sports programming viewers into active sports programming participants will become even more important in the next decade as evolving over-the-top (OTT) digital streaming platforms provide consumers far more content options that can be narrowly tailored to an individual fan’s sports appetite. OTT platforms allow consumers to access digitally streamed content through second-screen internet connected mobile devices such as phones, desktop and laptop computers, tablets, gaming consoles and smart TVs. Cord-cutting (switching from conventional cable or satellite providers to OTT platforms) enables users to access their favorite sports content anywhere, anytime using the device of their choice. By leveraging this technology, sports business and betting stakeholders, as well as content-distribution partners, will be able to transform an audience from passive viewers to more engaged active participants. Those that do not achieve this transformation are likely to lose segments of the audience to those that do. Make no mistake about it: Existing and technology companies will play a major role in the multi-billion dollar sports betting marketplace. For example, ESPN reported last year that tech-stalwarts Microsoft and Sony already have patents covering sports betting platforms.¹³

In this new, rapidly evolving paradigm shift from linear bundled television broadcasting packages to non-linear digital streaming through OTT platforms, the battle between content creators and their distributors will grow. As that battle plays itself out, demand for sports content that will attract the largest audience will be even more intense because competition for the audience will be more competitive. New content offerings such as esports will emerge to fill some of the demand. One of the main drivers of the gaming industry’s interest in the space is the sheer size of the esports audience. For instance, the 2014 League of Legends finals drew a 27 million-person audience, which exceeded the number of US viewers for the 2014 World Cup.¹⁴ Of further note, gaming analysts project that US\$23.5 billion will be wagered on

¹³ Clark Shultz, “Huge Potential Seen for Early Adopters in US Sports Betting,” *Seeking Alpha*, October 31, 2016. <https://seekingalpha.com/news/3218724-huge-potential-seen-early-adopters-u-s-sports-betting>.

¹⁴ Delaware North, *The Future of Sports*, 2nd ed. 2016. <http://futureof.org/wp-content/uploads/The-Future-of-Sports-2016-Report.pdf>

esports by year 2020.¹⁵ Like esports, other sports content that will attract the biggest audiences – i.e., the most valuable sports properties – will be the programming that transforms the passive viewer into the active participant. As the current fragmented media space evolves and more OTT platforms grow their bandwidth to provide greater distribution options for sports content, the number of viewers who are also active participant bettors watching the sports content will increase and become more engaged fans.

Preparing for *Christie*: Practical Legal Considerations

Sports betting is certain to expand beyond Nevada soon, irrespective of how the US Supreme Court decides *Christie v. National Collegiate Athletic Association*¹⁶ – New Jersey’s appeal of the Third Circuit Court of Appeals’ decision that PASPA blocks the state from authorizing sports betting within its borders.

Sports betting expansion is imminent because NBA Commissioner Adam Silver has announced that his organization is ready to “embrace” sports betting. Silver candidly recognized that betting on sports generates hundreds of millions of dollars of revenues and that “[u]ltimately, as the owners of the intellectual property, we’re going to embrace it.”¹⁷ Silver’s comment implicitly and accurately reflects an important gap in PASPA: Enforcement of PASPA is 100 percent optional.

PASPA clearly and unambiguously does not require any sports organization or the federal government to enforce PASPA. Rather, Sec. 3703 of PASPA grants sports organizations the option to exclude states beyond Nevada from authorizing sports betting.¹⁸ As Silver recognized in his comment, such an option to exclude is an intellectual property right—not an absolute prohibition—that is commonly found in all patents and copyrights issued by the US Patent and Trademark Office.

Because PASPA grants sports organizations a property right to exclude, if a sports organization opts to waive its right to exclude by entering into a covenant not to sue a state under PASPA, subsequent sports betting in the state would arise from the covenant, not a state law, and thus would comply fully with PASPA. It follows from PASPA’s optional structure of enforcement that there is nothing in PASPA that prevents the NBA or the NFL, MLB, NHL, NCAA,

¹⁵ Ibid.

