Sports Bet Decision Reveals Hidden Preemption Requirement

By **Lawrence Ebner** (May 16, 2018)

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On May 14, the U.S. Supreme Court held in Murphy v. National Collegiate Athletic Association that the Professional and Amateur Sports Protection Act is unconstitutional because its prohibition against states authorizing sports betting, 28 U.S.C. § 3702(1), violates the "anticommandeering principle." This fundamental principle of federalism "simply represents the recognition" that the limited, enumerated, legislative powers which the Constitution grants to Congress do not include "the power to issue direct orders to the governments of the States."[1] Instead, "[t]he Constitution ... 'confers upon Congress the power to regulate individuals, not States.'"[2]

"Private Actor" Requirement for Federal Preemption

The court's opinion, authored by Justice Samuel Alito, rejects the solicitor general's argument that PASPA's anti-authorization provision "constitutes a valid preemption provision." In holding that the anti-authorization provision "is no such thing," the court in Part V of its opinion provides a fascinating, and potentially far-reaching, clarification of the nature of federal preemption.[3]

The court's preemption discussion begins with the familiar point that the Constitution's Supremacy Clause, Art. VI, cl. 2, "is not an independent grant of legislative power to Congress. Instead, it simply provides 'a rule of decision' ... . It specifies that federal law is supreme in case of a conflict with state law." For this reason, to preempt state law, any federal statute, including PASPA, "must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do."[4] In other words, only a valid federal law can preempt a conflicting state law.

The court's discussion of why PASPA's anti-authorization provision does not preempt the New Jersey sports betting law at issue in the case unexpectedly identifies a second requirement that must be satisfied for federal law to preempt state law: "the PASPA provision at issue must be best read as one that regulates private actors," not states.[5] The opinion indicates that all three categories of federal preemption — "express," "field" and "conflict" — "work in the same way: Congress enacts a law that imposes restrictions or confers rights on private actors; a state law confers rights or imposes restrictions that conflict with the federal law; and therefore the federal law takes precedence and the state law is preempted."[6]

This "private actor" prerequisite for federal preemption has not been previously emphasized — and arguably has been hidden below the surface — in the Supreme Court's continually shifting federal preemption jurisprudence. The sports betting opinion provides case law examples of how each type of preemption involves a preemptive federal statute that is directed to private actors:

- Conflict preemption — Citing Mutual Pharmaceutical Co. v. Bartlett,[7] the court indicated that "a federal law enacted under the Commerce Clause regulated manufacturers of generic drugs, prohibiting them from altering either the composition or the labeling approved by the Food and Drug Administration." The court held in that case a state's tort law which required manufacturers to supplement

the FDA-required label warnings "was preempted because it imposed a duty that was inconsistent — i.e., in conflict — with federal law."[8]

- Field preemption — Citing and quoting Arizona v. United States,[9] the court noted that "federal statutes 'provide a full set of standards governing alien registration.'"[10] The court concluded in that case that "'these laws reflect[] a congressional decision to foreclose any state regulation in the area, even if it parallel to federal standards.'"[11] According to the sports betting decision, "[w]hat this means is that the federal registration provisions not only impose federal registration obligations on aliens but also confer a federal right to be free from any other registration requirements."[12]

- Express preemption — The court's opinion indicates that "[e]xpress preemption operates in essentially the same way, but this is often obscured by the language used by Congress in framing preemption provisions."[13] Citing Morales v. Trans World Airlines Inc.,[14] the court offered, by way of example, the federal Airline Deregulation Act's express preemption provision, which provides that "no State ... shall enact or enforce any law ... having the force and effect of law relating to rates, routes, or services of any [covered] air carrier." The court's opinion explains that "[t]his language might appear to operate directly on the States, but it is a mistake to be confused by the way in which a preemption provision is worded."[15] According to the court, "if we look beyond the phrasing ... it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities [i.e., covered carriers] a federal right to engage in certain conduct subject only to certain (federal) restraints."[16]

Bringing this preemption discussion back to PASPA's anti-authorization provision, the court's opinion indicates "there is no way in which this provision can be understood as a regulation of private actors. ... there is simply no way to understand the provision prohibiting state authorization as anything other than a direct command to the States. And that is exactly what the anticommandeering rule does not allow."[17]

Preemption Implications

The court's opinion indicates that for a federal statute to have express and/or implied preemptive effect, it must regulate (i.e., authorize or restrict) particular conduct by "private actors" (e.g., conduct by manufacturers), and in essence, cannot command the states to take, or refrain from taking, particular actions. As a practical matter, this means that an express preemption provision which on its face explicitly requires or prohibits certain state conduct must be interpreted in the context of the statute in which it appears. Such statute must regulate the conduct of private actors in order for there to be express preemption.

Similarly, implied preemption of state law under conflict or field preemption principles must be evaluated in terms of whether the federal law at issue regulates private actors.

This seemingly new prerequisite for federal preemption probably calls upon attorneys and courts to include an additional step — a "private actor" discussion — in their federal

preemption arguments and analyses. Nevertheless, most cases involving the express or implied preemptive effect of federal regulatory statutes should readily satisfy the Supreme Court's private actor requirement.

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[1] Opinion at 15.

[2] Id. at 21 (quoting New York v. United States, 505 U.S. 144, 166 (1992)).

[3] Id. at 21.

[4] Id.

[5] Id.

[6] Id. at 21-22.

[7] 570 U.S. 472 (2013).

[8] Opinion at 22.

[9] 567 U.S. 387, 401 (2012).

[10] Id. at 22.

[11] Id. at 23.

[12] Id.

[13] Id. at 22.

[14] 567 U.S. 387, 401 (2012).

[15] Id. at 22.

[16] Id. at 23.

[17] Id. at 24.