September 24, 2001

OPINION
OF
PATRICIA M. MADRID
Attorney General

Opinion No. 01-01

BY: Alvin R. Garcia
Assistant Attorney General

TO: The Honorable Representative Marsha C. Atkin
New Mexico House of Representatives
3116 21st Avenue
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The Honorable Senator Timothy Jennings
New Mexico Senate
P.O. Box 1797
Roswell, NM 88202-1797

QUESTION:

Does Public Law 102-559, the federal Professional and Amateur Sports Protection Act ("PASPA"), 28 USCA §3701 et seq., prohibit the State of New Mexico from authorizing the establishment of pari-mutuel gambling on Keirin style velodrome bicycle racing pursuant to the Bicycle Racing Act, 1978 NMSA, §60-2D-1 et seq.?

CONCLUSION:

Yes. For the reasons expressed below, we conclude that PASPA operates to prohibit the State of New Mexico from authorizing the commencement of pari-mutuel gambling on Keirin style velodrome bicycle racing pursuant to the Bicycle Racing Act, 1978 NMSA, §60-2D-1 et seq.

FACTS:

The 1991 New Mexico Legislature enacted the Bicycle Racing Act, which created the Bicycle Racing Commission ("BRC") and authorized the establishment of pari-mutuel gambling on velodrome bicycle racing. 1978 NMSA 60-2D-1 et seq. The Bicycle Racing Act became effective on July 1, 1992. See 1991 NM Laws 233. The BRC is authorized

under state law to regulate Keirin style velodrome bicycle racing. Id. BRC members have met at various times since 1992, and as of 1998 had drafted regulations for the administration of pari-mutuel gambling on Keirin style velodrome bicycle racing in New Mexico. The draft regulations have never been formally adopted and pari-mutuel gambling on Keirin style velodrome bicycle racing has never occurred in New Mexico. There is no licensed velodrome in New Mexico in which to conduct Keirin style velodrome racing.

Congress enacted PASPA in 1992 to prohibit the spread of gambling on professional and amateur sporting events. It states:

> 3702. Unlawful sports gambling
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> 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.

On its face, the plain terms of that law would prohibit bicycle racing. Exemptions to the Act are set forth at 28 USCA §3704, which states in relevant part as follows:

> 3704. Applicability
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> (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 pari-mutuel 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; [Emphasis added.][1]

[1] The exceptions provided in Section 3704 (a)(3) and (4) are not quoted because they apply only to casinos in municipalities [(a)(3)] and pari-mutuel animal racing or jai-alai games [(a)(4)].

ANALYSIS:

The federal statute broadly prohibits state sponsored or authorized sports gambling activities, with certain exemptions for established sports gambling activities in states. Established sports gambling activities would only be exempt if the sports gambling activity was: (1) authorized and in operation at any time during the period beginning January 1, 1976, and ending August 31, 1990; or (2) authorized by state statute as in effect on October 2, 1991; **and** (3) **actually conducted** in that State at any time during the period beginning September 1, 1989, and ending October 2, 1991. Id.

The New Mexico Bicycle Racing Act was enacted in 1991, however it did not take effect until July 1, 1992. See 1991 NM Laws 233. Therefore, activities conducted under the Act are neither covered by the exemption in 28 USCA §3704(a)(1) nor within the exemption at 28 USCA § 3704(a)(2)(A). In addition, the second mandatory part of the exemption at 28 USCA § 3704(a)(2)(B) requires that pari-mutuel gambling on Keirin style bicycle racing must actually have been conducted prior to October 2, 1991. As noted above, such racing had not occurred by then, nor indeed has it ever occurred in New Mexico. Thus, this particular exemption is also not applicable.

There has been some discussion regarding whether Congress intended for PASPA to apply to New Mexico's pari-mutuel Keirin velodrome bicycle racing initiative.[2] Specific exemptions may have been discussed for New Mexico Keirin pari-mutuel bicycle racing, but it is clear that any such exemption was never inserted into the final federal legislation before it was enacted by Congress and signed by the President.

In an after-the-fact statement, after the full congressional enactment of the legislation, Senator Dennis DeConcini, (D, Arizona) the sponsor of the legislation, asserted that the New Mexico initiative would fall under the exemptions at 3704(a)(2) for established sports gambling activities.[3] Senator DeConcini apparently believed that the New Mexico pari-mutuel gambling initiative would not be affected by PASPA because of the existing New Mexico statutory authorization for pari-mutuel gambling on velodrome bicycle racing. The discussions concerning the application of PASPA to New Mexico do not, however, address the fact that state sanctioned gambling on velodrome bicycle racing had never actually occurred in New Mexico. As discussed above, pari-mutuel gambling on

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[2] The Congressional record, in 1992, reflects that Senator Pete Domenici (N.M.) and Senator Dennis De Concini (A.Z.), the primary Senate Bill 474 sponsor, discussed the effect of the recently enacted U.S. Senate version of PASPA and New Mexico's statutory authorization for pari-mutuel velodrome bicycle racing. See 138 Cong. Rec. S17434-0 (Senate Proceedings and Debates of the 102nd Congress, Second Session Wednesday, October 7, 1992).