¹⁶ *National Collegiate Athletic Association v. Christie*, 832 F.3d 389 (3d Cir. 2016, cert. granted, US June 26, 2017. (No. 16-476). <http://www.scotusblog.com/case-files/cases/christie-v-national-collegiate-athletic-association-2/>

¹⁷ John Ourand, “League Commissioners Have Differing Views On Whether To Embrace Gambling,” *Sports Business Daily*, July 19, 2017. <http://www.sportsbusinessdaily.com/Daily/Issues/2017/07/19/Leagues-and-Governing-Bodies/Leagues-Gambling.aspx>

¹⁸ See 28 U.S.C. § 3703.

PGA, NASCAR or any other sports organization – big or small – from embracing sports betting on its games and permitting sports betting to commence in states beyond Nevada. For these reasons, the *Christie* case is not about whether sports betting will expand in the United States, it is about which side will control the expansion of sports betting: the states (if New Jersey wins) or the sports organizations (if New Jersey loses).

The Supreme Court's decision in *Christie* could go either way. On one hand, the Supreme Court recognized in *New York v. United States*¹⁹ that Congress is authorized to regulate interstate commerce directly, but Congress is not authorized to "regulate the states' regulation of interstate commerce." On its face, PASPA can be construed as an act regulating New Jersey's regulation of sports betting, not regulation of sports betting itself. If the majority of the Court adopts this construction, New Jersey will win.

On the other hand, the Court also held in *New York* that Congress is permitted to exclude states from access to valuable assets to incentivize states.²⁰ In *New York*, the Court blessed a federal statute that permitted radioactive waste generators in New York to be excluded from access to low-level radioactive waste storage assets in other states if New York did not provide such storage for its generators before a deadline set in the statute. Both radioactive waste storage and sports betting are economic assets to states because economic benefits (i.e., fees and taxes) can be derived therefrom. Like the statute at issue in *New York*, PASPA excluded gaming operators in New Jersey from access to sports betting only after the state failed to provide authorization of sports betting before the expiration of the deadline PASPA expressly granted it to do so.

The 2003 NFL Draft offers an illustration of how the Supreme Court might construe New Jersey's failure to provide sports betting before the expiration of the 365-day window that PASPA provided to the state to authorize sports betting. In 2003, the Minnesota Vikings held the No. 7 pick, but the team's management failed to make a selection before the 15-minute period allotted for their pick expired.²¹ Instantly, the team holding the next pick, the Jacksonville Jaguars, turned in their pick. The next team, the Carolina Panthers, also alertly turned in their pick. Finally, Minnesota made its pick at No. 9.

When the dust settled on the top 10 picks in the 2003 NFL Draft, the Vikings lost control of some of their power, but not all of their power. Minnesota did not completely forfeit its right to pick a player in the first round, but its failure to act within the specified time limit rendered

¹⁹ *New York v. United States*, 505 U.S. 144 (1992).

²⁰ *Ibid.* at 173-74.

²¹ Len Pasquarelli, "Slow on trigger, Vikings miss pick," ESPN.com, April 26, 2003.

<http://www.espn.com/nfldraft/columnist?id=1545117>

its power to make a first round pick subject to Jacksonville’s power and subject to Carolina’s power, which would not have occurred but for the Vikings’ failure to act in a timely manner.

New Jersey finds itself in the same position. If New Jersey had acted in a timely manner and authorized sports betting during the 365-day window that Congress provided in PASPA, today New Jersey would not be subject to the power of the sports organizations to exclude it from unilaterally authorizing sports betting.

If, as the Supreme Court held in *New York*, Congress has the power to encourage states to act to satisfy federal desires (creation of more storage for radioactive waste), it is logical that Congress also has the power to discourage states from acting to satisfy federal aversions (more states authorizing sports betting) by subjecting the states to the sports organizations’ option to enforce or waive a prohibition on such expanded sports betting.

Precedent for upholding a private enforcement option against a challenge under the 10th Amendment such as New Jersey’s challenge. In *Horsemen’s Benevolent & Protective Association—Ohio Division, Inc. v. DeWine*,²² the Sixth Circuit Court of Appeals upheld a similar, but not identical, private enforcement option in the Intestate Horse Racing Act that operated to “veto” a state law. Further, the *DeWine* decision was written by Judge Jeffrey Sutton,²³ a well respected jurist who has fed many law clerks to the Supreme Court and who usually exhibits a judicial philosophy that is similar to the judicial philosophy of the conservative members of the Supreme Court.

