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States Need Realistic Expectations For Sports Betting

By **A.G. Burnett and Rick Trachok** (May 24, 2018, 5:36 PM EDT)

On May 14, 2018, the U.S. Supreme Court entered its decision in the *Murphy v. National Collegiate Athletic Association* case removing the federal ban on sports betting in the U.S. The Professional and Amateur Sports Protection Act of 1992 grandfathered sports betting in only four states, Nevada, Oregon, Delaware and Montana. New Jersey's myriad challenges to PASPA, and the resultant Supreme Court ruling of May 14, struck PASPA down. States are now free to legalize and regulate sports betting.

In the run-up to the court's decision, many state officials across the country viewed legalized sports betting as the answer to their budgetary problems. The unofficial estimate of the total amount wagered in sports betting in the U.S. was staggering, with the sum of over \$150 billion bandied about. Hence, the rush in various states that offer casino gambling to enact statutes and regulations in order to offer sports betting in their casinos.

In retrospect, as with most things in life, the decision in *Murphy* was entirely predictable. The court's conservative majority continued its trend of deferring matters to the states. Whether the court will follow this precedent with more politically charged issues such as legalized marijuana or right-to-die, remains to be seen.

In its attempt to carve out exceptions to existing sports betting jurisdictions, Congress in PASPA dictated that state legislatures were prohibited from authorizing sports gambling. The court said that clearly Congress had the constitutional authority to ban sports betting in the U.S. outright, but the Constitution prohibits Congress from issuing orders directly to the states, or from commandeering the state legislative process. The Constitution grants Congress the "power to regulate individuals and not states," and PASPA violated that dictate.

While the decision certainly changed the dynamic of legalized sports betting opportunities in this country, there are many things that the decision did not accomplish. First of all, it did not legalize sports betting in the U.S. It is now up to each state to determine whether it wants to legalize sports betting, and thereafter regulate it. Second of all, online or internet interstate sports betting remains illegal in this country, not because of PASPA, but because the Wire Act specifically proscribes this type of interstate betting. Finally, even if Congress were to repeal the Wire Act, other federal gambling legislation, such as the Travel Act or the Unlawful Internet Gaming Enforcement Act, would still make interstate, or Internet sports betting a felony if bets are taken



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or received in a state that prohibits the activity.

So where does that leave us today? Without repeal of the various federal gambling laws we cannot sit in front of our TVs or computer screens and bet on the next field goal or free throw like many bettors in Europe and the U.K. Sports betting within those states legalizing it will be allowed either in brick-and-mortar casinos or betting shops or through mobile applications blocking bets from beyond a state's physical boundaries.

In order to make this work, however, there is much to be done in states interested in legalizing sports betting. Aside from the regulatory infrastructure, which is significant, states will soon learn, if they haven't already, that sports betting is a complicated and low-margin business. While \$150 billion certainly is eye-popping, Nevada's results are sobering. Of the \$4.87 billion wagered in Nevada on sporting events in 2017, the sportsbooks won \$248 million, for an ultimate hold percentage of 5.11 percent. From that \$248 million the state of Nevada took \$16.6 million in tax revenues. If we extrapolate from these actual numbers from well-established and well-regulated sports betting operations, of the \$150 billion estimate of sports bets in the U.S., bookies across the country could expect to win approximately \$7.6 billion, and the 23 states that currently authorize casino gambling could expect to generate \$517 million in tax revenue, or approximately \$22.5 million in additional tax revenue per state. This certainly is nothing to sneeze at, but it is well short of the bonanza currently envisioned.

The professional sports leagues likewise see dollar signs as states move to legalize sports betting. Just as with the states, the leagues' vision of a cash cow is wide of the mark. In such a low margin business like sports betting, every dollar that comes off the top eats into the operators' thin margins. The 1 percent "integrity fee" on the total amount bet translates into a 20 percent cut in the operators' margins. This would force some operators out of business, driving players to illegal offshore betting sites. There is no advantage for any state to agree to pay any so-called integrity fee. The data used in sports betting is in the public domain. Neither Nevada operators nor any Nevada university has paid a fee to the NCAA or a sports league in the 50 years of legalized sports betting in the state.

Even though a state may legally allow, license and regulate legitimate sportsbook operators, there will still be many illegal operators. Offshore illegal sportsbook operators located outside of the state's geographic jurisdiction will present problems for the regulated market. Some specific examples of these problems include the following.

First, the illegal operators may not block users in a state that has legal sportsbook operations from using their offshore books. These offshore books are readily accessible on the internet to users. There will be many times that users will not know that they are using an unlawful internet gambling website.

Second, the offshore books may send agents into states with legalized gambling to act as marketing personnel to recruit bettors in the legal jurisdiction to play the offshore book instead, or to gather data from legal sportsbooks for use in the illegal, offshore location's books.

Third, patrons are not protected at offshore books like they are within a regulated sports betting environment; there are no patron dispute regulations or laws the aggrieved patron can look to for redress if they have a dispute with the operator.

States should consider amending civil and criminal laws to provide regulators and law enforcement with tools to police unlawful sports betting activity. Offenses for violating licensing provisions in state law may need to be strengthened in order to provide federal prosecutors with the necessary state predicate offenses required for a federal prosecution. State regulators should

be funded appropriately and given the statutory and regulatory tools they need.

States should also consider the following recommendations to not only boost the powers of their regulatory authorities, but to encourage other authorities to act and assist:

- Spotting agents for illegal offshore sites located in their casinos;
- Conduct routine internet investigations to determine what sites are offering sports betting illegally in their jurisdiction; and
- Develop working relationships between state regulators and law enforcement authorities such as the U.S. Department of Justice, FBI and any state or local prosecutors who may have jurisdiction over an illegal operator's agent found in the state.

Bettors in the U.S. will soon have safe, legal and reliable options as states enact the regulatory framework for sports betting. Sports betting will be another gambling attraction for casinos in state and tribal jurisdictions across the country. Those states and operators with unrealistic expectations of new found riches will be disappointed, and the leagues and the NCAA will realize that this is not a jackpot. States and operators should closely examine the Nevada model that has served its players, operators and the state so well over the last 50 years.

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