PASPA & SPORTS

Sports Wagering in General

Sports wagering has held a special place in gaming law and gaming law policy for centuries. Even when other forms of gaming were prohibited in Roman Times, wagering on sporting events and races was permitted. In U.S. gaming law history, sports and race wagering have taken two distinct and opposite paths. Horse race wagering, while experiencing a short period of prohibition, has generally been permitted under federal law and the laws of many states. However, sports wagering has been, with rare exception, prohibited under federal law and the laws of most states.

The materials for sports wagering will start with the most direct law addressing sports wagering, namely, the Professional and Amateur Sports Protection Act and recent efforts by Delaware and New Jersey to determine the scope and constitutionality of the Act.

In Nevada

Nevada has long had broad based commercial sports wagering. In Nevada, a non-restricted gaming license is required for operating a sports pool. What is not always obvious is that a sports pool license is separate and distinct from a casino operator's license and a race book operator's license.

Nevada is the only state in the Nation that has a long history of regulated legal sports wagering. The regulations regarding sports wagering can be found in Nevada Gaming Commission Regulation 22,

The Professional and Amateur Sports Protection Act

The Professional and Amateur Sports Protection Act of 1992 was an act to limit sports wagering in the United States. The Act was introduced by Senator DeConcini of Arizona as a measure in response to the impending threat of state-sponsored sports lotteries. As one might expect, there was strong opposition from states that currently had sports wagering and sports lotteries and thus there is a grandfathering clause to exempt such activities.

The Statutes

Current Section Chapter 178. Professional and Amateur Sports Protection

§ 3701. Definitions

For purposes of this chapter--

(1) the term "amateur sports organization" means--

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more amateur athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(2) the term "governmental entity" means a State, a political subdivision of a State, or an entity or organization, including an entity or organization described in section 4(5) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(5)), that has governmental authority within the territorial boundaries of the United States, including on lands described in section 4(4) of such Act (25 U.S.C. 2703(4)),

(3) the term "professional sports organization" means--

(A) a person or governmental entity that sponsors, organizes, schedules, or conducts a competitive game in which one or more professional athletes participate, or

(B) a league or association of persons or governmental entities described in subparagraph (A),

(4) the term "person" has the meaning given such term in section 1 of title 1, and

(5) the term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Palau, or any territory or possession of the United States.

§ 3702. Unlawful sports gambling

It shall be unlawful for--

(1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or

(2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity,a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

§ 3703. Injunctions

A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States by the Attorney General of the United States, or by a professional sports organization or amateur sports organization whose competitive game is alleged to be the basis of such violation.

§ 3704. Applicability

(a) Section 3702 shall not apply to--

(1) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990;

(2) a lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity where both--

(A) such scheme was authorized by a statute as in effect on October 2, 1991; and

(B) a scheme described in section 3702 (other than one based on parimutuel animal racing or jai-alai games) actually was conducted in that State or other governmental entity at any time during the period beginning September 1, 1989, and ending October 2, 1991, pursuant to the law of that State or other governmental entity;

(3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that--

(A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and

(B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date

pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

(4) parimutuel animal racing or jai-alai games.

(b) Except as provided in subsection (a), section 3702 shall apply on lands described in section 4(4) of the Indian Gaming Regulatory Act (25 U.S.C. 2703(4)).

Delaware and the Lottery Exemption

In 1976, the state of Delaware had a sports lottery product that consisted of parlay wagering on NFL games. The product was not financially successful and was short lived. In 2009, Delaware sought to restart its sports based state lottery with Las Vegas style sports wagering products. At first the sports leagues challenged the plan as unconstitutional under Delaware's sate constitution. The Delaware supreme court held in an advisory opinion that the lottery plan did not violate the state's constitution.

Supreme Court of Delaware.

IN RE: REQUEST OF the GOVERNOR FOR AN ADVISORY OPINION.

No. 150, 2009.

-- May 27, 2009

Before STEELE, Chief Justice, HOLLAND, BERGER, JACOBS and RIDGELY, Justices. Lawrence C. Ashby (argued), Richard D. Heins, Catherine A. Gaul and Toni-Ann Platia, Ashby & Geddes, Wilmington, Delaware for the Negative Position. Andre G. Bouchard (argued), David J. Margules, Joel Friedlander, James J. Merkins, Jr., and Sean M. Brennecke, Bouchard Margules & Friedlander, P.A., Wilmington, Delaware, for the Affirmative Response. Kenneth J. Nachbar (argued), Michael Houghton, Geoffrey A. Sawyer, III, and Brenda R. Mayrack, Morris Nichols Arsht & Tunnell LLP, Wilmington, Delaware for Amicus Curiae The National Football League.

Pursuant to 10 Del. C. § 141 and 29 Del. C. § 2102, you asked the Justices for their opinions regarding the proper construction of Article II, Section 17 of the Delaware Constitution in relation to your initiative to reinstitute a sports lottery. To assist you and the General Assembly in fulfilling your respective constitutional duties to enact a balanced budget before the end of the fiscal year, we agreed to expedite our response. For the reasons that follow, we answer your question in part, but conclude that certain aspects of your question cannot be answered on the current record.

FACTS

In a March 19, 2009 letter to this Court, providing a basic outline of the proposed sports lottery, you described the sports lottery as follows:

(a) The sports lottery would be under control of the state. Specifically, the state would have the power and the duty to operate and administer the sports lottery and promulgate rules and regulations for that purpose. The state would control, among other things, the type and number of games to be conducted, the payouts from the sports lottery games, price or prices of tickets for any game, the licensing of agents for sports lotteries, the regulation of licensed agents, vendors and other persons involved in the sports lottery, advertising standards, and security arrangements. In general, the applicable elements of control exercised by the State over the video lottery pursuant to 29 Del. C. § 4801, et seq. would be extended to the sports lottery.

(b) The sports lottery would be operated for the purpose of raising funds. Specifically, my proposal would mandate that proceeds from the sports lottery, less amounts returned to winning players, be returned to the state at a rate of no less than 50% of the total win. All amounts returned to the state for its use would be used for administration of the Delaware Lottery and/or contributed to the General Fund.

(c) The games offered by the sports lottery would be, at all times, "lotteries" within the meaning of that term in Article II, Section 17. The games offered as part of a sports lottery would be structured so that, in every case, the outcome is determined by chance. To achieve that, games offered through the sports lottery would involve a "line" or a similar mechanism, the purpose of which would be to make the outcome of wagering on the winner of the contest a 50/50 proposition and to ensure that approximately equal amounts of wagers accrue on each side of the game. For example, a "line" might be the predicted point spread between two teams. Or, for "total" games, the "line" would be a number representing the total score for that game, and the player would select either the "over" (more points than the line would be scored) or the "under" (less points than the line would be scored). Using the "line" template to ensure that the game is decided by chance, the State Lottery is contemplating one or more of the following games.

(i) Single Game Lottery: Players must select the winning team in any given contest with a line.

(ii) Total Lottery: Players must select whether the total scoring in a game will be over or under the total line.

(iii) Parlay Lottery: Players must select the winning outcome on multiple elements, such as the winner of two or more games, the winner of two or more over-under bets.

No game would offer a pay-out based on pool or pari-mutuel wagering.

In your initial letter, you requested the Justices' opinions regarding the following question:

Is the proposed Delaware sports lottery, as described above, in whole or in part, a permissible lottery under State control under Article II, Section 17 of the Delaware Constitution of 1897?

In a March 31, 2009 supplemental letter, you forwarded a copy of House Bill 100, which was the then-pending enabling statute for the proposed sports lottery.

We appointed Andre G. Bouchard of Bouchard, Margules & Friedlander P.A., to present an affirmative response and Lawrence C. Ashby of Ashby & Geddes, to present a negative response to your question.1 We also asked counsel to consider the following subsidiary issues that we concluded might affect our ability to answer your question:

(1) May the Justices, in their discretion, opine on the constitutionality of a proposed statute that has been introduced by the General Assembly, but not yet passed?

(2) If not, please reformulate the Governor's question and specify any factual limitations that would allow the Justices to answer his request as fully as possible. Please analyze the issue as reformulated.

(3) If the Justices may opine on the Governor's request as submitted, please address whether it is constitutionally permissible to delegate to the Director of the State Lottery the authority to "provide for the features and attributes" of any sports lottery games. In addition, please address whether there are any essential characteristics that any such games must possess to qualify as a permissible lottery under the constitution.

On April 6, 2009, Members of the General Assembly offered House Substitute No. 1 for House Bill 100. Although we expressed concern, in an April 30, 2009 letter, that the circumstances underlying your initial request for our opinions may have significantly changed and were in flux (possibly mooting your initial request), we agreed to maintain the original briefing schedule.