For all of these reasons, it is likely that no matter how the Supreme Court decides *Christie*, gaming operators in states outside Nevada and New Jersey that want to add sports betting to their operations will have to maintain relationships with both state legislators and regulators and representatives of sports organizations to do so. Actions that gaming operators can take now to prepare for the sports betting legal environment after the Supreme Court issues its *Christie* decision include the following:

- Reviewing your state Constitution to determine if bookmaking and/or other types of sports betting can be offered in your state without amending the constitution;
- If a constitutional amendment is necessary for bookmaking and/or other types of sports betting to be offered in your state, engaging with sports organizations to advocate for initiating the process to amend the constitution;
- Seeking to engage with sports organizations on a specific, organization-by-organization basis to understand each sport organization’s interest in sports betting

²² *Horsemen’s Benevolent & Protective Association—Ohio Division, Inc. v. DeWine*, 666 F.3d 997 (6th Cir. 2012).

²³ *Ibid.* at 998.

and each organization’s knowledge of both the economic risk of sports betting to the operator and the integrity monitoring resources that are available to protect and preserve the integrity of games and contests from which sports bets are derived.

Learning from Europe’s Experience

Faced with the prospect of an entirely new and lucrative sports-betting market arriving in the United States, it is likely that the prospective sports-betting operators, and the organizers of the sports themselves, have different perspectives of how to obtain a functional, fair and fruitful relationship. The potential prize is the largest legal sports-betting market in the world. For insight on how they might get there, some historical perspective – and more recent analysis – of experiences from Great Britain and elsewhere within Europe could be of value.

Great Britain has had no history of a legally enforceable requirement of bookmakers to pay any sport for the “right to take a bet” on that sport, save for horseracing which takes place in either England, Scotland or Wales. British horse racing and betting have always had a symbiotic relationship, so it was not surprising that a special regime was put in place, introduced more than 50 years ago.

The Horserace Betting Levy is the statutory instrument which essentially transfers money from those who bet on horseracing to the racing industry.²⁴ Collected by bookmakers and distributed by the Horserace Betting Levy Board (HBLB), a non-departmental public body of the Department of Culture, Media and Sport, it’s been in place since 1963, has raised more than US\$2.5 billion, but has been regarded as out-of-date, and argued over, for years.²⁵

Previous attempts to prod the horse racing industry to adopt a more “commercial” (as opposed to statutory) model to fund the sport had proved challenging, most notably by the governing authority itself, the British Horseracing Board (BHB), in 2004.

BHB vs. William Hill, an international London Stock Exchange-listed bookmaker, was essentially a High Court case/judgment designed to define the intellectual property inherent within horse racing’s data (such as runners, riders and handicap weights); it represented the first time that the sport had attempted to establish a definitive commercial value in, and legally enforceable protection of, its data.²⁶

²⁴ Horserace Betting Levy Board (UK), “Bookmaker Levy,” October 28, 2016. <http://www.hblb.org.uk/page/4>

²⁵ Estimate produced by Gaming Economics, August 2017, based on published HBLB data and using August 2017 GBP/US\$ exchange rates.

²⁶ InfoCuria – Case Law of the Court Justice, “The British Horseracing Board and Others, 9 November 2004. <http://curia.europa.eu/juris/liste.jsf?num=C-203/02>

The BHB lost that case, as the High Court determined that the data used by betting operators did not form a substantial part of the database and that the data taken was not the subject of relevant investment to justify payment, a position subsequently upheld by the Court of Justice of the European Union (CJEU).²⁷

Meanwhile, the UK government continued to search for a long-term replacement to the Levy system, and the HBLB, consulting widely with interested parties, including, of course, the betting operators. To the surprise of many, and in the final Budget before 2015's UK General Election, the then Chancellor of the Exchequer announced the government would bring forward legislation in the new Parliament for the introduction of new "horserace betting right" (HBR) which would apply to all bookmakers, wherever they were located, who took bets on British horseracing.²⁸

So far, so good. Gaming Economics (a member of the team producing this white paper) had joined others in urging the UK government to finally replace the statutory Levy with a modern, fair, sustainable and enforceable commercial model.

