



Full Speed Ahead for New York's Sports Betting Industry

by Carson R. Cooper

States have long eyed the sports gambling market, watching black market sports books reap the benefits out of reach from state taxation because of federal restrictions. In 2017, the Supreme Court struck down those restrictions, opening the door for states to enter the sports gambling industry.

In light of the Supreme Court's 2017 decision in *Murphy v. National Collegiate Athletic Association*, in which the Supreme Court struck down the Professional and Amateur Sports Protection Act (PASPA), several states raced to legalize the sports betting industry. New York State, ever the cautious player, did not immediately act. Now, the state appears to be close to entering the fray, lured by the potential for substantial profit flowing from that same New York City gambling industry. However, the nature of what sports betting will look like in the state – not to mention gaming tribes' role in the industry – remains uncertain.

New York State's Modification of the Sports Betting Laws

Anticipating the downfall of PASPA, New York State's 2013 gambling legislation – which created casino gaming for four upstate non-Indian casinos – also contemplated that those casinos would need to refrain from offering a sports book only “until such time as there has been a change in federal law.” The *Murphy* decision constituted that change in federal law, opening the door for sports wagering in the state, subject only to the need for updated rules from the New York Gaming Commission.

The state's Gaming Commission published proposed rules in January for the initial launch of sports betting in New York. The proposed regulations allow only the four upstate non-Indian casinos to offer sports wagering. In addition, the proposed regulations expressly authorize tribal gaming casinos to conduct such gaming, acknowledging the tribes' inherent ability to do so outside regulation by the state. The proposed rules require each casino to maintain a designated sports betting lounge to accept bets, in addition to dozens of other control regulations.

The proposed regulations closed for public comment on May 20. The Gaming Commission is now in the process of reviewing those comments. Barring any changes, the regulations will be published to the New York State Register, officially opening the sports betting market in New York. Proponents of sports betting within the New York Legislature have expressed an expectation that the sports betting markets

will be open by the time the college football season kicks off in late August.

The New York Legislature is also acting to further define the contours of New York's sports betting industry. Parallel bills have been introduced in the State Senate and Assembly to add additional guardrails for sports betting, as well as capture additional revenue from the industry. The proposed legislation includes a “royalty fee” of .20%, which the state will pay to the appropriate governing bodies for each sports league based on total betting revenue attributable to each respective sport. It also imposes a one-time fee of \$12 million on the non-Indian casinos, along with an 8.5% tax on gross revenue derived from sports wagering.

Of course, the New York's regulatory authority over gambling does not extend to Indian Country. Instead, each tribes' ability to conduct gaming is subject only to their gaming compact with the state pursuant to the Indian Gaming Regulatory Act (IGRA). Each gaming tribe's ability to open a physical sports book at its existing facilities therefore depends solely on whether that type of gaming is allowed by its respective compact.

Irrespective of the new sports gambling legislation moving through Albany, sports betting appears imminent at the four non-Indian casinos by Fall 2019. However, the real drama – and bigger revenue pot – depends on whether the New York can expand its sports betting beyond the casinos, and on to individual phones across the state.

Mobile Betting

Recognizing the inherent limitations of in-person sports betting at the four upstate casino locations, especially their remote location relative to New York City, state leaders from both parties are looking to the mobile sports betting market as a cash trove for the state coffers.

These efforts have been led by State Senator Joseph Addabbo, Jr., a Democrat representing parts of Queens and Brooklyn. Motivated in part by the scarcity of downstate casino gaming options, Senator Addabbo has been vocal in his advocacy for mobile sports betting. Senator Addabbo is also looking across the Hudson River – early estimates of New Jersey's mobile sports betting industry show as much as 25% of its revenue coming from residents of downstate New York. Combined with estimates that 80% of New Jersey's sports betting revenue comes from mobile bets, the impetus for including mobile sports betting in New York's new sports betting law is clear.