The General Assembly then passed House Substitute No. 1 to House Bill 100, as amended, by the requisite majority, and you signed that legislation on May 14, 2009. That same day, you renewed your request for our opinions, informing us that you had instructed the Department of Finance and the Delaware Lottery Office to begin implementing a sports lottery. You also reiterated the need for a timely response to enable you to work with the General Assembly to craft and pass a balanced budget for fiscal year 2010 before June 30, 2009.

On May 21, 2009, we heard oral argument. In addition to hearing counsel for both sides of the issues, we allowed the National Football League (we had already allowed the NFL to submit a brief as amicus curiae) to participate in the argument.

DISCUSSION

When presented with a request for an Opinion of the Justices, the individual Justices may give the Governor "their opinions in writing touching the proper construction of any provision in the Constitution of this State . , or the constitutionality of any law or legislation passed by the General Assembly."2 It is well within the Justices' discretion to decide whether and to what extent to answer questions the Governor presents.3 Because we are convinced that your questions touch upon the proper construction of Article II, Section 17 of the Delaware Constitution, we answer your questions (to the extent possible), to better enable you and the General Assembly to discharge your respective constitutional duties to present and enact a balanced budget.

The fact that you have already signed H.S. No. 1 to H.B. 100 does not prevent us from providing an advisory opinion. 10 Del. C. § 141(a) contemplates an opinion about "the constitutionality of any law" as well as "legislation passed" (but presumably as yet unsigned). For example, in 1978 the Justices answered a question presented by Governor du Pont concerning legislation that he had already signed.4 In that case, the Justices recognized the Governor's need to "commit funds and hire personnel."5 In 1981, the Justices similarly answered a question concerning legislation already signed by Governor du Pont because his request "establishe[d] a need for [an] opinion due to present constitutional duties awaiting performance by the Governor."6

In your May 14, 2009 letter renewing your request for our opinions, you advised us that: "Over the next several weeks, the State will begin working with the video lottery agents, potential vendors, and other interested parties to create a sports lottery." You also advised us of your view that the potential revenue generated by a sports lottery is "an important component" of constructing a balanced budget. Therefore, it is clear that our

opinions may assist you in committing funds, hiring personnel, and addressing the current budgetary situation.

To determine whether the proposed sports lottery, in whole or in part, constitutes a permissible lottery under Article II, Section 17 of the Delaware Constitution, we must address several subsidiary issues. They are: (1) whether the sports lottery will be under State control; (2) whether it is constitutionally permissible to delegate to the Director of the State Lottery the authority to "provide for the features and attributes" of the sports lottery; (3) whether lotteries, as permitted by the Delaware Constitution, must be games of pure chance or predominately chance; and finally (4) depending on our answers to those questions, whether the three specific games described in your original letter are constitutionally permissible.

The Proposed Sports Lottery Will be "Under State Control"

Article II, Section 17(a) of the Delaware Constitution permits "[l]otteries under State control for the purpose of raising funds."7 Here, we each conclude that the State will control all significant aspects of the sports lottery. As with the currently operating video lottery, the State Lottery Director will control the sports lottery. The Lottery Director will be responsible for determining the "[t]ype and number of sports lottery games to be conducted, the price or prices for any sports lottery games, the rules for any sports lottery games, and the payout and manner of compensation to be paid to winners of sports lottery games." H.S. No. 1 to H.B. 100 requires the Lottery Director to "administer the sports lottery in a manner which will produce the greatest income for the State while minimizing or eliminating the risk of financial loss to the State."

The Lottery Director will oversee the State's purchasing or leasing of all sports lottery machines,8 which shall appear "exclusively at facilities operated by video lottery agents licensed by the State."9 As is the case with the video lottery's proceeds, the Lottery Director will manage the daily or weekly transfer of the sports lottery's proceeds to the State Lottery Fund.10

The Lottery Director will also oversee the licensing of a risk manager, who "must be a bookmaker currently licensed to operate, and operating, sports books in the United States."11 The risk manager may be an independent contractor and need not be a State employee. Although the risk manager will be responsible for defining certain crucial aspects of the sports lottery, the State frequently hires outside experts without relinquishing its inherent control. We note that the State already contracts with outside entities in its control and operation of the video lottery.12

For the above reasons, we conclude that the sports lottery satisfies the State control requirement found in Article II, Section 17(a) of the Delaware Constitution.

H.S. No. 1 to H.B. 100 Does Not Impermissibly Delegate Legislative Power

We further conclude that the sports lottery legislation does not impermissibly delegate legislature power to the Lottery Director.

The General Assembly need not spell out every detail concerning the administration of a law.13 A statute does not unlawfully delegate legislative power, if the statute "establish[es] adequate standards and guidelines for the administration of the declared legislative policy and for the guidance and limitation of those in whom discretion has

been vested."14 This nondelegation principle is intended to prevent "arbitrary and capricious action, and to assure reasonable uniformity in the operation of the law."15

We have previously recognized that "[t]he preciseness of the statutory standards will vary with both the complexity of the area at which the legislation is directed and the susceptibility to change of the area in question."16 It also is well established that, at times, the General Assembly may better achieve its legislative goals by deferring to an administrative agency's greater skill and knowledge.17 For example, the General Assembly relies on the Department of Natural Resources and Environmental Control to fix and regulate hunting seasons and bag limits as necessary to "protect, manage and conserve all forms of protected wildlife of this State."18

We conclude that H.S. No. 1 to H.B. 100 does not impermissibly delegate legislative powers to the Lottery Director. In that legislation, the General Assembly established adequate standards and guidelines by requiring the Lottery Director to initiate a sports lottery governed by those rules and regulations that the Lottery Director believes "will produce the greatest income for the State while minimizing or eliminating the risk of financial loss to the State."19 H.S. No. 1 to H.B. 100 explicitly defines a sports lottery as "a lottery in which the winners are determined based on the outcome of any professional or collegiate event, including racing, held within or without the State, but excluding collegiate sporting events that involve a Delaware college or university and amateur or professional sporting events that involve a Delaware team ."20

In this case, the scope of the delegation is comparable to the scope of the authority delegated to the Lottery Director over existing State lotteries. In administering the video lottery, the Lottery Director is responsible for determining the "[t]ype and number of games to be conducted," the "[p]rice or prices of tickets for any game," the "[n]umber and sizes of the prizes on the winning tickets," and the "[m]anner of selecting the winning tickets."21 The General Assembly reasonably deferred to the Lottery Director's skill and knowledge in creating the specific sports lottery games, and no reasons are cited to us creating concern that the Lottery Director would exceed his authority or otherwise act in an arbitrary or capricious manner.

We, therefore, conclude that H.S. No. 1 to H.B. 100 does not impermissibly delegate legislative authority to the Lottery Director.

The Delaware Constitution Permits Lotteries Involving an Element of Skill

The next issue we must address is whether the fact that the sports lottery involves an element of skill precludes it from being a "lottery" authorized by the Delaware Constitution.

Although Article II, Section 17 authorizes State controlled lotteries, the Delaware Constitution does not define the term "lottery." We are fortunate, however, to have the benefit of analyses by two distinguished Delaware jurists' concerning the meaning of the term "lottery." Then Delaware District Court Judge Walter K. Stapleton addressed this issue in National Football League v. Governor of the State of Delaware, where the NFL sought injunctive relief barring Delaware from conducting a lottery based on the NFL's games.22 Judge Stapleton found "three elements necessary to a lottery: prize, consideration and chance."23 For reasons discussed below, Judge Stapleton determined that lotteries, as permitted by the Delaware Constitution, need not be matters of pure

chance.24 Rather, the element of chance "may be accompanied by an element of calculation or even of certainty" provided that "chance is the dominant or controlling factor."25

One year later, Governor du Pont asked the then three Delaware Supreme Court Justices for an advisory opinion addressing whether pool or parimutuel wagering on jai alai exhibitions constitutes a lottery under state control within the constitutional exception.26 Although Chief Justice Herrmann and Justice Duffy did not address whether the Delaware Constitution authorizes lotteries that involve an element of skill, Justice McNeilly explicitly adopted Judge Stapleton's "cogent analysis" and lottery definition.27

In our opinion, Judge Stapleton convincingly and correctly interpreted Article II, Section 17. He described a split of authority concerning whether a lottery may incorporate an element of skill as follows:

Under the English rule, a lottery consists in the distribution of money or other property by chance, and nothing but chance, that is, by doing that which is equivalent to drawing lots. If merit or skill play any part in determining the distribution, there is no lottery . In the United States, however, by what appears to be the weight of authority at the present day, it is not necessary that this element of chance be pure chance, but it may be accompanied by an element of calculation or even of certainty; it is sufficient if chance is the dominant or controlling factor. However, the rule that chance must be the dominant factor is to be taken in the qualitative or causative sense. 28

Judge Stapleton concluded that "[a]bsent clear language in the Constitution supporting a contrary rule," one should read Article II, Section 17 consistent with the majority, dominant factor rule.29 Although it is not without significance that a majority of jurisdictions in the United States apply the dominant factor rule, we find Judge Stapleton's historical review of the Delaware legislature's interpretation of the term "lottery" entirely persuasive, independent of any jurisdictional "headcount."