[3] 138 Cong. Rec. S18332-01, (Comments by Senator Dennis DeConcini A.Z. Senate Proceedings and Debates of the 102nd Congress, Second Session Thursday, October 29, 1992)

Keirin style velodrome bicycle racing has never been conducted in New Mexico and was not conducted prior to October 2, 1991.[4]

The controlling consideration in construing a federal statute is ascertainment of the legislative intent. Such legislative intent is determined primarily from the language contained in the statute. The rules of statutory construction for federal statutes require legislative intent to be ascertained from the legislative history only if the statute at issue is ambiguous or unclear on its face. If the statute is clear and unambiguous, then inquiry into the meaning of the statute ends. "In interpreting a statute, the court looks first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of congress; then, if the language of the statute is unclear, the court may look to the traditional canons of statutory interpretation and to the statute's legislative history." Sperling v. White, 30 F.Supp.2d 1246, 1249, (C.D. Cal. 1998). Where the statutory command is straightforward, there is no reason to resort to legislative history. U.S. v. Gonzales, 520 U.S. 1, 6, (1997). "There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear." Ratzlaf v. U.S., 510 U.S. 135, 146 (1994).

In addition, the specific October 1992 discussions concerning the application of PASPA to the New Mexico Bicycle Racing initiative occurred after the Senate and full congressional passage of PASPA. Thus they are not reflective of congressional intent at the time of enactment. Rather, the discussions reflect subsequent interpretations of the application of PASPA and do not represent legislative intent of the Congress at the time it originally passed PASPA. "Post enactment 'legislative history' becomes of absolutely no significance in statutory interpretation when the subsequent Congress, or House Committee, takes on the role of a Court and in its reports asserts the meaning of a prior statute." U.S. ex rel. Long v. SCS Business & Technical Institute Inc. 173 F.3d 870, 878 (1999). Therefore, none of the post enactment congressional discussions of PASPA are proper legislative history.[5]

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[4]We understand that it has also been asserted that the New Mexico bicycle racing initiative should fall under the exemption for pari-mutuel animal racing which exempts the horse racing industry from PASPA. 28 USCA § 3704(a)(2)(B). We do not believe that this exemption applies to professional or amateur human sports participants, since the term "animal" cannot be interpreted to include human beings. See Black's Law Dictionary 87 (6th ed. 2001) (defining "animal" as non-human, animate being which is endowed with the power of voluntary motion. Animal life other than man.) (emphasis added).

Additionally, and again after the Senate passage of PASPA, the sponsoring senator similarly stated; "It is my interpretation of this prohibition that it would not apply to pari-mutuel bicycle racing because it does not constitute a 'game.'" 138 Cong. Rec. S17434-0 (Senate Proceedings and Debates of the 102nd Congress, Second Session Wednesday, October 7, 1992.) We believe this to be an incorrect interpretation of the term "game" in its common usage. See Black's Law Dictionary 346 (5th ed. 1983) (defining "Game" as a sport, pastime or contest. A contrivance which has for its object to furnish sport, recreation, or amusement.)

[5] Legislative statements subsequent to enactment of a statute are not part of the legislative history but are merely entitled to some consideration as being secondarily authoritative expression of expert opinion. See Bobsee Corp. v. U.S. 411 F.2d 231, 237 (1969). Statements as to legislative intent made by legislators subsequent to the enactment of statute are typically not entitled to great weight, but are entitled only to consideration as an expert opinion concerning the statute's proper interpretation. See Barnes v. Cohen, 749

In conclusion, we believe that, on its face, PASPA clearly prohibits states from allowing the commencement of gambling on amateur or professional sporting events unless such gambling had actually occurred between September 1, 1989 and October 2, 1991. In this case, because no pari-mutuel gambling on Keirin style velodrome bicycle racing actually took place in New Mexico during that time frame, PASPA clearly and unambiguously prohibits New Mexico from allowing the commencement of pari-mutuel gambling on Keirin velodrome bicycle racing.

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F.2d 1009, 1015 (1984). The Senators' 1992, post-enactment, discussions regarding the application of PASPA to the New Mexico Keirin Bicycle Racing initiative failed to address the fact that no such racing had ever occurred in New Mexico. Thus even when considered as "expert opinion," the Senators' discussions failed to consider this dispositive fact and cannot be used to effectively override the statute's plain meaning.