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LAW ENFORCEMENT DIRECTIVE 2014-1

FORMAL OPINION 1-2014

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FROM: John J. Hoffman, Acting Attorney General

SUBJECT: Law Enforcement Directive to Ensure Uniform Enforcement of the Sports Wagering Act's Exemption from Criminal Liability for the Operation of Sports Pools by Casinos and Racetracks

Formal Opinion Addressing the Effects of Law Enforcement Directive 2014-1 on the Sports Wagering Act's Exemption from Civil Liability for the Operation of Sports Pools by Casinos and Racetracks

DATE: September 8, 2014



LAW ENFORCEMENT DIRECTIVE 2014-1

On November 8, 2011, the citizens of New Jersey voted overwhelmingly to amend the New Jersey Constitution to permit the Legislature to repeal prohibitions against the operation of sports pools by casinos and racetracks. Thereafter, Governor Christie signed the Sports Wagering Act, N.J.S.A. 5:12A-1 to -6, to effectuate the will of the people expressed in the constitutional referendum. That statute decriminalized the operation of sports pools by casinos and racetracks, and implemented an extensive licensing and regulatory regime. Those regulations are codified in N.J.A.C. 13:69N-1.1 et seq.

Certain sports leagues claimed that the State's implementation of the Sports Wagering Act violated the federal Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. 3701 et seq. They brought suit in federal court to enjoin the implementation of the Sports Wagering Act. Governor Christie and the other defendants argued that PASPA violated the federal constitution and therefore could not be enforced. The federal district court ruled in favor of the plaintiff sports leagues and, in accordance with PASPA, enjoined the State from licensing or authorizing sports wagering.

Governor Christie and the other defendants appealed to the United States Court of Appeals for the Third Circuit. In September 2013, that court upheld the constitutionality of PASPA on the basis that it does not require States to maintain existing laws and thus does "not prohibit New Jersey from repealing its ban on sports wagering." N.C.A.A. v. Governor of the State of New Jersey, 730 F.3d 208, 232 (3d Cir. 2013), cert. denied, ___ U.S. ___ (2014) (hereinafter "N.C.A.A. v. Governor" or "Third Circuit opinion"). In holding that New Jersey "may repeal its sports wagering ban," id. at 233, the Third Circuit accepted the positions of the plaintiffs in the case, who had argued that the statute was constitutional because "nothing in [PASPA] requires New Jersey to maintain or enforce its sports wagering prohibitions," and, indeed, that New Jersey's "repeal of its state-law prohibition on the authorization of sports wagering" itself was "in compliance with PASPA." Br. of the United States ("U.S. Br."), No. 13-1713 (3d Cir.) at 28-29; Br. of Leagues ("Leagues Br.") No. 1713 (3d Cir.) at 16.

The specific issues addressed in this Law Enforcement Directive are whether, in light of N.C.A.A. v. Governor, casinos and racetracks would be committing a criminal offense under New Jersey law if they were to operate sports pools as part of their business activities.

The New Jersey Code of Criminal Justice (Title 2C) provides that when determining whether their conduct constitutes a criminal offense, persons may rely on "an official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense." N.J.S.A. 2C:2-4(c)(2). Pursuant to the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., the Attorney General serves as the State's chief law enforcement officer, and is required to ensure the uniform and efficient enforcement of the criminal law and administration of criminal justice. The Attorney General ultimately is responsible for the

enforcement of our State's criminal laws, including our gambling laws, and therefore is the public officer best suited to interpret the Sports Wagering Act and its relationship to Title 2C in view of the Third Circuit opinion. Given the importance of the issues raised by that opinion, it is appropriate to issue clear and authoritative guidance on whether casinos and racetracks are prohibited by our criminal law from operating sports pools, or whether the provisions of the Sports Wagering Act that exempt casinos and racetracks from criminal liability remain in effect.

For the following reasons, sports pools operated by casinos or racetracks continue to be exempted from criminal liability under New Jersey law so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. See N.J. Const., art. 4, sec. 7, par. 2E and F. Accordingly, no law enforcement or prosecution agency or officer shall, pursuant to N.J.S.A. 2C:37-1 to -9, make an arrest, file a complaint against, or prosecute any person¹ involved in the operation of a sports pool by a casino or racetrack to the extent that such activity takes place consistent with this Law Enforcement Directive.

Title 2C expressly provides that “no conduct constitutes an offense unless the offense is defined by this code or another statute of this State.” N.J.S.A. 2C:1-5. Criminal statutes establish the scope of criminal liability not only by defining the material elements of offenses, see N.J.S.A. 2C:1-13(h), (i), but also by creating exemptions or affirmative defenses. In the specific context of gambling, chapter 37 of Title 2C establishes a comprehensive suite of criminal offenses that generally prohibit all persons from promoting gambling or engaging in gambling activity, subject to certain exceptions. See, e.g., N.J.S.A. 2C:37-1(c); N.J.S.A. 2C:37-9.