Judge Stapleton explained that, by two separate two-thirds votes in 1972 and 1973 (with an intervening election), the General Assembly amended Article II, Section 17 to authorize State lotteries .30 He noted that "[t]he same Legislature that gave final approval to the constitutional amendment in its second session in 1974 established the State Lottery and State Lottery Office."31 "In doing so, it construed the term lottery broadly: " 'Lottery" or "state lottery" or "system" shall mean the public gaming systems or games established and operated pursuant to this chapter and including all types of lotteries.' "32 Judge Stapleton also determined that " 'Games' or 'gaming' embrace a far wider range of activities than those based on pure chance."33 Finally, Judge Stapleton noted that the same legislature that finalized amending Article II, Section 17 "contemplated that some lottery games would be related to or based on sporting events."34 We agree with and adopt Judge Stapleton's conclusion that "[g]iven the near contemporaneous approval of the lottery amendment and the lottery statute," we should defer to the legislature's interpretation of the term "lottery."

Therefore, we conclude that Article II, Section 17 of the Delaware Constitution authorizes "not only games of pure chance but also games in which chance is the dominant determining factor."35

We Adopt Judge Stapleton's Factual Findings Concerning Parlay Lotteries

In your initial request for our opinions, you described three potential sports lottery games:

(i) Single Game Lottery: Players must select the winning team in any given contest with a line.

(ii) Total Lottery: Players must select whether the total scoring in a game will be over or under the total line.

(iii) Parlay Lottery: Players must select the winning outcome on multiple elements, such as the winner of two or more games, the winner of two or more over-under bets.

Because it is for the Lottery Director to decide the actual structure of the sports lottery's games, we have the benefit of only the above broad descriptions. Because Judge Stapleton addressed these lottery variations after trial and on a complete record, to that extent we adopt, and are able to rely on, his factual findings in arriving at our opinions.

To address the constitutionality of the three specific games comprising Delaware's Scoreboard lottery, Judge Stapleton required six days of evidentiary hearings, presentation of expert testimony, and extensive briefing.36 Judge Stapleton described those three games, all based on regularly scheduled NFL games, as follows:

In Football Bonus, the fourteen games scheduled for a given weekend are divided into two pools of seven games each. A player must mark the lottery ticket with his or her projections of the winners of the seven games in one or both of the two pools and place a bet of $1, $2, $3, $5 or $10. To win Football Bonus, the player must correctly select the winner of each of the games in a pool. If the player correctly selects the winners of all games in both pools, he or she wins an “All Game Bonus”. The amounts of the prizes awarded are determined on a pari-mutuel basis, that is, as a function of the total amount of money bet by all players.

In Touchdown, the lottery card lists the fourteen games for a given week along with three ranges of possible point spreads. The player must select both the winning team and the winning margin in each of three, four or five games. The scale of possible bets is the same as in Bonus and prizes are likewise distributed on a pari-mutuel basis to those who make correct selections for each game on which they bet.

Touchdown II, the third Scoreboard game, was introduced in mid-season and replaced Touchdown for the remainder of the season. In Touchdown II, a “line” or predicted point spread on each of twelve games is published on the Wednesday prior to the games. The player considers the published point spread and selects a team to “beat the line”, that is, to do better in the game than the stated point spread. To win, the player must choose correctly with respect to each of from four to twelve games. Depending upon the number of games bet on, there is a fixed payoff of from $10 to $1,200. There is also a consolation prize for those who beat the line on nine out ten, ten out of eleven or eleven out of twelve games.37

Judge Stapleton determined that in each of those games, chance is the predominate factor. He noted that the outcome of all NFL games involves an element of chance, citing “the weather, the health and mood of the players and the condition of the playing field.”38 Because the three Scoreboard games required players to select the winners of multiple games, “the element of chance that enters each game is multiplied by a

minimum of three and a maximum of fourteen games."39 Judge Stapleton also determined that "[Touchdown II's] designated point spread or 'line' is designed to equalize the odds on the two teams involved" and "injects a further factor of chance."40 He found it noteworthy that "[n]one of the games permits head-to-head or single game betting."41 Despite counsel's stipulation of facts before us, we must emphasize that wide areas of disagreement exist between studies, and internal inconsistencies within studies, addressing single game betting and the issue of whether chance or skill predominates.

Under Judge Stapleton's view of the Scoreboard games, all would be considered parlay lotteries. Because we can and do rely on Judge Stapleton's factual findings, we agree with his conclusion that chance is the dominant factor in parlay lotteries, which require players to select the winners of two or more games.42

That said, because we lack the benefit of actual evidence concerning single game bets and the extent to which "the line" introduces chance and causes it to predominate over skill or merely manages the money flow, we cannot opine on the constitutionality of single game bets.

CONCLUSION

Recognizing the difficulties that you and the General Assembly face in presenting a balanced budget for fiscal year 2010, we have attempted to answer your questions to the fullest extent possible. In our opinion, the sports lottery, as defined by H.S. No. 1 to H.B. 100, satisfies the State control requirement of Article II, Section 17 and does not impermissibly delegate legislative authority to the Lottery Director.43 We further conclude that the Delaware Constitution allows lotteries to involve an element of skill, but only where chance predominates. Without specific details of the exact nature of an interplay of sports betting options, however, all that we can currently opine is that the Lottery Director's designed games must assure that chance is the predominant factor.

FOOTNOTES

1. We greatly appreciate the pro bono service of the teams of attorneys who assisted in presenting the affirmative and negative responses to your question. We thank David J. Margules, Joel Friedlander, James J. Merkins, Jr., and Sean M. Brennecke, for assisting with the affirmative response. Similarly, we recognize the efforts of Richard D. Heins, Catherine A. Gaul, and Toni-Ann Platia in presenting the negative response.

2. 10 Del. C. § 141(a):(a) The Justices of the Supreme Court, whenever the Governor of this State or a majority of the members elected to each House may by resolution require it for public information, or to enable them to discharge their duties, may give them their opinions in writing touching the proper construction of any provision in the Constitution of this State, or of the United States, or the constitutionality of any law or legislation passed by the General Assembly, or the constitutionality of any proposed constitutional amendment which shall have been first agreed to by two-thirds of all members elected to each House;see also 29 Del. C. § 2102 (authorizing the Governor to seek advisory opinions "whenever the Governor requires it for public information or to enable the Governor to discharge the duties of office with fidelity").

3. See In re Request of Governor for Advisory Opinion, 722 A.2d 307, 309 (Del.1998).

4. See Opinion of the Justices, 385 A.2d 695 (Del.1978); see also, e.g., Opinion of the Justices, 425 A.2d 604 (Del.1981); Opinion of the Justices, 283 A.2d 832 (Del.1971); Opinion of the Justices, 233 A.2d 59 (Del.1967); Opinion of the Justices, 233 A.2d 59 (Del.1967); Opinion of the Justices, 177 A.2d 205 (Del.1962).

5. Opinion of the Justices, 385 A.2d at 696.

6. Opinion of the Justices, 425 A.2d at 605.

7. It is undisputed that the proposed sports lottery is intended to raise funds.

8. H.S. No. 1 to H.B. 100 defines sports lottery machines as "any machine in which bills, coins or tokens are deposited in order to play a sports lottery game. A machine shall be considered a sports lottery machine notwithstanding the use of an electronic credit system making the deposit of bills, coins or tokens unnecessary."

9. See id.

10. Id.

11. Id. Similarly, the Lottery Director will oversee the sports lottery technology system provider, which "must be licensed to operate lotteries in the United States." Id.

12. We rely on the examples provided by counsel presenting the affirmative argument. See, e.g., 29 Del. C. § 4805(a)(11) (providing for payment of contracts for "promotional, advertising or operational services"); 29 Del. C. § 4805(b)(4) (authorizing the Lottery Director to contract "for the operation of any game or part thereof and . for the promotion of the game or games"); 29 Del. C. § 4820(d)(requiring the Lottery Director to hire an "independent laboratory to test video lottery machines"); 29 Del. C. § 4833(d) (the Tri-State Lotto Commission's functions "shall be carried out by . independent contractors, agents, employees and consultants as may be appointed by the Commission"); see also 7 Del. C. § 4214 (allowing DNREC to retain "geologists, engineers, or other expert consultants and such assistants"); 4 Del. C. § 404 (the Division of Alcohol and Tobacco Enforcement may "engage the services of experts and persons"); 3 Del. C. § 904 (authorizing Agricultural Lands Preservation Foundation to "retain by contract auditors, accountants, appraisers, legal counsel, surveyors, private consultants, financial advisors or other contractual services"); 2 Del. C. § 1309(7) (authorizing Transportation Authority to "employ consulting engineers, architects, attorneys . real estate counselors, appraisers, accountants, construction and financial experts, superintendents, managers and such other consultants and employees").