As a sport, British horse racing faces significant structural challenges. With a declining share of the domestic betting market, fewer race horses and owners, and static TV audience numbers, it is easy to see why it wants certainty in its long-term funding so it can protect its status as a major part of British sporting heritage and substantial supporter of the rural economy. However, within days of that announcement by government in mid-2015, the criticisms commenced. The Association of British Bookmakers (ABB) described the scheme as "...unworkable..."²⁹ with other legal opinions expressed since predicting major practical concerns and future legal challenges, including whether the proposed plan would be compatible under EU law.

Some Parliamentarians – including ex-Tote Director Lord Lipsey – went as far to decry the HBR as "the creation of a pernicious monopoly designed to shield racing from facing up to the challenge of modernisation."³⁰

One current argument is whether the HBR is a better, more-efficient and sustainable long-term commercial solution than the Levy. It would legally require all bookmakers taking

²⁷ 5RB, *British Horseracing Board v William Hill*, 9 November 2004. <http://www.5rb.com/case/british-horseracing-board-v-william-hill/>

²⁸ UK Government website, "Chancellor George Osborne's Budget 2015 speech," 18 March 2015. <https://www.gov.uk/government/speeches/chancellor-george-osbornes-budget-2015-speech>

²⁹ Association of British Bookmakers press release, "The Racing Right is unworkable and the detail will derail it," March 18, 2015. <http://abb.uk.com/the-racing-right-is-unworkable-and-the-detail-will-derail-it/>

³⁰ House of Lords Hansard, "Horse Race Betting Right" transcript, April 20, 2016. <https://hansard.parliament.uk/Lords/2016-04-20/debates/0B49CE0A-806A-4BF6-B0EE-1081B898F1C5/HorseraceBettingRight>

bets on a horse-race taking place in Great Britain to directly contribute to the sport, including income obtained from remote offshore betting operators who do not currently have to pay the Levy.

Right now, with the consultation over and the timetable set, the jury remains out, with more legal challenges expected, largely led by the Association of British Bookmakers and the Remote Gambling Association. But with the UK Gambling Commission due to take over the operation of the new HBR, and the collection of commercial fees and duties from the HBLB, from 2018-19,³¹ the clock is already ticking.

Not surprisingly, other sports, as well as other gaming jurisdictions, have been watching developments closely, with some sports clamoring to be given the same treatment as horse racing – a legally enforceable entitlement to charge bookmakers for the right to bet on the sport they administer – an argument which, at least domestically, has received support from official Opposition politicians. Labour MP Clive Efford, a past Shadow Minister for Sport and Tourism, recently reiterated Labour’s position that “... it is right that businesses that make money from sport should contribute to sport.”³²

The sports sector itself has long argued that it should benefit directly through payment for the use of sport-related data – such as club names, club players and fixture lists – relied on and used by regulated betting operators to create sports betting markets and odds. Frequently referred to as the “right to bet,” some sports have actively lobbied governments to establish legally-enforceable frameworks to enable the creation of new, and sustainable, commercial revenue streams and, to date, have had some moderate success.

In France, online legislation requires betting operators licensed there to make integrity payments to national sporting bodies for their events for betting, and in Australia, the State of Victoria also requires operators licensed there to contribute to domestic sports associations.³³ Back on the Continent, the European Parliament also supported this approach, producing, in 2013, a Resolution on Online Gambling, in which it “reaffirms its position that sports bets are a form of commercial use of sporting competitions.”³⁴

³¹ House of Commons Hansard, March 28, 2017. <https://hansard.parliament.uk/Commons/2017-03-27/debates/fa0e5a5f-7bc7-4347-a4de-47334692d45e/DraftHorseraceBettingLevyRegulations2017>

³² “Harman Consults on Premier League And Betting Levy To Boost Community Sport,” *Labour Press*, July 24, 2014. <http://press.labour.org.uk/post/92673573514/harman-consults-on-premier-league-and-betting-levy>