Succumbing to the allure of this revenue, the Senate's Racing, Gaming and Wagering Committee approved a bill on May 13 sponsored by its Chair, Senator Abbaddo, that would allow commercial casinos to offer mobile sports betting – with a 12.5% gross revenue taxation rate. The bill enjoys support from both sides of the aisle, suggesting a quick passage through the Legislature. However, one key hurdle remains.

Governor Cuomo's Constitutional Objection to Mobile Sports Betting

Governor Andrew Cuomo has taken the position that the launch of mobile sports betting would require an amendment to the State Constitution. The State Constitution bans gambling, but creates several exceptions, one of which allows "casino gambling at no more than seven facilities as authorized and prescribed by the legislature." Advocates for New York's online sports gaming program have argued that the "gambling" act for mobile sports betting takes place not where the patron places their bet, but rather where the server is located. This argument has little support under state or federal law, and Governor Cuomo's position that the Constitution must be amended to allow mobile sports betting is likely consistent with existing law.

To pass a constitutional amendment the Legislature would need to approve the amendment in two consecutive sessions, before the amendment appears on a referendum. The earliest realistic date for the electorate to vote on a referendum would be on the November 2021 ballot.

To date, Governor Cuomo has not indicated whether he would veto a mobile sports betting law, should the Legislature present one for his signature. Regardless, any legislation legalizing mobile sports betting is sure to garner legal challenges based on the constitutionality concerns expressed by Governor Cuomo, potentially delaying implementation of the mobile sports betting industry in the state for the next couple of years.

What Will Mobile Betting Mean for Tribes?

If the State of New York legalizes mobile sports betting, including for tribal gaming enterprises, tribes will need to weigh how IGRA and their respective gaming compacts will



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apply. Under New York’s conception of mobile gaming, the mobile bet will take place at the location of the server accepting the bet. Of course, tribal casinos are located within Indian Country in a jurisdiction free from state regulation. In this rare case, freedom from state regulatory jurisdiction may be a detriment to New York tribes, because the state’s laws legalizing and regulating the mobile gaming industry will have no effect. Instead, tribal gaming conducted in Indian Country would still be subject to IGRA. Case law under IGRA still remains unsettled with respect to whether tribes can accept mobile bets from off-reservation patrons.

This creates an unusual paradox for tribes: IGRA – a statute designed in part to protect tribal gaming from state interference – may prohibit the same activity that would be legal under state law. This forces tribes to consider an alternative outside IGRA: hosting tribal mobile sports betting platforms off-reservation.

New York State’s proposed sports betting legislation recognizes just such a possibility, by allowing tribes to host their own mobile sports betting servers at the non-Indian casinos: “[E]ach casino shall agree, upon request of a tribe . . . to provide a site for a mobile sports wagering server and related equipment for the Indian tribe[.]” The non-Indian casinos must offer these server sites at cost to the tribes.

Of course, New York State is not offering off-reservation server space for free. The proposed legislation requires New York tribes to waive any existing exclusivity applicable to mobile sports wagering within their geographic zone. It also requires tribal gaming operators to comply with the state’s regulations for mobile online betting – no small concession for tribes that have long fought any implementation of state regulatory law on their gaming operations. And of course, New York imposes the same 12.5% percent tax on the tribe’s gross revenue derived from mobile sports betting.

By allowing tribes to enter the mobile sports betting market on par with non-Indian casinos, New York State is creating a unique opportunity for tribes to participate in the future of the gambling industry outside the constraints of IGRA. While the mobile sports betting industry is likely still years away, New York gaming tribes should consider opening a dialogue with the non-Indian casinos so that they are prepared to launch their mobile sports betting apps concurrently with the non-Indian casinos once mobile sports betting is legal.

The plight of sports betting in New York also provides some predictive value for those states with Indian gaming that are still weighing the launch of state-regulated sports betting. New York tribes have been able to leverage their position in the existing gaming market to ensure participation in the future of mobile sports betting. Tribes in other states should do the same by utilizing their gaming compacts and sovereignty to gain a seat at the table when their own state enters the mobile sports betting world. ♣

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