13. See Marta v. Sullivan, 248 A.2d 608, 609 (Del.1968).

14. Id.; see also Opinion of the Justices, 425 A.2d at 607.

15. Marta, 248 A.2d at 609.

16. Atlantis I Condominium Ass'n v. Bryson, 403 A.2d 711, 713 (Del.1979) (citations omitted).

17. See Raley v. State, 1991 WL 235357, at *3 (Del.1991) ("[T]he legislature was aware of the difficulties in legislating environmental controls. It simply chose to defer to DNREC's greater skill and knowledge to better accomplish the legislative goals.").

18. See 7 Del. C. §§ 102-103.

19. See H.S. No. 1 to H.B. 100.

20. Id.

21. See 29 Del. C. § 4805(a).

22. See generally 435 F.Supp. 1372 (D.Del.1977).

23. Id. at 1383.

24. Id. at 1384-85.

25. Id. at 1384.

26. See generally Opinion of the Justices, 385 A.2d 695.

27. Id. at 709.

28. NFL, 435 F.Supp. at 1383-84 (citations omitted).

29. Id. at 1384.

30. Id.

31. Id. (citation omitted).

32. Id. (citing 29 Del. C. § 4803(b)).

33. Id. Judge Stapleton explained:Black's Law Dictionary 808 (4th ed.1968) defines games as "a sport, pastime or contest. A contrivance which has for its object to furnish sport, recreation or amusement". The same source defines gaming as follows: An agreement between two or more persons to play together at a game of chance for a stake or wager which is to become the property of the winner, and to which all contribute. "Gaming" and "gambling", in statutes are similar in meaning and either one comprehends the idea that, by a bet, by chance, by some exercise of skill, or by the transpiring of some event unknown until it occurs, something of value is, as the conclusion of premises agreed, to be transferred from a loser to a winner. Id. at 1384 n. 22.

34. Id. at 1384 (citing 29 Del. C. § 4805(b)(4)).

35. See id. at 1385.

36. Id. at 1376.

37. Id.

38. Id. at 1385.

39. Id.

40. Id.

41. Id. at 1385.

42. Logic suggests little meaningful distinction between a parlay lottery of two as opposed to three games. It is the single bet that raises factual issues about whether skill or chance predominates, and the role of the "line."

43. Because Opinions of the Justices "do not arise in a case or controversy, and are not an opinion of the Supreme Court . they are not binding in later litigation." See In re Request of Governor for Advisory Opinion, 722 A.2d 307, 309 (Del.1998).

- See more at: http://caselaw.findlaw.com/de-supreme-court/1404923.html#sthash.EaibHXcz.dpuf

In late July 2009, the leagues filed suit against the state in federal court (a copy of the complaint is in these materials). The leagues then moved for a TRO, a permanent injunction and summary judgment.

Please read the following complaint and district court opinion regarding the league's motion:

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

THE OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as Major League Baseball, THE NATIONAL BASKETBALL ASSOCIATION, a joint venture, THE NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, an unincorporated association, THE NATIONAL FOOTBALL LEAGUE, an unincorporated association, and THE NATIONAL HOCKEY LEAGUE, an unincorporated association,

Plaintiffs,

v. C.A. No. 09-538 (GMS)

JACK A. MARKELL, Governor of the State of Delaware, and WAYNE LEMONS, Director of the Delaware State Lottery Office,

Defendants.

MEMORANDUM ORDER

1. On July 24, 2009, the plaintiffs filed the complaint in this action alleging, among other things, that the Delaware Sports Lottery Act (the "Act"), 29 Del. C. § 4825, and the regulations proposed pursuant to the Act violate the Professional and Amateur Sports Protection Act ("PASPA"), 28 U.S.C. § 3701 et seq. and the Delaware Constitution, Del. Const. art. II, § 17. (D.I. 1.)

2. On July 28, 2009, pursuant to Fed. R. Civ. P. 65(a), the plaintiffs filed a motion for a

preliminary injunction seeking to enjoin the defendants from commencing any "sports lottery" that permits: "(i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976." (D.I. 8.)3. In the exercise of its discretion, the court has considered the applicable law, and carefully reviewed: (1) the pleadings filed thus far in this matter (D.I. 1); (2) the federal statute at issue; (3) the plaintiffs' motion for preliminary injunction (D.I. 8) ; (4) the plaintiffs' opening brief and attachments in support of their motion for preliminary injunction (D.I. 9-12); (5) the parties' additional submissions filed in this case, including the plaintiffs' ten-page, single-spaced, letter brief (D.I. 14), and the defendants' three-page, single-spaced, letter brief filed on August 3, 2009 (D.I. 15), as well as the defendants' four affidavits filed on August 4, 2009 (D.I. 17).

4. The court has also considered the arguments of counsel for the parties during a one-hour teleconference in this matter conducted on July 29, 2009 (D.I. 13). After giving due consideration to all of these things, the court concludes that a preliminary injunction is not warranted in this case. The court will, therefore, deny the plaintiffs' motion.

5. With good reason, federal courts are typically reluctant to grant the type of relief requested here. Indeed, the Third Circuit has made clear that a "preliminary injunction is an extraordinary remedy that should be granted only if: (1) the plaintiff is likely to succeed on the merits; (2) denial will result in irreparable harm to the plaintiff; (3) granting the injunction will not result in irreparable harm to the defendant; and (4) granting the injunction is in the public interest." NutraSweet Co. v. Vit-Mar Enterprises, Inc., 176 F.3d 151, 153 (3d Cir. 1999) (citation omitted). "A plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." See Opticians Ass'n of Am. v. Indep. Opticians of Am., 920 F.2d 187, 192 (3d Cir. 1990) ("Only if the movant produces evidence sufficient to convince the trial judge that all four factors favor preliminary relief should the injunction issue.")

6. First, based on the record as it stands, the court is not convinced that the plaintiffs will 2 "likely succeed on the merits" in this case. NutraSweet, 176 F.3d at 153. In fact, both sides vigorously and ably contend that they are entitled to win on the merits. Indeed, the plaintiffs propose, despite the nascent nature of this action, that the court and the parties go straight into the summary judgment phase of the litigation. Specifically, at page 2 of their August 3, 2009 letter brief, the plaintiffs "ask the Court [] to treat plaintiffs' motion [for injunctive relief] as one for summary judgment." (D.I. 14 at 2.) In addition, at page 7 of their letter brief, the plaintiffs write; "plaintiffs respectfully request that the Court treat their motion for a preliminary injunction as one for summary judgment on Count I of the Complaint, alleging violation of [the Professional and Amateur Sports Protection Act] PASPA." (Id. at 7.) Indeed, the plaintiffs propose, "that the Court schedule a summary judgment proceeding such that this matter can be decided prior to the first week of September 2009," and generously offer to rely on the combination of their brief in support of their motion for a preliminary injunction and their letter brief of August 3. (Id.)

7. In this matter, as whenever a party invokes the authority of the court, the ends of justice dictate a judge, where possible, proceed with deliberation and caution – especially when a party seeks extraordinary relief of the type at issue here. On the current record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue. On this record, and in light of these critical issues, the court cannot say that the plaintiffs will likely succeed on the merits.