³³ “Horserace Betting Right: A consultation on potential structure and operation,” Department for Digital, Culture, Media and Sport, February 5, 2015. <https://www.gov.uk/government/consultations/horserace-betting-right-a-consultation-on-potential-structure-and-operation>

³⁴ European Parliament Resolution of 10 September 2013 on Online Gambling in the Internal Market, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0348+0+DOC+XML+V0//en>

Developing that position, the European Commission commissioned the Asser Institute and the University of Amsterdam to examine the issue of sports rights in general, including a specific review of betting. Their conclusions were published in mid-2014 and were largely critical of the sports “betting right” approach. Although much of the Asser Report concentrated on the justification aspect from an integrity perspective, it also examined important commercially-related topics, including sports data.³⁵

The use of data concerning sporting events – such as fixtures lists – has been the focus of various judicial action resulting in some crucial judgments from the CJEU.³⁶ As highlighted by the Asser Report, the widespread reproduction of fixtures and sporting calendars/schedules by sports betting operators, whether in print or online, has raised demands for clarity as to whether this data qualified for protection under the law of intellectual property and, specifically, copyright and/or database rights.

With such potential offered by a legalized and licensed US sports-betting market, it’s now the turn of the “Big Four” North American sports – football, basketball, baseball and hockey – to dissect and debate these developments from around the world, and to see where and how a scope might exist to develop policy and establish possible bargaining positions.

Conclusion

This report is permeated by various themes, but one that resonates throughout this report – as well as throughout any discussions on the future of sports betting – is that times and attitudes change. Quite often, the changes are barely perceptible, but over time can be viewed as nothing less than profound. As noted in the introduction of this report, the relationship between sports and broadcasting has come full circle, while the relationship between sports and betting has been generally moving along the same continuum.

At the East Coast Gaming Congress held earlier this year, American Gaming Association President and CEO Geoff Freeman noted another trend that has been subtle, yet inexorable: Las Vegas, which is correctly viewed as the global capital of the legal gaming industry, will soon be home to an NFL team as the Raiders make the move from Oakland. Freeman noted that every NFL owner except one approved the move, and that one dissenting vote had nothing to do with the omnipresence of gaming – and more particularly sports betting – in Las Vegas.³⁷

³⁵ European Parliament, “Sports betting: commercial and integrity issues,” Asser Institute; undated.
<http://www.egba.eu/media/Sports-Betting-Report-FINAL.pdf>

³⁶ InfoCuria – Case Law of the Court Justice, “Judgment of the Court (Grand Chamber) of 9 November 2004. Fixtures Marketing Ltd v Organismos prognostikon agonon podofairou AE (OPAP).”
<http://curia.europa.eu/juris/liste.jsf?num=C-444/02>

³⁷ Geoff Freeman, speaking at East Coast Gaming Congress, May 25, 2017, Harrah’s Atlantic City.

Freeman noted that such a move by a professional sports team to a city that relies on gambling as its core industry would have been unthinkable only a few years ago. That shift in attitude, emblematic of the larger society's evolving view, is one factor that will advance the expansion of legal sports betting in the United States.

That evolving view can be traced to numerous root causes, including the coast-to-coast expansion of land-based casinos, which now number more than 1,000 in the United States. Another factor, however, is arguably more important: There is no longer any discernible doubt as to the notion that gaming can be regulated and operated effectively.

Gaming licenses are considered privileges, not rights, and that privilege is limited to individuals and companies that have demonstrated the requisite good character, honesty and integrity. That successful formula will doubtless inure to sports betting, thus increasing the likelihood of its advancement. With that in mind, the authors of this report suggest that the same principles that apply to casinos should be applied to any entity that seeks to enter this realm: A gaming license is a privilege that should be granted judiciously without any sacrifice of standards, and the licensing and regulatory systems that will support sports betting should be structured to do more than generate a new fiscal stream. Rather, they should be developed to advance multiple public policy goals.

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Kevin Braig provides gaming law expertise to Shumaker, Loop & Kendrick, LLP's highly regarded sports law practice group. His gaming practice focuses on sports betting regulation, daily fantasy sports regulation, esports and esports-betting regulation, skill-based amusement machine regulation, charitable gaming regulation and game software development. Braig advises clients on issues including registration, record-keeping, licensing and compliance with state and federal law, including PASPA, the Wire Act, and the Unlawful Internet Gambling Enforcement Act. He also has defended governmental enforcement actions, and has drafted statutory gaming language for proposed state gaming laws.

