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A sporting chance in the US

In the US an ever-increasing number of US states are introducing legislation to legalise fantasy sports betting, and the US Supreme Court has agreed to hear New Jersey's case against PASPA. Greg Gemignani and Kate Lowenhar-Fisher, of Dickinson Wright, consider the events that have led to the US Supreme Court recently agreeing to hear New Jersey's case on the legality of PASPA, which prohibits states from authorising and regulating sports wagering.

As most sports betting enthusiasts know, Nevada is the only place in the United States where you can legally bet on sports¹. What many people don't know is why and why it may change in the near future. Sports wagering is generally prohibited throughout the United States. In the early 20th century, particularly after the alleged corruption of the 1919 Major League Baseball World Series by gambling rang with ties to organised crime, laws prohibiting sports wagering swept through each state of the United States.

In 1992, the United States Congress enacted the Professional and Amateur Sports Protection Act ('PASPA'), which sought to stop the spread of state-regulated and state-sponsored sports wagering. The intent of the drafters of PASPA was to freeze sports wagering in the United States. In doing so, Congress successfully prohibited almost all US states from authorising and regulating sports wagering, thus essentially freezing the supply side of legal sports wagering providers in the United States.

While PASPA addressed the supply side of sports wagering, it did nothing to address the demand for sports wagering. While research and reports of the sports wagering market in the United States vary widely, even conservative estimates project the size of the market to be measured in the hundreds of billions of dollars. With Nevada accounting for about four billion dollars of the US sports betting handle, and Delaware and Montana (two of the other states exempted under PASPA) collectively accounting for much less than a billion dollars, the vast majority of sports wagering is conducted by suppliers in violation of federal and state laws in the US.

Fantasy sports and the DFS phenomenon

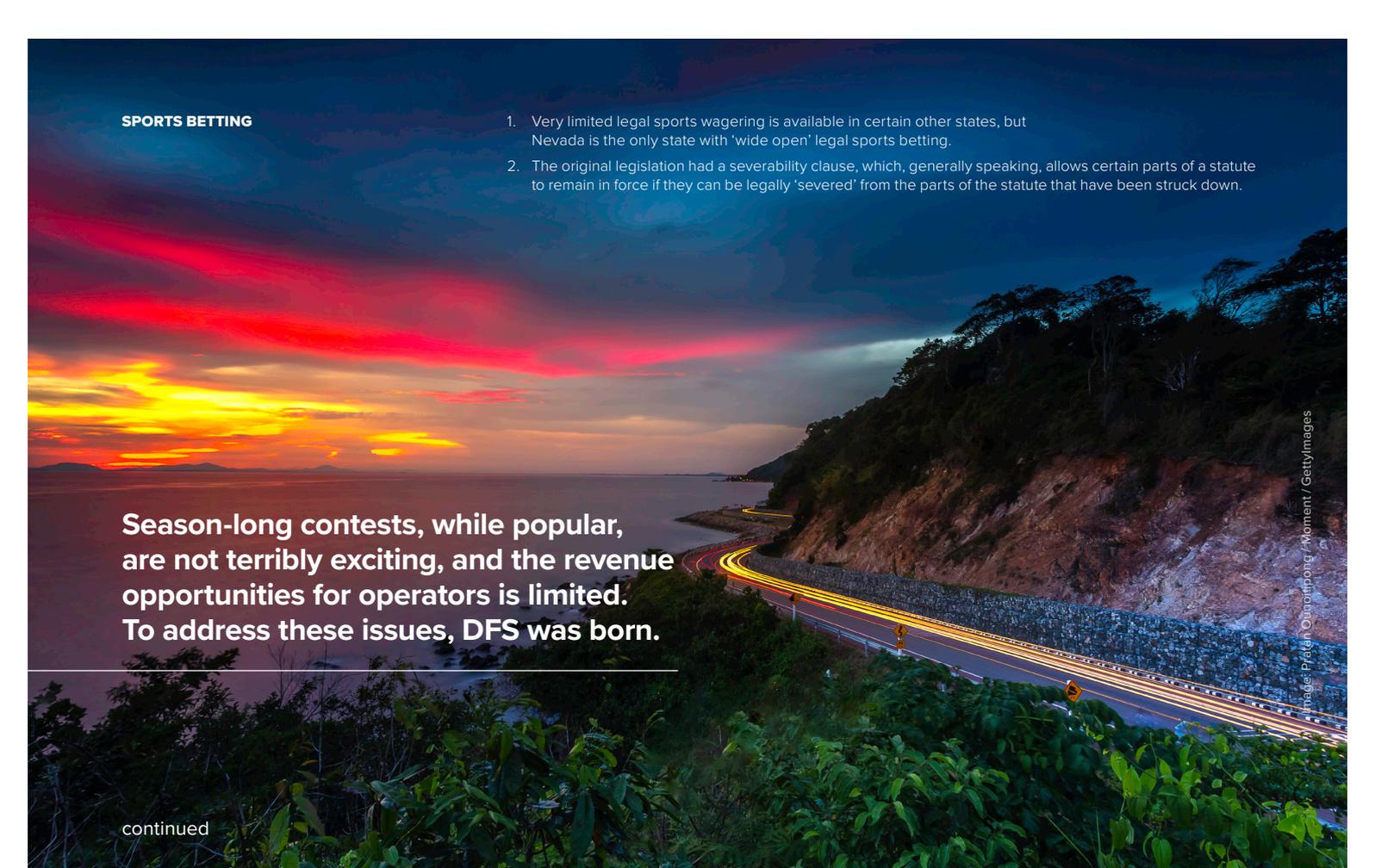
From the insatiable demand for sports wagering arose the daily fantasy sports ('DFS') contest. Season-long fantasy sports contests had been a popular recreational pastime among friends and co-workers for more than two decades. Such contests were limited and time consuming prior to the use of