8. Second, the court is not certain that the plaintiffs have demonstrated irreparable harm, so as to warrant the court granting preliminary injunctive relief. In enacting the federal

legislation
3
at issue here, Congress appears to have made specific findings as to the "harm" it intended to address. Nevertheless, and contrary to what the plaintiffs seem to suggest, in the context of a motion under Fed. R. Civ. P. 65(a), and considering the language of the actual statute at issue, these findings do not mandate or require under all circumstances that this court grant preliminary injunctive relief. In other words, this court is not convinced that the underlying statutorily defined harm is dispositive of the question as to whether the plaintiffs are entitled to preliminary injunctive relief or per se establishes the existence of the threat of irreparable harm that might necessitate the issuance of a preliminary injunction. To the contrary, Third Circuit precedent requires that the court consider this factor along with and in the context of each of the factors courts traditionally consider when confronted with a request for a preliminary injunction. See NutraSweet, 176 F.3d at 153; see also Opticians Ass'n, 920 F.2d at 192 ("[w]hen ruling on such a motion, the district court must consider four factors").
4
9. In addition, it is noteworthy that when asked some 32 years ago by the National Football League, a party to this action, to grant preliminary injunctive relief barring the State of Delaware from instituting a lottery game based on games of the NFL, an issue at least related to the matter before the court today, in denying the NFL's request for a temporary restraining order, a respected, indeed, a distinguished judge of this court and now the Third Circuit Court of Appeals, Judge Walter K. Stapleton, wrote the following:
I should add that the plaintiffs have not demonstrated that the existence of gambling on its games, per se, has or will damage its good will or reputation for integrity. By this, I do not suggest that an association of the NFL with a gambling enterprise in the minds of the public would not have a deleterious effect on its business. Such an association presupposes public perception of the NFL sponsorship or approval of a gambling enterprise or at least confusion on this score . . . . I do find, however, that the existence of gambling on NFL games, unaccompanied by any confusion with respect to sponsorship, has not injured the NFL and there is no reason to believe it will do so in the future. The record shows that extensive gambling on the NFL has existed for many years and that this fact of common public knowledge has not injured plaintiffs, or their reputation.
Nat'l Football League v. Governor of the State of Delaware, 435 F. Supp. 1372, (D. Del. 1977).
10. Today, the court sees some irony in the fact that Judge Stapleton made his findings 16 years before the Congressional findings that underpin PASPA, and that another 16 years have elapsed since the passage of that Act and the reappearance of the NFL, along with other parties plaintiff, before this court making similar claims to being in imminent danger of having their reputations and good will compromised because of yet another attempt by Delaware to engage in gambling activity associated with professional football and other sports. The irony is this: during the course of the court's discussion with counsel on July 29, 2009, counsel for the defendants made
5
1378
some, apparently fact based assertions which, while certainly not the equivalent of evidence based findings of a court or the Congress of the United States, are, at least relevant to the court's consideration of the issue of irreparable harm when asked to grant a request for preliminary injunctive relief. Counsel observed:
For example, the New York Times reported two years ago that the Motorcity Casino is owned by the same person who owns the Detroit Red Wings . . . Marian Ilitch co-owns the Detroit Red Wings with her husband Michael, Michael owns the Detroit Tigers . . . In the NBA, the

Sacramento Kings [are] owned by the same people who own the Palms Casino in Las Vegas. . . . The Chairman and CEO of Harrah's owns a stake in the Celtics [that would be the Boston Celtics] . . . There [are] plenty of instances where the NFL and other sports leagues allow broadcast affiliates to broadcast betting information, betting lines, injury reports . . . advice on which side of a bet to be on . . . Major League Baseball recently loosened its policy on casino and gambling sponsorship, so Harrah's Casino is a signature partner of the Mets. . . The Mohegan Sun Hotel & Casino operates a Mohegan Sports Bar at Yankee Stadium. The Brewers, the Braves, the Diamondbacks, the Angels, the Dodgers, the Marlins and the Cubs [all MLB baseball clubs] all have sponsorship deals with casinos and gambling interests or state lotteries. . . The NHL hosted its 2009 Player Awards in the Palms Casino.
(D.I. 13 at)
21-22.
11. ruling in 1977, that is, the Congress has enacted PASPA. This court cannot and will not ignore either the plain language of the statute or the Congressional findings that led to its passage. In spite of these findings, however, it is important to note, particularly within the context of a request for a preliminary injunction, that it is not readily apparent that Congress determined the harm it found demands the award of preliminary injunctive relief. In other words, despite its findings, by the plain language of the statute, the Congress seems to have left in tact the ability of judicial officers to apply
6
Clearly, circumstances have changed materially since Judge Stapleton issued his well-settled and proven principles of equity when deciding whether to grant the type of relief requested here. Simply put, unlike other enactments of Congress which, upon the judgment or finding of a named party or official, seem to require the court do a thing such as issue an injunction, e.g., the Emergency Price Control Act of 1942[1] which provides that an injunction "shall be granted without bond," PASPA, under the sub-heading "Injunctions" provides: "A civil action to enjoin a violation of section 3702 may be commenced in an appropriate district court of the United States." 28 U.S.C. § 3703. Thus, it seems reasonable to conclude that a district court may still determine whether the requirements for the issuance of a preliminary injunction have or have not been met, even in light of PASPA.
12. Third, the court cannot say, at this stage in the proceedings, that granting the injunction will result in irreparable harm to the defendants. However, the court also cannot say that granting an injunction in this case is in the public interest. In fact, given that the defendants claim they intend to use monies raised from the activities at issue in this case to balance the State's budget, the converse may very well be true. At this juncture in the proceedings, the court cannot say either way. As such, the public interest factor is, at best, neutral on the issue of whether to grant a preliminary injunction.
[1] 50 U.S.C. Appx. § 901 et seq. (repealed 1956). 7
13. In considering and balancing the preliminary injunction factors, and in light of the present record, at this early stage of the case, the court concludes that a preliminary injunction is not appropriate.
Therefore, IT IS HEREBY ORDERED that the plaintiffs' motion for preliminary injunction (D.I. 8) is DENIED.

Dated: August 10, 2009 /s/ Gregory M. Sleet CHIEF, UNITED STATES

DISTRICT JUDGE

Upon learning of their unsuccessful attempt at stopping the state lottery in the federal district court, the leagues appealed the denial of the TRO with the 3rd Circuit Court of Appeals. Please read the following order and opinion from the 3rd Circuit Court of Appeals.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-3297

OFFICE OF COMMISSIONER OF BASEBALL, et al. Appellants

v. JACK A. MARKELL, GOVERNOR OF THE STATE OF DELAWARE, et al.

(D. Del. No. 09-cv-00538)

Present: MCKEE, FUENTES and HARDIMAN, Circuit Judges

We determine that there is no factual issue with respect to the merits in this case. We conclude, as a matter of law, that the Delaware sports lottery, planned to commence September 1, 2009, pursuant to the authority granted in 29 Del. Code § 4805, violates the Professional and Amateur Sports Protection Act, 28 U.S.C. §§ 3701 *et seq.,* and is not covered by the exemption in 28 U.S.C. § 3704(a)(1). Accordingly, there is no need to address the issue of irreparable harm. An opinion of this Court will follow.
Dated: August 24, 2009 PDB/cc: All Counsel of Record

By the Court,
/s/ Theodore A. McKee Circuit Judge

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3297

OFC COMM BASEBALL, an unincorporated association doing business as Major League Baseball; NATL BASKETBALL ASSN, a joint venture; NATL COLLEGIATE ATHLETIC ASSN, an unincorporated association; NATL FOOTBALL LEAGUE, an unincorporated association; NATL HOCKEY LEAGUE, an unincorporated association,

Appellants,

v.
JACK A. MARKELL, Governor of the State of Delaware; WAYNE LEMONS, Director of the Delaware State Lottery Office,

Appellees.

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 09-cv-00538)
District Judge: Honorable Gregory M. Sleet

Argued August 24, 2009
Before: McKEE, FUENTES and HARDIMAN, Circuit
Judges.

(Filed: August 31, 2009)

Kenneth J. Nachbar [Argued]
Pauletta J. Brown
Megan W. Cascio
Susan W. Waesco
Morris, Nichols, Arsht & Tunnell
1201 North Market Street

P.O. Box 1347
Wilmington, DE 19899-0000
Attorneys for Appellants

Andre G. Bouchard [Argued]
Joel E. Friedlander [Argued]
Sean M. Brennecke
David J. Margules
Bouchard, Margules & Friedlander
Suite 1400
Wilmington, DE 19801-0000

Attorneys for Appellees

OPINION OF THE COURT

HARDIMAN, Circuit Judge.

In this interlocutory appeal we review an order of the United States District Court for the District of Delaware denying a motion for preliminary injunction filed by the National Football League, the National Basketball Association, the National Hockey League, the Office of the Commissioner of Baseball, and the National Collegiate Athletic Association (collectively, Leagues). The Leagues sought to enjoin Delaware state officials from implementing certain elements of its Sports Lottery Act (Act), Del. Laws Ch. 28 (H.B. No. 100) (2009), 29 Del. Code § 4801 et seq., on September 1, 2009. As we shall explain, we need not decide whether the District Court's denial of the Leagues' preliminary injunction was proper because we hold as a matter of law that elements of Delaware's sports lottery violate federal law.

I.

