

SPORTS BETTING IN THE BLACK & BLUE DIVISION: TRIBES v. STATES

Andrew Adams III¹
Hogen Adams PLLC

2019 Indian Law Conference
State Bar of Wisconsin Indian Law Section
Thursday, August 1, 2019
Wilderness Resort
Wisconsin Dells, Wisconsin

I. Introduction

- a. *Murphy v. National Collegiate Athletic Association*² addressed the question of whether the Professional and Amateur Sports Protection Act (“PASPA”) was invalid under the anticommandeering doctrine. The Supreme Court determined that PASPA’s express prohibition against states authorizing or licensing sports gambling was invalid. It then went on to strike down the entirety of PASPA, based on its severability jurisprudence. Two provisions that it struck down prohibited states and private parties from sponsoring, operating, or promoting sports gambling schemes.
- b. I will do a brief summary of the legality of sports betting in Illinois, Michigan, Minnesota, and Wisconsin and what this means for federally recognized tribes located in each state.
- c. The Indian Gaming Regulatory Act of 1988 (“IGRA”) is as much a land tenure law as it is a gambling law.³ IGRA’s statutory text mentions:
 - i. “Indian Lands” 34 times;
 - ii. “on Indian lands” 22 times;
 - iii. “Gaming on Indian Lands” 8 times;
 - iv. “Conducted on Indian Lands” 4 times;
 - v. “located on Indians” 2 times; and
 - vi. “operated on Indian lands” 2 times.

II. Illinois

- a. Public Act 101-0031⁴ was signed by Governor Pritzker on June 28, 2019 and calls for \$45B capital plan to rebuild school, roads, and bridges within the state that will be funded through new taxes:
 - i. \$150M from video gaming terminal taxes;

¹ Thank you to Peter Rademacher of Hogen Adams PLLC for assisting me with the research that went into this outline.

² *Murphy v. National Collegiate Athletic Association*, 138 S.Ct. 1461, 2018 WL 2186168 (2018).

³ 25 U.S.C. §2701 et al.

⁴ See <http://ilga.gov/legislation/publicacts/101/101-0031.htm> (last visited on July 30, 2019).

- ii. \$10M from sports wagering revenue;
 - iii. \$500M upfront license fees from casino and sports betting;
 - iv. \$30M tax on parking garages and lots;
 - v. \$68M increase on real estate transfer tax on commercial properties;
 - vi. \$45M from removing the sales tax exemption on traded-in property valued above \$10,000; and
 - vii. \$156M from an increase on the cigarette tax by \$1 per pack.⁵
- b. New law allows for a massive downtown Chicago casino, and a number of smaller casinos scattered across the state.
 - c. New law allows for full-fledged sports betting within the state with the caveat of it being limited to brick & mortar casinos for the first 18 months with full-fledged online sports betting occurring afterwards.
 - d. There are no federally-recognized Indian tribes located within Illinois.

III. Michigan

- a. PROPOSAL 04-1: A PROPOSAL TO AMEND THE STATE CONSTITUTION TO REQUIRE VOTER APPROVAL OF ANY FORM OF GAMBLING AUTHORIZED BY THE LEGISLATURE:

The legislature may authorize lotteries and permit the sale of lottery tickets in the manner provided by law. No law enacted after January 1, 2004, that authorizes any form of gambling shall be effective, nor after January 1, 2004, shall any new state lottery games utilizing table games or player operated mechanical or electronic devices be established, without the approval of a majority of electors voting in a statewide general election and a majority of electors voting in the township or city where the gambling will take place. *This section shall not apply to gaming in up to three casinos in the City of Detroit or to Indian Tribal Gaming.*⁶

- b. The 1996 Act states that all forms of casino gambling are legal in the Detroit casinos.⁷ The 1996 Act does not explicitly authorize sport betting but it does not prohibit it either. Additionally, the 1996 Act delegates authority to the MGCB to approve new forms of gaming within the Detroit casinos under its

⁵ “All bets are on – Pritzker signs \$45B capital plan, massive gambling expansion”, Mitchell Armentrout, Chicago Sun Times, June 28, 2019, (<https://chicago.suntimes.com/2019/6/28/18848959/pritzker-capital-plan-gambling-expansion-chicago-casino-sports-betting>; last visited July 30, 2019).