internet technology because league members had to communicate lineups, agree on lineups, and score their teams each week based on statistics published in newspapers. Wins and losses would then be confirmed and recorded by a league commissioner or organiser. Season-long fantasy sports received significantly more interest once online sites were developed to aid in automatic communication of lineups and scoring. The activity became so popular that it was exempted from the funds transfer prohibitions of the Unlawful Internet Gambling Enforcement Act of 2006 (the 'UIGEA').

After enactment of the UIGEA, many more online season-long fantasy sports suppliers began offering products online. The argument that the activity was not gambling was twofold: first it was the skill of constantly actively managing player lineups and rosters over the course of a season that primarily determined the outcome of the event, and second, the UIGEA exempted fantasy sports from the definition of a bet or wager for which funds transfers

SPORTS BETTING

1. Very limited legal sports wagering is available in certain other states, but Nevada is the only state with 'wide open' legal sports betting.
2. The original legislation had a severability clause, which, generally speaking, allows certain parts of a statute to remain in force if they can be legally 'severed' from the parts of the statute that have been struck down.



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were prohibited. These arguments went untested by courts and law enforcement.

Season-long contests, while popular, are not terribly exciting, and the revenue opportunities for operators is limited. To address these issues, DFS was born. DFS allowed players to pick a fantasy lineup and win prizes on a daily or weekly basis. The arguments that DFS is not gambling echo the arguments for season-long fantasy contests - namely, that fantasy sports contests are exempted from the funds transfer prohibitions of the UIGEA and such contests are expressly legal in the US, and the skill of contestants in picking a team determines the outcome of the event.

The flaws with the DFS arguments are that the UIGEA is not a criminal gambling statute, it does not define what constitutes illegal gambling and it does not preempt state law or other federal laws to legalise any form of gambling. Even if DFS meets the funds transfer exemptions under the UIGEA, it does not mean that DFS contests are not gambling under other federal and state laws. The skill argument is also a weak argument. While season-long contest operators argued that the high volume of managerial decisions was the dominant factor in determining the outcome of a game, there is no similar constant and evolving managerial

decision making in a DFS contest. A DFS contest is similar to other sports bets in that participants make their picks and then wait for scoring based on the performance of real athletes to see if they have won. This is not to say there is no skill in DFS or other forms of sports wagering, but the contestant has no control over how the athletes selected by them will perform to calculate the score that determines wins or losses.

These weaknesses in the DFS arguments led to the issuance of no fewer than ten opinions from state law enforcement agencies that DFS contests were illegal gambling. In response, leaders in the DFS industry sought to change state laws to exempt DFS from gaming regulations or to have DFS lightly regulated by state gaming authorities. Thus far, the effort has resulted in more than a dozen states enacting state laws to permit DFS contests in their states.

Another issue for DFS is whether PASPA prohibits states from authorising and regulating the activity. Specifically, PASPA prohibits states from authorising or regulating any lottery, sweepstake, or other wagering scheme based directly or indirectly on the outcome of any professional or amateur sporting contest or upon the performance of athletes in such contests. PASPA also provides standing for affected sports

leagues to enjoin states and operators from engaging in such activities. In 2016, there were numerous reports that the NCAA was preparing such a suit. In response, the major DFS companies voluntarily ceased all contests based on the performance of NCAA athletes, thus removing standing from the NCAA to bring such an action. Whether DFS is legal or illegal has been the subject of substantial debate. What is clear is that DFS has been a catalyst for revisiting laws regarding sports wagering in the United States.

Which brings us to New Jersey.

New Jersey - part one

PASPA contains a (very) thinly veiled exemption for the state of New Jersey. The exemption allowed any state with ten years of regulated casino gaming in a municipality to enact legislation to permit sports betting in such casinos within one year of the enactment of PASPA. New Jersey was the only state that could qualify for the exemption. New Jersey immediately began efforts to enact sports wagering legislation. However, those opposed to sports wagering, such as US Senator Bill Bradley, fought to prevent such legislation from passing. Ultimately, those opposed to sports wagering were successful in stalling and fighting legislation to permit sports wagering in New Jersey, and

the PASPA exemption expired without new legislation being enacted there.