In March 2009, the Governor of Delaware, Jack Markell, proposed legislation authorizing sports betting and table gaming at existing and future facilities in Delaware. On March 19, Governor Markell sought an advisory opinion from the Delaware Supreme Court pursuant to 10 Del. Code § 141 and 29 Del. Code § 2102, regarding the constitutionality of his proposal under the Delaware Constitution. In a letter to the Delaware Supreme Court, Governor Markell described three types of

proposed sports gambling: (1) point-spread bets on individual games; (2) over/under bets on individual games; and (3) multi-game parlay bets.1 On May 14 — while the request for an advisory opinion from the Delaware Supreme Court was pending — Governor Markell signed the Act into law. In re Request of Governor for an Advisory Opinion (In re Request of Governor), --- A.2d ---, No. 150, 2009, 2009 WL 1475736, at *2 (Del. May 29, 2009).

After hearing oral argument, the Delaware Supreme Court issued an opinion on May 29, which found that multi-game betting would not violate state law. In analyzing the legality of the Act and the "lotteries" proposed pursuant to the Act, the Delaware Supreme Court relied heavily on Judge Stapleton's decision in National Football League v. Governor of the State of Delaware (NFL), 435 F. Supp. 1372 (D. Del. 1977). That case concerned the NFL's challenge to a sports betting scheme known as "Scoreboard" that Delaware conducted during the 1976 season. Scoreboard was comprised of three

1 Under regulations proposed pursuant to the Act, Delaware intends to offer three games: Single Game Lottery, Total Lottery, and Parlay Lottery. In Single Game Lottery, bettors must select the winning team in a single sports contest against a point spread. In Total Lottery, the bettor gambles on whether the total number of points scored by both teams in a single contest will be over or under a specified sum. The final game, Parlay Lottery, combines elements of the first two games in asking bettors to correctly choose the winners of two or more sports contests, or two or more over/under bets, or some combination of winners and over/under bets.

games: Football Bonus, Touchdown, and Touchdown II. In Football Bonus, the State offered two pools of seven NFL games each and bettors had to predict the winners – without a point spread – in one or both of the pools. In Touchdown, bettors selected both the winners and point spreads for either three, four, or five NFL games. Finally, Touchdown II – which replaced Touchdown midway through the season – required bettors to pick the winners, against the point spread, for between four and twelve NFL games. All of the Scoreboard games conducted in 1976 were confined to betting on the NFL, and all required that the bettor wager on more than one game at a time.

In NFL, Judge Stapleton held such wagering was permissible under the Delaware Constitution because chance is the "dominant factor" in multi-game (parlay) betting. The Delaware Supreme Court reached the same conclusion in its advisory opinion, In re Request of Governor, 2009 WL 1475736, at *8, but did not decide the constitutionality of single-game betting, except to recognize that it differs from the parlay games addressed by Judge Stapleton. Id. The Delaware Supreme Court did not address the federal statutory question presented in this appeal.

Following receipt of the Delaware Supreme Court's advisory opinion, on June 30 the State published its proposed regulations to implement the Act (Regulations). According to the Regulations, Delaware intends to implement a sports betting scheme that would include wagers "in which the winners are determined based on the outcome of any professional or collegiate sporting event, including racing, held within or without the State, but excluding collegiate sporting events that

involve a Delaware college or university, and amateur or professional sporting events that involve a Delaware team." A168. Delaware's proposed sports betting scheme includes single-game betting in addition to multi-game (parlay) betting, as the Regulations define the term "maximum wager limit" to include "the maximum amount that can be wagered on a single sports lottery wager be it head-to-head or parlay . . . ." A168 (Regulations § 2.0, definition of "maximum wager limit") (emphasis added).

Delaware intends to commence its sports betting scheme on September 1, 2009, in time for the start of the upcoming NFL regular season. Though the NFL is its focus, Delaware intends to conduct – and the Regulations sanction – betting on all major professional and college sports.

II.

On July 24, the Leagues filed a complaint against Governor Markell and Wayne Lemons, the Director of the Delaware State Lottery Office (collectively, Delaware or State), claiming that elements of Delaware's proposed sports betting scheme violate the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. § 3701, et seq.2 Although PASPA has

2 The PASPA claim was brought at Count I. The Leagues also brought a claim under state law at Count II, which alleged that the sports betting scheme violates Section 17 of the Delaware Constitution because it does not constitute a permissible "lottery." The state-law claim is not at issue in this appeal.

broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also "grandfathered" gambling schemes in individual states "to the extent that the scheme was conducted by that State" between 1976 and 1990.

Four days after filing their complaint, the Leagues filed a motion for preliminary injunction, requesting that the District Court enjoin the State "from commencing, instituting, operating and maintaining a proposed 'sports lottery' to the extent that such lottery permits (i) single-game sports betting, (ii) betting on sports other than professional football, or (iii) any other sports betting scheme that was not conducted by the State of Delaware in 1976" pending final adjudication of the Leagues' action.

The District Court held a scheduling conference on July 29 at which it urged the parties to reach an agreement by which the State would "stand down" pending an expedited adjudication of the merits. A268. The parties could not reach such an agreement, however, so the District Court asked for written submissions and held a conference on August 5. Following the conference, the court orally denied the Leagues' motion and scheduled a trial for December 7. On August 10, the District Court issued a 13-paragraph memorandum order explaining its reasons for denying the injunction.

In its memorandum order, the District Court found that the Leagues had not shown a likelihood of success on the merits. Office of Comm'r of Baseball v. Markell, --- F. Supp. 2d ---, 2009 WL 2450284, at *1 (D. Del. Aug. 10, 2009). Noting that "both sides vigorously and ably contend that they are entitled to win on the merits," the District Court stated: "On the current

record, the court is simply not in a position to give either side a nod on the merits. Indeed, there may exist factual disputes as to what, if anything, the State of Delaware actually did in the past with respect to sports gambling; or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." Id. at *2. The District Court also noted that the Leagues suggested in their letter brief that the court treat their motion for preliminary injunction as a motion for summary judgment and questioned whether the Leagues had demonstrated both the requisite irreparable harm and that the balance of the equities fell in their favor. See id. at *2-4.

On August 7 – prior to receipt of the District Court's memorandum opinion – the Leagues filed their notice of appeal. Three days later, the Leagues filed a motion to expedite their appeal and their opening brief. On August 12, Delaware filed a motion to dismiss the appeal and its opposition to the Leagues' motion to expedite. On August 13, we granted the Leagues' motion to expedite, issued a briefing schedule, and set oral argument for August 24.

It is often noted that the wheels of justice move slowly – and for good reason. As the procedural history of this case demonstrates, however, that is not always the case. When a party seeks injunctive relief, the stakes are high, time is of the essence, and a straightforward legal question is properly presented to us, prudence dictates that we answer that question with dispatch.

III.

We begin, as always, by considering whether we have jurisdiction to hear this appeal. The Leagues claim we have jurisdiction under 28 U.S.C. § 1292(a), which provides: "courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts . . . granting, continuing, modifying, refusing, or dissolving injunctions." (emphasis added). The State disagrees, arguing that we must apply the test set forth in Carson v. American Brands, Inc., 450

U.S. 79 (1981), which requires the Leagues to show that the District Court's denial of the motion for preliminary injunction (1) will have a serious, perhaps irreparable, consequence; and (2) can be effectively challenged only by immediate appeal. Id. at 83; see also Stringfellow v. Concerned Neighbors In Action, 480 U.S. 370, 379 (1987).

In arguing that the Leagues must establish the Carson factors, Delaware relies on dicta from some of our prior cases stating that both orders expressly denying injunctions and orders having the practical effect of denying injunctions must meet the two-prong Carson test. See Vuitton v. White, 945 F.2d 569, 574 (3d Cir. 1991); Ross v. Zavarella, 916 F.2d 898, 902 (3d Cir. 1990). But none of the cases upon which Delaware relies involved express denials of injunctive relief; rather, they dealt with orders that were alleged to have the practical effect of denying injunctive relief. Accordingly, the Leagues need not demonstrate that the order will have a "serious, perhaps irreparable, consequence" and can be "effectively challenged" only by immediate appeal. See Cohen v. Bd. of Trs. of Univ. of Med., 867 F.2d 1455, 1464 (3d Cir. 1989). The language of §1292(a)(1) is clear and the Leagues need not satisfy any

jurisdictional hurdle beyond the fact that they have appealed from an order refusing to enter an injunction.

We next turn to the scope of our review under 28 U.S.C. § 1292(a). We have adopted a broad view of appellate jurisdiction under this section. See Kershner v. Mazurkiewicz, 670 F.2d 440, 445 (3d Cir. 1982); see also 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3921.1, at 28 (2d ed. 1996) ("Jurisdiction of the interlocutory appeal [under § 1292(a)(1)] is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development."). Moreover, we have held that "[w]hen an appeal is taken from an order made appealable by statute, we have all the powers with respect to that order listed in 28 U.S.C. § 2106."3 United Parcel Serv., Inc. v. U.S. Postal Serv., 615 F.2d 102, 107 (3d Cir. 1980). Accordingly, we have broad authority to decide this case as appropriate under § 2106.