⁶ Michigan Constitution of 1963, Art. IV, § 41 [emphasis added]. ([http://www.legislature.mi.gov/\(S\(yad2xizjvj015yunmjbeacfe\)\)/mileg.aspx?page=GetObject&objectname=mcl-Constitution](http://www.legislature.mi.gov/(S(yad2xizjvj015yunmjbeacfe))/mileg.aspx?page=GetObject&objectname=mcl-Constitution); last visited July 30, 2019).

⁷ MCL 432.203 (https://www.michigan.gov/documents/PA69_56070_7.pdf; last visited on July 30, 2019).

administrative powers.⁸ Anyone could make a reasonable argument that sports betting is a “traditional casino game” and that the MGCB has the authority to promulgate rules to regulate this new activity.

- c. A sports betting bill has been circulated within the Michigan Legislature and there is a great chance that it will be taken up this fall.
- d. 1993 Compact Tribes within Michigan all have language within their compacts that allows the Governor to authorize “additional Class III games.”⁹
- e. Post-1993 Compact Tribes within Michigan all have language within their compacts that allow for “Any other Class III game that lawfully may be operated by a person licensed to operate a casino pursuant to the Initiated Law of 1996, MCL 432.201 *et seq.*”¹⁰
- f. 1993 Compact Tribes within Michigan must negotiate compact amendments to authorize sports betting as a Class III activity and Post-1993 Compact Tribes must wait until the Michigan Gaming Control Board authorizes the Detroit casinos to offer sports betting.

IV. Minnesota

- a. 2018 and 2019 have seen two sports betting bills introduced to the Minnesota Legislature, Rep. Pat Garofalo’s Safe and Regulated Sports Gambling Act of 2019¹¹ and Sen. Roger Chamberlain’s SF 1894.¹²
- b. In the *Murphy* case, the decision means that individual state laws control whether sports betting is legal. Under current Minnesota law,¹³ sports betting is illegal.
- c. Yet, the ironic thing is that “sports tipboards” have been allowed by law in Minnesota since 2012.¹⁴ Tipboards are defined as:

... a board, placard or other device containing a seal that conceals the winning number or symbol, and that serves as the game flare for a tipboard game. A sports-themed tipboard is a board, placard, or other device that

⁸ MCL 432.204(17)(d)(i) (https://www.michigan.gov/documents/PA69_56070_7.pdf; last visited on July 30, 2019).

⁹ Section 3(B) of each of the 1993 Compact Tribes in Michigan. (https://www.michigan.gov/mgcb/0,4620,7-351-79129_79729-245321--,00.html; last visited on July 30, 2019).

¹⁰ Section 3(A) of each of the post-1993 Compact Tribes in Michigan, (https://www.michigan.gov/mgcb/0,4620,7-351-79129_79729-245321--,00.html; last visited on July 30, 2019).

¹¹ <https://www.scribd.com/document/399572698/Safe-and-Regulated-Sports-Gambling-Act-of-2019>

¹² https://www.senate.mn/bills/index.php?ls=&billnum=sf%201894&all_sessions=y&display_links_on_ly=&special_session=

¹³ Minn. Stat. §§ 609.75, 609.76.

¹⁴ Minn. Stat. § 349.12, subd.34.

contains a grid of predesignated numbers for which the winning numbers are determined in whole or in part by the numerical outcome of one or more professional sporting events, serves as the game flare for player registration, but is not required to contain a seal. For a sports-themed tipboard, the winning numbers must be determined solely by the numerical outcome.¹⁵

- d. Under a *Cabazon* analysis,¹⁶ it seems disingenuous for the State of Minnesota to argue that all forms of sports betting are illegal within the state given the authority to offer sports tipboards. In my opinion, none of the tribes located within Minnesota have challenged the state's position because of their united policy against any expansion of gambling within the state (especially their vehement opposition to mobile or internet based gambling).
- e. Despite the issue concerning tipboards, compacts with Minnesota Tribes would need to be amended to allow for sports betting wagers to be accepted on Indian lands.