The Sports Wagering Act, however, provides that “[i]n addition to casino games permitted pursuant to the provisions of P.L.1977, c.110 (C.5:12-1 et seq.) [the Casino Control Act], a casino may operate a sports pool....” N.J.S.A. 5:12A-2(a). It further provides that, “[i]n addition to the conduct of pari-mutuel wagering on horse races under regulation by the racing commission pursuant to chapter 5 of Title 5 of the Revised Statutes, a racetrack may operate a sports pool....” Id. In this manner, the Sports Wagering Act repealed the prohibition against the operation of sports pools by casinos and racetracks, thus exempting those activities from criminal prosecution under New Jersey law. The issue, then, is whether that exemption is consistent with the Third Circuit's ruling. The answer to that question is found in the text and reasoning of the Third Circuit opinion, as well as the concessions made by the plaintiffs in that case.

The Third Circuit made clear that it did “not read PASPA to prohibit New Jersey from repealing its ban on sports wagering.” 730 F.3d at 232. The Court reached this conclusion based on the arguments of the sports leagues, which stated that “[n]owhere in its unambiguous text does PASPA order states to keep laws on their books,” or “to keep existing laws in effect.” Leagues Br. at 16. The United States Department of Justice, which had intervened in the case to defend

¹The New Jersey Code of Criminal Justice defines “person” to include any natural person and, where relevant, a corporation or an unincorporated association. N.J.S.A. 2C:1-14(g).

PASPA's constitutionality, joined in the leagues' arguments, stating that "nothing in the statute requires New Jersey to maintain or enforce its sports wagering prohibitions," and that "PASPA also allows a state to . . . modify or repeal its prohibitions." U.S. Br. at 29. Summarizing and accepting those arguments, the Third Circuit noted that "no one contends that PASPA requires the states to enact any laws, and we have held that it does not require states to maintain existing laws." 730 F.3d at 235. Indeed, the United States Constitution clearly forbids Congress from requiring a State to criminalize conduct under state law. As the Third Circuit observed, "Congress 'lacks the power directly to compel the States to require or prohibit' acts which Congress itself may require or prohibit." *Id.* at 227 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

That federal courts have found the licensing regime of the Sports Wagering Act to be preempted by PASPA does not invalidate the Sports Wagering Act's repeal of prohibitions against the operation of sports pools by casinos and racetracks. Recognizing that the Sports Wagering Act might be challenged under PASPA, the Legislature included a "severability clause" in its statute:

If any provision of this act, P.L. 2011, c. 231 (C.5:12A-1 et al), or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

[N.J.S.A. 5:12-2(g).]

The Legislature therefore intended for the provisions of the statute that are not directly invalidated to continue in force and effect. Here, as the Third Circuit made clear, and as the sports leagues and the Department of Justice conceded, PASPA does not prohibit States from repealing state-law prohibitions on sports wagering. The Sports Wagering Act's repeal of prohibitions against sports wagering in casinos and racetracks can be given effect without licensing or otherwise authorizing by law sports wagering, as prohibited by the Third Circuit's decision, and, accordingly, must be given effect. N.J.S.A. 1:1-10.

For the foregoing reasons, it is the view of the Attorney General that, at least, the provisions of the Sports Wagering Act exempting casinos and racetracks from criminal liability for operating a sports pool—specifically, N.J.S.A. 5:12A-2(a), which states that "a casino may operate a sports pool" and that "a racetrack may operate a sports pool," in accordance with how those terms are defined in N.J.S.A. 5:12A-1—remain in force and effect, and all law enforcement and prosecuting agencies in carrying out their duties under the laws of the State of New Jersey shall abide by that exemption.

Any questions concerning this Law Enforcement Directive shall be addressed to the Director of the Division of Criminal Justice.

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The issue also has arisen regarding what effect the above Law Enforcement Directive has on the civil proscriptions applicable to sports wagering. See N.J.S.A. 2A:40-1 to -9. It is the Attorney General's statutory role to "[a]ct as the sole legal advisor" of, and to "interpret all statutes and legal documents" governing, state agencies. N.J.S.A. 52:17A-4(e).

As explained in the above Law Enforcement Directive, the Sports Wagering Act provides that a casino or racetrack "may operate a sports pool." Accordingly, sports pools operated by casinos and racetracks are exempted from criminal liability so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. For the same reason, sports pools operated by casinos and racetracks are exempted from the civil proscriptions of Title 2A, chapter 40, so long as no wagering occurs on a college sport or athletic event that takes place in New Jersey or in which any New Jersey college team participates regardless of where the event takes place. Accordingly, I hereby instruct that the Department of Law and Public Safety shall not object to or seek civilly to enjoin a sports pool operated by a casino or racetrack to the extent that it is conducted in a manner consistent with this Formal Opinion.

Any questions concerning this Formal Opinion shall be addressed to the Director of the Division of Law.



John J. Hoffman
Acting Attorney General

Dated: September 8, 2014

- c. Christopher S. Porrino, Chief Counsel to the Governor
Lee Vartan, Executive Assistant Attorney General
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