Having determined that we have authority to address all aspects of this case, we must determine whether it is proper to exercise that authority. "As a general rule, when an appeal is

3

Section 2106 provides: "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

10

taken from the grant or denial of a preliminary injunction, the reviewing court will go no further into the merits than is necessary to decide the interlocutory appeal." Callaway v. Block, 763 F.2d 1283, 1287 n.6 (11th Cir. 1985). This ordinarily requires that we review the decision to grant or deny a preliminary injunction for abuse of discretion, employing the standard four-factor test. See Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir. 1999). Nevertheless, the Supreme Court has held the "general rule" of limited review is one of "orderly judicial administration, not a limit on judicial power." Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 757 (1986), overruled on other grounds by Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833 (1992).

In Thornburgh, the Supreme Court considered whether this Court properly exercised its jurisdiction in striking down portions of a Pennsylvania statute following an appeal from the district court's partial denial of a preliminary injunction. See id. at 755-57. The Supreme Court acknowledged that review of a preliminary injunction is normally limited to the injunction itself, but explained: "if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction." Id. At the same time, the Supreme Court cautioned: "A different situation is presented . . . when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial." Id. at 757 n.8. In affirming this Court's decision to

address the merits of the plaintiff's case, the Supreme Court quoted from our opinion:

Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a district court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.

Id. at 757 (quoting Am. Coll. of Obstetricians & Gynecologists

v. Thornburgh, 737 F.2d 283, 290 (3d Cir. 1984)). The approach taken in Thornburgh has been embraced by a number of our sister courts of appeals. In an appeal from the grant of a preliminary injunction in Campaign for Family Farms

v. Glickman, 200 F.3d 1180 (8th Cir. 2000), the Court of Appeals for the Eighth Circuit exercised its discretion to reach the merits of the underlying dispute, determining that it was "faced with a purely legal issue on a fixed . . . record." Id. at 1186-87. The court explained: "[t]he considerations that caution against a broad scope of review in the usual interlocutory appeal — that is, a tentative and provisional record with conflicting material facts — simply are not present here." Id. at 1187. Likewise, in Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250 (11th Cir. 2005), the Court of Appeals for the Eleventh Circuit assessed the merits of the plaintiff's First Amendment claim on appeal after the district court denied his request for a preliminary injunction. Finding that the facts of the case were

"simple and straightforward, and the record need[ed] no explanation," id. at 1274, the court explained that "we do not think it necessary or prudent to confine our opinion to holding that [the plaintiff] has shown a likelihood of success on the merits, when it is altogether clear that [the plaintiff] will succeed on the merits of its First Amendment claims," id. at 1272 (emphasis in original). Finally, in Doe v. Sundquist, 106 F.3d 702 (6th Cir. 1997), the Court of Appeals for the Sixth Circuit considered the merits of the plaintiffs' claim following a denial of their preliminary injunction motion. The court noted that "[i]f an issue unaddressed by the district court is presented with sufficient clarity and completeness and its resolution will materially advance the progress of the litigation," consideration of that issue is proper. Id. at 707 (internal quotation marks and citation omitted). The court explained that "[t]he sort of judicial restraint that is normally warranted on interlocutory appeals does not prevent us from reaching clearly defined issues in the interest of judicial economy." Id. (citation omitted).

In light of Thornburgh and its progeny, we must determine whether the record in this appeal presents "a pure question of law" that is "intimately related to the merits of the grant [or denial] of preliminary injunctive relief," United Parcel Serv., 615 F.2d at 107, or whether the Leagues' "probability of success on the merits depends on facts that are likely to emerge at trial," Thornburgh, 476 U.S. at 757 n.8. For the reasons that follow, we conclude that this case falls into the former category.

In denying the Leagues' motion for preliminary injunction, the District Court hypothesized that "there may exist factual disputes as to what, if anything, the State of Delaware

actually did in the past with respect to sports gambling or as to what, if any, proposed sports betting activities are exempted by the federal statute at issue." Markell, 2009 WL 2450284, at *2 (emphasis added). Contrary to the District Court's supposition, we have reviewed the record and cannot find any material issues of fact in dispute. As the Leagues rightly argue, Judge Stapleton's opinion in NFL is the definitive word regarding the scope and extent of Delaware's gambling scheme as it was conducted in 1976; the State neither challenged Judge Stapleton's findings 33 years ago nor does so now. Likewise, the parties do not dispute the scope and extent of the sports gambling scheme that Delaware intends to implement on September 1. As counsel for Delaware properly and candidly conceded at oral argument, the State intends to conduct widespread betting on both professional and college sports beyond the scope of the football-only parlays permitted in 1976. In sum, the parties agree upon what Delaware did in 1976 and what Delaware intends to do now. Given the absence of any disputed issue of material fact – as confirmed by both parties at oral argument – we conclude that this case does not turn on a "legal issue that might be seen in any different light after final hearing," United Parcel Serv., 615 F.2d at 107, and is ripe for adjudication as a matter of law. Therefore, we will proceed to assess the merits of the Leagues' claim that Delaware's sports betting scheme violates PASPA.4

IV.

4 Because we reach the merits of this case, we need not consider the parties' arguments regarding irreparable harm and the balancing of the equities.

We begin our legal analysis with the statutory language. PASPA prohibits any person or governmental entity from sponsoring, operating, advertising or promoting:

> a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.

28 U.S.C. § 3702. The statute contains four exceptions, only one of which is relevant here. That exception provides that PASPA's general prohibition against sports betting shall not apply to: "lottery, sweepstakes, or other betting, gambling, or wagering scheme in operation in a State or other governmental entity, to the extent that the scheme was conducted by that State or other governmental entity at any time during the period beginning January 1, 1976, and ending August 31, 1990." 28 U.S.C. § 3704(a) (emphasis added). Not surprisingly, the parties view PASPA's language differently, with both sides claiming that the plain language requires a favorable result on the merits.

A.

Delaware contends that its sports betting scheme qualifies for the exception in § 3704(a)(1), claiming: "[t]he plain language of the pertinent PASPA exemption allows Delaware to

reintroduce a sports lottery under State control because Delaware conducted such a scheme at some time between January 1, 1976, and August 31, 1990." Del. Br. at 3. The State also contends that the exemption "is broad in scope, and nowhere states that it restricts Delaware to operating particular lottery games for a particular sport." Id. at 32. In Delaware's view, § 3704(a)(1) allows it to conduct any "sports lottery under State control," id., because it did so in 1976. Although the State acknowledges, as it must, that the exception permits its lottery only "to the extent that the scheme was conducted," it argues that the word "scheme" refers neither to the three particular games it offered in 1976, nor to parlay betting in general, nor even to wagering on NFL games, but to a "sports lottery under State control in which the winners of lottery games were affiliated with the outcome of sporting events." Id. at 33.

Even assuming that Delaware's interpretation of the word "scheme" were persuasive, we must reconcile that interpretation with the statutory language "to the extent that the scheme was conducted by that State." (emphasis added). The State claims that this phrase merely "identifies a condition (i.e., that a State must have conducted a sports lottery in the past in order to be permitted to operate a sports lottery in the future)," id. at 34, rather than limiting the State's gaming authority to either the particular sports or types of games previously offered. Delaware argues that because state law previously authorized a broad lottery encompassing many types of games and many sports, it may now institute a broad lottery with those features.

In contrast to Delaware's argument, the Leagues contend that the exception in § 3704(a)(1) applies only to lotteries or

other schemes "to the extent" that such lottery or scheme "was conducted" by the State between January 1, 1976 and August 31, 1990. The Leagues insist that it is not sufficient that a particular lottery may have been contemplated, or even authorized, but rather we must consider the specific means by which the lottery was actually conducted.

We agree with the Leagues' interpretation. As the exception found at § 3704(a)(2) makes clear, there is a distinction between wagering schemes that were merely "authorized" and those that were "conducted." See 28 U.S.C. § 3704(a)(2) (which applies to a wagering scheme that was both

(i) "authorized by a statute as in effect on October 2, 1991," and (ii) "actually was conducted during the period beginning September 1, 1989 and ending on October 2, 1991"). Whatever the breadth of the lottery authorized by Delaware state law in 1976, PASPA requires us to determine "the extent" – or degree – to which such lottery was conducted. We cannot hold – as the State impliedly suggests – that Congress meant to conflate "authorized" and "conducted." See BFP v. Resolution Trust Corp., 511 U.S. 531, 537 (1994) ("It is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another."); Alaka v. Attorney General, 456 F.3d 88, 97-98 (3d Cir. 2006) ("It is a fundamental canon of statutory construction that where sections of a statute do not include a specific term used elsewhere in the statute, the drafters did not wish such a requirement to apply."). Thus, the sole exception upon which Delaware relies – applicable to wagering schemes dating back to 1976 – applies only to schemes that were "conducted." 28 U.S.C. § 3704(a)(1).