New Jersey - part two

While the effort in the 1990s to legalise sports wagering in New Jersey failed, it was never far from the minds of those in the New Jersey State legislature. In 2008, New Jersey again took up sports betting. A member of the State legislature filed an action against the US Department of Justice challenging the constitutionality of PASPA. A federal court dismissed the action for lack of standing, stating that a member of the legislature did not represent the State. In 2009, New Jersey Governor Corzine indicated that he was inclined to join the suit and satisfy the standing requirement. Simultaneously, the Governor was in talks with the NFL to permit New Jersey to host the Super Bowl in 2014. The Governor never signed onto the suit, and in early 2010 the NFL announced that the 2014 Super Bowl would, for the first time, be held in an outdoor stadium in a northern location... in New Jersey.

Governor Corzine's term ended in 2010, and he was succeeded by Governor Christie. Governor Christie remained uncommitted to sports wagering legislation, but he invited a state-wide referendum to allow the voters of New Jersey to address the issue. In 2011, the state-wide referendum occurred, and New Jersey voters expressed their desire to have legal sports wagering offered in their State. The New Jersey legislature quickly enacted a law to support the referendum that both (i) repealed the State's sports wagering ban as it applied to casinos and horseracing facilities, and (ii) authorised state gaming regulators to enact regulations governing sports wagering.

The lawsuits - round one

Just as they had done in 2009, the major sports leagues and the NCAA filed suit under PASPA to enjoin New Jersey from acting on its newly-minted statutes. The Federal District Court in New Jersey heard the matter and agreed with the leagues that PASPA prohibited the actions of the State. New Jersey appealed the Federal District Court decision and presented its case to the Third Circuit Court of Appeals. The Third Circuit agreed with the District Court. New Jersey appealed the decision of the Third Circuit to the

US Supreme Court, but the US Supreme Court declined to hear the matter.

New Jersey lost.

The lawsuits - round two

Round one was not a total loss. In their opinions the federal courts gave New Jersey a veritable roadmap for overcoming a PASPA challenge: the courts stated that PASPA does not require New Jersey to prohibit sports wagering; it merely prohibits the State from authorising and regulating sports wagering. The New Jersey legislature picked up on this idea and passed legislation to decriminalise sports wagering at casinos and race tracks. Governor Christie vetoed the legislation. Shortly after the Governor vetoed the legislation, a couple of interesting things happened. Governor Christie declared that the State's existing laws prohibiting the operation of sports betting would not be enforced against State gaming licensees, and the New Jersey Attorney General's Office took the position that the Third Circuit Court opinion struck down only certain provisions of the New Jersey statutes under the legal concept of 'severability'. In a nutshell, it was the opinion of the State that the Third Circuit Court decision struck down the portion of the legislation regulating sports wagering and not the limited repeal of the State's sports wagering prohibitions. As such, the New Jersey Attorney General's Office took the position that casinos and race tracks could begin taking sports bets at the start of the next NFL season.

As one might expect, the leagues were not pleased and again filed an action pursuant to PASPA to prohibit anyone from relying on the State's sports wagering laws to take sports wagers. The District Court once again sided with the leagues, identifying this attempt as another way to authorise sports wagering in violation of PASPA. Again New Jersey filed an appeal. The Third Circuit Court of Appeals heard the matter before a three-judge panel and ultimately agreed with the District Court. New Jersey once again appealed, requesting that the three-judge panel opinion be vacated and the matter be considered by the entire panel of judges for the Third Circuit Court of Appeals. The Third Circuit Court of Appeals agreed, and a second appeal was heard before the panel. Months passed, and finally, the Third Circuit

Court of Appeals issued a thorough opinion supporting the District Court, upholding PASPA and enjoining legal sports wagering activities in New Jersey.

Did New Jersey lose again?

New Jersey again requested that the matter be heard by the US Supreme Court. In 2017, the new Solicitor General of the United States reviewed the matter and opined that the US Supreme Court should not grant New Jersey a hearing on the matter.

Today

Despite the Solicitor General's opinion, the US Supreme Court has agreed to hear the matter. Proponents of sports wagering are hoping that the US Supreme Court declares PASPA to be unconstitutional in total, thus allowing states to permit and regulate sports wagering. In anticipation, several state legislatures are introducing and debating bills to regulate sports wagering. Opponents of sports wagering believe the US Supreme Court will uphold PASPA in its entirety, or, at a minimum, will uphold the provisions prohibiting anyone from relying on new state laws to conduct sports wagering. Another possible outcome is that Congress beats the US Supreme Court to the punch - although that is hard to envision given the current state of the US Congress. Still, optimism is high that the current state of affairs will result in the opportunity for regulated sports wagering in the US, either through a Supreme Court opinion or through new federal legislation.

However, even if PASPA is deemed unconstitutional in whole, that does not mean legal sports wagering will be offered nationally in the US. If PASPA falls, then each state will be permitted to enact sports wagering regulation, but not all states will. Even if states authorise sports wagering, such activities will be limited to occurring only on an intra-state basis because the Federal Wire Act still prohibits the transmission of sports wagers in interstate or foreign commerce. Even with the Federal Wire Act limitations, for the first time in a generation, US sports bettors have a sporting chance of having legal and regulated sports betting. They have New Jersey's tenacity to thank.