

Federal Action on Sports, E-Sports, and Internet Gambling

On May 14, 2018, the U.S. Supreme Court issued its opinion in *Murphy v. NCAA*, which involved a constitutional challenge to the federal prohibition on sports betting. In a 6-3 decision authored by Justice Samuel Alito, the Court held that the Professional and Amateur Sports Protection Act (“PASPA”) is unconstitutional. As a result, state governments are free to determine whether sports betting is legal within their borders and tribal governments can conduct sports betting pursuant to the Indian Gaming Regulatory Act (IGRA).

Importantly for Indian Country, the Court ruled that the entire text of PASPA was unconstitutional. The Court “h[e]ld that no provision of PASPA is severable from the provision directly at issue in these cases,” and thus the entire law is void—including several references to Indian tribes and IGRA within the Act.

The opinion makes clear that, unless Congress acts to prohibit or regulate sports betting directly, states and tribal governments are now free to determine the legality of sports betting. In the short time since the Court issued the *Murphy* decision, the states of New Jersey and Delaware joined Nevada with full-scale sports betting. Pennsylvania, New York, Rhode Island, Mississippi, and West Virginia will soon implement recent laws authorizing full sports betting. More than a dozen other states are actively considering laws to join these 8 states.

Sports Betting Under IGRA. Under IGRA, tribal governments are free to conduct Class II games without a tribal-state compact, but pursuant to an NIGC-approved tribal gaming ordinance. IGRA (and NIGC regulations) define Class II gaming as bingo, games similar to bingo (used with technologic aids), and non-banked card games that are explicitly authorized under state law or are not expressly prohibited by the state—but must be played in line with state regulatory limits, including hours of operation and pot sizes.

All forms of gaming that do not fall under the definition of Class I gaming (traditional forms of Indian gaming) or Class II gaming are considered Class III gaming—and can only be conducted pursuant to an approved tribal-state gaming compact. While the text of IGRA was silent regarding sports betting, NIGC regulations define “any sports betting and parimutuel wagering...” as Class III gaming. (25 C.F.R. Part 502.4 (1992)).

Tribes have fought for two decades to protect and broaden the definition of Class II gaming to dull the impact of the U.S. Supreme Court’s 1996 decision in *Seminole Tribe of Florida v. Florida*, which ruled that tribal governments cannot enforce IGRA’s requirement that states negotiate gaming compacts in good faith. Some states have used the *Seminole* decision to veto Class III gaming by refusing to negotiate with tribes, and other states have used the added leverage from *Seminole* to press for higher revenue sharing agreements.

Most traditional forms of sports betting will be treated as Class III gaming under IGRA. (See NIGC regulation, 25 CFR Part 502.4(c)). However, there are many types of sports bets that go beyond traditional single game point spread bets, such as sports pools, elaborate parlays, mixed sport wagers, futures bets, proposition bets, and more. These less traditional wagers or potentially newly engineered “sports-related” or “sports-themed” games could arguably be classified as Class II games under IGRA. However, more details on the types of games under consideration and additional legal analysis must be conducted.

Next Steps. In the immediate future, states will continue to implement and consider sports betting laws and regulatory structure within their borders and tribes will continue to analyze approaches to sports betting under IGRA.

Congress is not expected to act on the issue of sports betting in the short remaining legislative days of the 115th Congress. While several sports gaming bills have been introduced, none have received a committee hearing. However, some oversight and consideration of a federal role in sports betting will come from social conservatives and the sports leagues, among others—potentially in the 116th Congress.

In the wake of the Court’s decision in *Murphy*, several lawmakers and professional sports leagues issued statements suggesting that Congress should enact limits on sports betting. Retiring Senator Orrin Hatch (R-UT), one of the original authors of PASPA, stated that “we cannot allow this practice [of Internet sports betting] to proliferate amid uneven enforcement and a patchwork race to the regulatory bottom. At stake here is the very integrity of sports.” Hatch then stated his intent to introduce legislation to impose federal regulatory limits on sports betting.

Major League Baseball noted that it will seek “proper protections for our sport, in partnership with other professional sports.... Our most important priority is protecting the integrity of our games.” The NFL’s statement noted its intent “to call on Congress again, this time to enact a core regulatory framework for legalized sports betting.”

Indian Country Impacts and Policy Position. Indian Country is well-prepared for the federal debate on sports betting if and when it comes. Indian Country has a sound seat at the decision making table with regard to federal legislative proposals that could impact sports and fantasy sports betting and Internet gaming.

In 2017, NIGA established a Sports Betting Task Force that has met several times over the past six months. The Task Force drafted a Sports Betting Resolution, that was later adopted by NIGA at the 2018 Tradeshow & Convention in April. The Resolution outlines principles that NIGA’s Member Tribes will press Congress to include in any federal action to regulate or impact sports betting on the federal level. These principles include:

- Tribes must be acknowledged as governments with authority to regulate and operate gaming; and
- Tribal government Sports Betting revenues shall not be subject to taxation; and
- Customers may access tribal government Sports Betting sites as long as Sports Betting is legal where the customer is located; and
- Tribal rights under the IGRA and existing tribal-state gaming compacts must be protected; and
- IGRA should not be opened up for amendments; and
- Tribal governments must receive a positive economic benefit in any federal or state Sports Betting legalization proposals; and
- Indian tribes possess the inherent right to opt in to a federal regulatory scheme to ensure broad-based access to markets; and
- Tribal governments acknowledge the integrity and protection of the game and patron protections for responsible gaming are of the utmost importance; and
- Any consideration of the use of mobile, on-line or internet gaming must adhere to these principles