17

While minimizing the importance of the language of § 3704(a)(2), Delaware asks us to draw parallels to § 3704(a)(3), which provides:

> a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that— (A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive State regulation authorized by that State's constitution and applicable solely to such municipality[.]

(emphasis added). Delaware argues that the phrase "to the extent" must mean the same thing in § 3704(a)(1) as it does in § 3704(a)(3), where the phrase identifies a condition. We reject this argument out of hand because the exception contained in § 3704(a)(3) – which deals with casinos – differs in subject matter, structure, and syntax from the language of § 3704(a)(1).

As a fallback position, Delaware argues that PASPA is ambiguous such that resort to legislative history is necessary. We disagree, because as we have noted:

> A statutory provision is not ambiguous simply because by itself, [it is] susceptible to differing

constructions because in addition to the statutory language . . . itself, we take account of the specific context in which that language is used, and the broader context of the statute as a whole. We assume, for example, that every word in a statute has meaning and avoid interpreting one part of a statute in a manner that renders another part superfluous.

Disabled in Action v. SEPTA, 539 F.3d 199, 210 (3d Cir. 2008) (internal quotations and citations omitted). Applying these principles of statutory construction, we find unambiguous the phrase "to the extent that the scheme was conducted by that State," so our "inquiry comes to an end." Kaufman v. Allstate

N.J. Ins. Co., 561 F.3d 144, 155 (3d Cir. 2009) (citation omitted).5

5 Delaware spends several pages of its brief explaining the legislative history and citing statements from various legislators. These statements are inconclusive at best. When we view them in their entirety rather than focusing on "cherrypicked" snippets, they offer no consistent insight into Congressional intent. For example, the Senate Report upon which Delaware relies, Del. Br. at 13, states that the exemption in § 3704(1) "is not intended to prevent . . . Delaware from expanding their sports betting schemes into other sports as long as it was authorized by State law. . . . At the same time, paragraph (1) does not intend to allow the expansion of sports lotteries into head-to-head betting . . . ." A152 (Senate Report). This excerpt from the Senate Report is unhelpful in two respects. First, it is at odds with PASPA's statutory language.

Because we do not find PASPA ambiguous, we find unpersuasive Delaware's argument that its sovereign status requires that it be permitted to implement its proposed betting scheme. See Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991) ("[A]bsent an unmistakably clear expression to alter the usual constitutional balance between the States and the Federal Government, [federal courts] will interpret a statute to preserve rather than destroy the States' substantial sovereign powers.") (internal quotations omitted). PASPA unmistakably prohibits state-sponsored gambling, 28 U.S.C. § 3702, subject to certain exceptions, 28 U.S.C. § 3704. Through PASPA, Congress has "altered the usual constitutional balance" with respect to sports wagering, although Delaware retains the right to implement a

Second, it contradicts Delaware's claim that single-game wagering is permitted. Similarly unhelpful are the many statements of individual legislators cited by Delaware because such "cherry-picked" statements cannot be deemed to reflect the views of other legislators, much less of a majority of those who enacted the statute. Szehinskyi v. Attorney General, 432 F.3d 253, 256, (3d Cir. 2005) ("[Appellant's] selective invocation of fragments of the floor debate is an object lesson in the perils of appealing to this particular kind of legislative history as a guide to statutory meaning. This case is a perfect illustration of the well-known admonition that what individual legislators say a statute will do, and what the language of the statute provides, may be far apart indeed. The law is what Congress enacts, not what its members say on the floor."). In sum, we conclude that "[t]he legislative history is more conflicting than the text is ambiguous," Wong Yang Sung v. McGrath, 339 U.S. 33, 49 (1950), and does not support the State's position.

20

sports wagering scheme "to the extent that the scheme was conducted" previously. Those words of limitation are not rendered nugatory by generalized notions of "state sovereignty."

Finally, Delaware argues that we cannot construe the language "to the extent that the scheme was conducted" so narrowly because doing so would render the PASPA exception a nullity. Certain aspects of Scoreboard were deemed impermissible by either Judge Stapleton, NFL, 435 F. Supp. at 1387-88 (holding that Touchdown II violated the lottery provision of the Delaware Constitution by utilizing a fixed-payoff scheme), or the Delaware Supreme Court, Op. of the Justices, 385 A.2d 695, 705 (Del. 1978) (striking down Football Bonus and Touchdown because they awarded prizes on a parimutuel basis in violation of the State's Constitution). Consequently, the State reasons that if it is confined to the exact scheme conducted in 1976, the exception would be illusory as applied to Delaware. The State argues that Congress could not have intended this result, especially when the legislative history makes clear that Delaware was one of only four states that were intended beneficiaries of the exception. See Conn. Nat'l Bank

v. Germain, 503 U.S. 249, 253 (1992) (courts should disfavor interpretations of statutes that render language superfluous). Delaware's reading overstates the narrowness of the exception provided by § 3704(a)(1). We do not hold that PASPA requires Delaware's sports lottery to be identical in every respect to what the State conducted in 1976. Certain aspects of the lottery may differ from the lottery as conducted in 1976, as long as they do not effectuate a substantive change from the scheme that was conducted during the exception

period. For example, as the State aptly noted – and the Leagues conceded – at oral argument, "to the extent the scheme was conducted" cannot mean that Delaware could institute a sports betting scheme for only four months as was done in 1976. Likewise, Delaware is neither limited to selling tickets at identical venues nor prohibited from allowing wagering on NFL teams that did not exist in 1976. Such de minimis alterations neither violate PASPA's language nor do violence to its central purposes, viz., to limit the spread of state-sponsored sports gambling and maintain the integrity of sports. By contrast, expanding the very manner in which Delaware conducts gambling activities to new sports or to new forms of gambling – namely single-game betting – beyond "the extent" of what Delaware "conducted" in 1976 would engender the very ills that PASPA sought to combat. In construing statutes, we consider the statute's overall object and policy, and avoid constructions that produce "odd" or "absurd" results or that are "inconsistent with common sense." Disabled in Action, 539 F.3d at 210 (internal citations omitted).

B.

In light of our reading of PASPA, we determine what scheme Delaware may conduct in 2009 with reference to the scheme it conducted in 1976. As Judge Stapleton held in NFL

– and as was not disputed in the proceedings before either the District Court or our Court in this matter – the only sports betting scheme "conducted" by Delaware in 1976 involved the three Scoreboard games. That betting scheme was limited to multi-game parlays involving only NFL teams. Thus, any effort

by Delaware to allow wagering on athletic contests involving sports beyond the NFL would violate PASPA. It is also undisputed that no single-game betting was "conducted" by Delaware in 1976, or at any other time during the time period that triggers the PASPA exception. See NFL, 435 F. Supp. at 1385 ("None of the [1976] games permits head-to-head or single game betting."). Because single-game betting was not "conducted" by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in § 3704(a)(1) of PASPA and thus prohibited under the statute's plain language.

Under federal law, Delaware may, however, institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976. Of course, we express no opinion regarding the legality of such a scheme under Delaware statutory or constitutional law.

For the foregoing reasons, we will vacate the order of the District Court and remand for proceedings consistent with this opinion.

23

N

Delaware Discussed

In class be prepared to discuss the following:

- the issues in each Delaware opinion
- the timeline of events
- the issues each side prepared to argue for each hearing
- the outcomes and their impact on gaming law policy

New Jersey

As you know from the reading above, PASPA was championed, in part by Senator Bradley from New Jersey. Additionally, New Jersey was afforded a special exemption under PASPA as follows:

> (3) a betting, gambling, or wagering scheme, other than a lottery described in paragraph (1), conducted exclusively in casinos located in a municipality, but only to the extent that--
>
> > (A) such scheme or a similar scheme was authorized, not later than one year after the effective date of this chapter, to be operated in that municipality; and
> >
> > (B) any commercial casino gaming scheme was in operation in such municipality throughout the 10-year period ending on such effective date pursuant to a comprehensive system of State regulation authorized by that State's constitution and applicable solely to such municipality; or

Note the parameters are that the exemption in 1992 was for any state provided that it had commercial casino gaming through a 10-year period prior to 1992 and it enacts legislation to conduct sports wagering in casinos within 1-year of enactment of PASPA. In 1992, the only state that could qualify for the exemption was New Jersey. However, New Jersey never enacted sports wagering legislation within 1 year of enactment of PASPA.

New Jersey's actions will be addressed in a separate class with separate reading materials.