



Supreme Court Ruling Gives Indian Casinos the Potential to Immediately Offer Sports Gambling

by Carson R. Cooper

On May 14, 2018, the United States Supreme Court carved out an opportunity for Indian gaming operations across the country, issuing a decision that facially allows tribes to immediately implement sports betting at their casinos. In *Murphy v. National Collegiate Athletic Association*, the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA), the federal statute that generally made sports gambling illegal, including sports gambling in facilities governed by the Indian Gaming Regulatory Act (IGRA).

The case was decided based on state sovereignty principles, and the Court's analysis proceeded exclusively upon the federal government's inability to command specific regulation by state governments. The Court reasoned that PASPA "commanded" the states to refrain from regulating sports gambling, an action disallowed by the constitutional principle known as the "anticommandeering rule." In this vein, the Court struck down the entirety of PASPA.

As a result, the Court left a scenario in which both states and tribes are immediately free to legalize and regulate sports gambling. While most states have laws on the books prohibiting sports gambling – as compelled by PASPA – tribes typically have no such laws, a fact left unaddressed by the Court. Because any state laws prohibiting sports gambling are regulatory in nature, they do not apply in Indian Country pursuant to *California v. Cabazon Band of Mission Indians*.

As a result, states are now required to repeal or otherwise pass statutes allowing sports gambling within the state. Many states have already initiated this process, with some states even passing laws pre-Murphy in anticipation of the Supreme Court legalizing sports betting. For example, the State of New York passed a law in 2013 allowing its four non-Indian owned casinos to offer sports gaming if PASPA was struck down. Those facilities now await the State Gaming Commission's implementation of regulations before they can open sports books.

At the time of publication, at least 20 states have already introduced some form of legislation to legalize sports gambling. Many others are openly discussing the possibility of introducing such legislation. Most experts predict that by the opening of the college football season in late August, several states will offer some form of sports gambling to the public.

In contrast, tribes can immediately implement sports gambling, subject only to constraints in each gaming tribe's

compact with the state. Gaming compacts – IGRA-required agreements between tribes and their respective states – set forth the specific types of gaming each tribe may engage in pursuant to IGRA. Depending on which state is party to a tribal gaming compact, the scope of what type of gaming is permitted varies widely. These differences in gaming compacts will inform whether a tribe can immediately offer sports gambling, or whether the tribe must seek either permission or an amendment to their compact before creating a sports book.

Some tribal-state gaming compacts authorize the tribe to conduct any "Class III gaming," which includes "all forms of gaming that are not Class I gaming or Class II gaming" – a definition that necessarily would include sports gambling. For example, each of the 17 New Mexico gaming tribes are party to a gaming compact allowing "any and all forms of Class III gaming." Likewise, Oregon has negotiated gaming compacts which permit tribes to "engage in any other Class III gaming activity that has been approved by the Nevada Gaming Commission" – a definition which includes sports gambling. Consequently, tribes in these states presumably have the right to immediately implement a sports book.

In contrast, the majority of states have insisted on narrowing the scope of permitted Indian gaming, specifically enumerating the types of Class III gaming allowed. For example, California has implemented a provision in its tribe-state gaming compacts that allows only the following gaming activities: (1) gaming devices (i.e. slot machines); (2) Any banking or percentage card games; (3) devices or games authorized under State law to the California Lottery; and (4) off-track wagering on horse races. Similarly, Michigan gaming compacts typically allow the following Class III games (1) craps; (2) wheel games; (3) roulette; (4) banking card games; and (5) electronic games of chance (i.e. slot machines). For those tribes which have specifically enumerated types of Class III gaming permitted in their compact, the tribe will need to conduct an analysis of the permitted gaming activities to determine whether sports gambling falls within those categories, which would allow the tribe to conduct sports gaming without running afoul of their compact.

At least one state contemplated that tribes could one day offer sports gambling. North Dakota gaming compacts typically include a provision allowing tribes to operate a "Sports Book except as prohibited by [PASPA.]" Consequently, with the Supreme Court's abdication of PASPA, North

“However inadvertently, the Supreme Court’s decision in Murphy has conferred a tremendous competitive advantage to tribes in the sports gambling industry. Yet that gift may be fleeting, as states scramble to legalize their own programs to compete with Indian casinos. For those tribes that wish to establish their own sports book, and offer this new gaming amenity in a relatively competition-free environment, tribal leaders must act quickly.”

Dakota tribes not only have the implicit right to engage in sports gambling – they have an express right to do so, guaranteed by their respective gaming compacts.

While some tribes may be restricted in their ability to immediately implement sports gambling due to the parameters of their respective gaming compacts, many tribes have a sword enabling them to prevent the state from implementing off-reservation sports gambling. This tool arises from compact-created gaming exclusivity, in which states agree to maintain tribal monopolies over certain types of Class III gaming in exchange for revenue-sharing payments. Such payments are typically a percentage of the net win at the casino derived from

Class III games of chance, and have been used by tribes to protect their gaming exclusivity within a specific geographic scope.

These exclusivity clauses may create a legal mechanism preventing states from implementing any sports gaming within the geographical scope defined by the compact. For example, the Oneida Indian Nation has an exclusivity agreement with the State of New York, prohibiting the state from legalizing, authorizing, or consenting to or engaging in “Casino Gaming” – which includes sports gambling – within a specific geographic area comprised of ten counties surrounding the Oneida Nation’s territory. As a result, the Oneida Nation has a legal right to demand exclusivity with respect to sports gambling within its exclusivity territory. A majority of gaming compacts have a similar exclusivity provision, and tribes should review their compact’s available legal remedies to determine whether they can prevent states from legalizing sports gambling within their own exclusivity zone.

Left undecided is the ability of tribes to conduct alternative forms of sports gambling, such as off-site online or mobile sports gambling, or other forms of sports gambling aimed at off-reservation customers. States will undoubtedly oppose such efforts, leaving the landscape of online and mobile sports gambling uncertain and sure to result in litigation. Nevertheless, the ability of tribes to offer onsite sports gambling is immediate and relatively clear.

However inadvertently, the Supreme Court’s decision in *Murphy* has conferred a tremendous competitive advantage to tribes in the sports gambling industry. Yet that gift may be fleeting, as states scramble to legalize their own programs to compete with Indian casinos. For those tribes that wish to establish their own sports book, and offer this new gaming amenity in a relatively competition-free environment, tribal leaders must act quickly. Tribes should review their gaming compacts, consult with their gaming attorneys, and make a quick and strategic determination whether to take advantage of this temporary competitive opportunity. ♣

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