V. Wisconsin

- a. Around the time that Congress passed the Indian Gaming Regulatory Act, the Lac du Flambeau Band of Lake Superior Chippewa Indians adopted a comprehensive gaming ordinance and, the next year, opened a gaming facility on the Reservation.¹⁷ It offered a variety of gaming, including Class III gaming.¹⁸ However, the Tribe did not have a gaming compact with the State, who had refused to negotiate with the Tribe.¹⁹ Therefore, despite the fact that the facility boosted revenue for the Tribe's governmental services and fostered greater employment rates in the area, the State began enforcing its criminal laws against the Tribe's gaming facility.²⁰ The Tribe brought suit, seeking to force the State into compact negotiations.²¹
- b. The State argued that its Constitution did not permit Class III gaming and, therefore, it was not required to negotiate a compact with the Tribe.²² The Western District of Wisconsin disagreed, and ordered the State to engage in good faith negotiations with the Tribe.²³ Even then, the State did not cooperate well. In fact, the 1992 Compact was the product of last-best-offer

¹⁵ *Id.*

¹⁶ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹⁷ *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin I* ("LDF I"), 743 F. Supp. 645, 646, 648 (W.D. Wis. 1990); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin II* ("LDF II"), 770 F. Supp. 480, 483 (W.D. Wis. 1991).

¹⁸ *LDF I*, 743 F. Supp. at 647.

¹⁹ *See LDF I*, 743 F. Supp. at 648-49; *LDF II*, 770 F. Supp. at 483.

²⁰ *See LDF I*, 743 F. Supp. at 646-48.

²¹ *See generally LDF I*, 743 F. Supp. 645; *LDF II*, 770 F. Supp. 480.

²² *LDF II*, 770 F. Supp. at 484-87.

²³ *LDF II*, 770 F. Supp. at 488.

mediation.²⁴

- c. The following year, the State passed a constitutional amendment that expressly prohibited the state from engaging in the following gaming activities:
 - 1) any game in which winners are selected based on the results of a race or sporting event; 2) any banking card game, including blackjack, baccarat or chemin de fer; 3) poker; 4) roulette; 5) craps or any other game that involves rolling dice; 6) keno; 7) bingo 21, bingo jack, bingolet or bingo craps; 8) any game of chance that is placed on a slot machine or any mechanical, electromechanical or electronic device that is generally available to be played at a gambling casino; 9) any game or device that is commonly known as a video game of chance or a video gaming machine or that is commonly considered to be a video gambling machine, unless such machine is a video device operated by the state in a [commonly understood lottery] to permit the sale of tickets through retail outlets under contract with the state and the device does not determine or indicate whether the player has won a prize, other than by verifying that the player's ticket or some or all of the player's symbols or numbers on the player's ticket have been selected in a chance drawing, or by verifying that the player's ticket has been randomly selected by a central system computer at the time of purchase; 10) any game that is similar to a game listed in this paragraph; or 11) any other game that is commonly considered to be a form of gambling and is not, or is not substantially similar to, a [commonly understood lottery].²⁵
- d. Eventually, legislators and private entities relied on this amendment in an attempt to limit and even eliminate tribal gaming.²⁶ Ultimately, the Wisconsin Supreme Court determined that the compacts predating the 1993 constitutional amendment were constitutional and allowed the Tribes the ability to negotiate all forms of gaming that the State permitted prior to the amendment.²⁷
- e. Due to the Constitution prohibition, the only entities within Wisconsin that may legally offer full sports betting will be Tribes under the legal rationale laid out in *Dairyland*. This will require amendments to tribal-state gaming compacts to classify sports betting as an authorized class III game within a Wisconsin tribe's Indian lands.
- f. In a statement, Rep. Peter Barca, D-Kenosha, said, "Given the substantial interest and increasingly common nature of activities ranging from fantasy sports to office 'March Madness' pools, it may be an appropriate time for the

²⁴ Lac du Flambeau Band of Lake Superior Chippewa Indians and State of Wisconsin Gaming Compact of 1992 (https://doa.wi.gov/Gaming/LDF_Compact.pdf; last visited on July 30, 2019).

²⁵ Wis. Const. art. IV, § 6(c).

²⁶ *Panzer v. Doyle*, 2004 WI 52; *Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 719 N.W.2d 408, (2006). *Dairyland*, 2004 WI 52, 680 N.W.2d 666 (2004).

²⁷ *Dairyland*, 2004 WI 52, 680 N.W.2d 666 (2004).

state to comprehensively evaluate our laws and weigh if further modification is necessary.”²⁸

²⁸ “If you are excited about sports gambling in Wisconsin, you will have to be patient”, Ricardo Torres, The Journal Times, May 18, 2018 (https://journaltimes.com/news/local/if-you-re-excited-about-sports-gambling-in-wisconsin-you/article_8a5ac8ed-5f1a-5fea-b4ee-0651860833ca.html; last visited on July 30, 2019).