Braig's passion for sports-related gaming and other businesses has led to a number of interesting ventures, including the invention and patenting of a college sports futures and options trading platform. Braig has authored numerous articles relating to sports betting, daily fantasy sports, and quantitative analysis and regulation in sports. He is a past participant in the Westgate Las Vegas Resort & Casino's Super Contest, which is widely considered the premier contest for NFL handicappers. Additionally, he maintains a website dedicated to objectively quantifying and analyzing NFL coaching through the prism of economic Growth Theory. As a high school defensive back, he spent his time at practice trying in vain to keep up with future NFL wide receiver and broadcaster Tom Waddle and future MLB Hall-of-Famer Ken Griffey, Jr.



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Michael Pollock oversees a broad portfolio of Spectrum services, including policy and impact studies for country, state and local governments, and financial and market studies for private-sector clients.

Pollock began analyzing the casino industry in 1978 and served as spokesman for the New Jersey Casino Control Commission from 1991 through 1996. He was a close advisor to the chairman, and oversaw the Office of Legislative Liaison. During this period of rapid deregulation, his charge was to maintain public confidence in the integrity of the regulatory system.

Pollock is the author of the award-winning book *Hostage to Fortune: Atlantic City and Casino Gambling*, published by the Center for Analysis of Public Issues in Princeton. The book examines the impact of casinos on Atlantic City and New Jersey. He has testified before the International Tribunal at The Hague, the World Bank in Washington DC, the US Senate Indian Affairs Committee and the US Senate Select Committee on Indian Gaming, and has been a featured speaker at the Congressional Gaming Caucus, a group of US House of Representatives members from gaming jurisdictions. He has also testified before numerous legislative committees throughout the United States.

He has led Spectrum economic analyses in markets throughout North America, as well as in Latin America, Guam and Korea.

Pollock has won 20 journalism awards, and is the former editorial page editor of *The Press of Atlantic City*. Pollock is often cited by national media outlets, including *The New York Times*, *Star-Ledger*, BBC, MSNBC, ABC News and National Public Radio.

Pollock earned his MBA, with high honors, from Rutgers University, and has served as a member of the adjunct faculty of New York University, Rutgers University and Stockton University.



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About This Report

This report was prepared by Spectrum Gaming Group, an independent research and professional services firm founded in 1993 that serves private- and public-sector clients worldwide. Our principals have backgrounds in operations, economic analysis, law enforcement, regulation and journalism.

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- British Columbia Lottery Corporation
- California Assembly Governmental Organization Committee
- Florida House Select Committee on Gaming
- Florida Senate Gaming Committee
- Georgia Joint Committee on Economic Development and Tourism
- Illinois Gaming Board
- Illinois House Executive Committee
- Indiana Gaming Study Commission
- Indiana Horse Racing Commission
- International Tribunal, The Hague
- Iowa Racing and Gaming Commission
- Louisiana House and Senate Joint Criminal Justice Committee
- Massachusetts Gaming Commission
- Massachusetts Joint Committee on Bonding, Capital Expenditures, and State Assets
- National Gambling Impact Study Commission
- New Hampshire Gaming Study Commission
- New Jersey Assembly Regulatory Oversight and Gaming Committee
- New Jersey Assembly Tourism and Gaming Committee
- New Jersey Senate Legislative Oversight Committee
- New Jersey Senate Wagering, Tourism & Historic Preservation Committee
- New York Senate Racing, Gaming and Wagering Committee
- Ohio House Economic Development Committee

- Ohio Senate Oversight Committee
- Pennsylvania Gaming Control Board
- Pennsylvania House Gaming Oversight Committee
- Puerto Rico Racing Board
- US House Congressional Gaming Caucus
- US Senate Indian Affairs Committee
- US Senate Permanent Subcommittee on Investigations
- US Senate Select Committee on Indian Gaming
- US Senate Subcommittee on Organized Crime
- Washington State Gambling Commission
- World Bank, Washington, DC

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